A DIGEST OF INDIAN LAW CASES VOL. V

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A

DIGEST OF INDIAN LAW CASES

CONTAINING

HIGH COURT REPORTS, 1862—1909;

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, 1836—1909,

WITH AN INDEX OF CASES,

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

B. D. BOSE

OF THE INNER TEMPLE, BARRISTER-AT-LAW; ADVOCATE OF THE HIGH COURT, CALCUTTA AND EDITOR OF THE INDIAN LAW REPORTS, CALCUTTA SERIES.

IN SIX VOLUMES.

VOLUME V: S—Z.

CALCUTTA
SUPERINTENDENT GOVERNMENT PRINTING, INDIA
1913

Price Eight Rupees.
English Price Twelve Shillings.

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A DIGEST

OF

THE HIGH COURT REPORTS,

1862—1909,

AND OF

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——— **Auctioneer**—*Agent bidding "kutchapucca"—Usage of trade—Custom—Condition of sale.* An agent of the defendants made at an auction-sale a bid for certain goods ; this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure. Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent. In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated "that such an arrangement had never been

SALE BY AUCTION—*contd.*

repudiated." *Held*, that the condition of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore that no suit would lie. MACKENZIE LYALL & Co. *v.* CHAMROO SINGH & Co. . . I. L. R. 16 Calc. 702

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See INSOLVENCY ACT.
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——— *Transfer of title—Registration—Transfer of Property Act (IV of 1882), s. 54—Registration Act (III of 1877), s. 17 (o)—Fishery rights.* Sale-certificates that are granted by the Collectors after sale of "B class" of surplus lands acquired by Government under the provisions of the Land Acquisition Act, are sufficient to themselves to validate the transfer of title from Government to the transferee without being registered. Fishery rights in water on certain portions of the land transferred to the purchaser by the sale-certificates, cannot exist separate from that land. SARAT CHANDRA ROY CHOWDHRY *v.* JATINDRA NATH MUKERJEE (1908) . . I. L. R. 35 Calc. 614

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See PUBLIC DEMANDS RECOVERY ACT (BEN. ACT I OF 1895), SS. 10, 17 AND 21
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See SALE FOR ARREARS OF ROAD CESS.

1. ——— **Setting aside sale**—*Public Demands Recovery Act (Bengal Act I of 1895), ss. 20, 21—Civil Procedure Code (Act XIV of 1882), ss. 223, 224, 244, 311, 312—Irregularity—Right of suit.* A certificate for recovery of cesses was made by the Cess Collector of Burdwan against the plaintiff and other persons who were all residents of that district ; the major portion of the property in respect of which the certificate was made was also situated within the jurisdiction of the Burdwan district ; the certificate was, however, ordered to be sent to Birbhum for execution and an intimation was sent that the demand was to be realised by the sale of the debtor's interest in a certain *mouzah* in Birbhum. The Birbhum Court thereupon held the sale. *Held*, in a suit to set aside the sale, that the sending of the certificate for execution to the Birbhum Court was not authorised under s. 223 of the Civil Procedure Code, and consequently the subsequent proceedings were not legal and the sale cannot stand. That the suit was not barred by s. 312 of the Civil Procedure Code. S. 312 of the Civil Procedure Cod

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SALE FOR ARREARS OF CESSES— *contd.*

does not apply to execution proceedings held under the Public Demands Recovery Act. *Ram Taruck Hazra* v. *Dilwar Ali, I. L. R. 29 Calc. 73,* relied on. GIRISH CHANDRA CHANGDAR *v.* GOLAM KARIM (1906) . . . **I. L. R. 33 Calc. 451 s.c. 10 C. W. N. 347**

2. ——— *Public Demands Recovery Act (Bengal Act VII of 1880), s. 17—Powers of revision of the Commissioner and the Board of Revenue—Certificate sale—Setting aside—Certificate issued under the Cess Act (Bengal Act IX of 1880)—Limitation—Deciding case in a party's absence—Proper remedy.* Bengal Act VII of 1880 for the recovery of public demands applied to cases of road and other cesses. *Sadhusaran Singh* v. *Panchdeo Lal, I. L. R. 14 Calc. 1,* referred to. Where a Commissioner set aside a sale held in execution of a certificate granted by a Deputy Collector in respect of a fine imposed for failure to comply with a notice under s. 16 of the Cess Act, on the ground that the evidence for the petitioner made out "a *primâ facie* case of fraud, or at any rate of irregularities, which prevented the petitioner from obtaining knowledge of the proceedings against him, and caused the sale of his estate at a most inadequate price." *Held,* that the power of revision conferred on the Commissioner by s. 17 of Bengal Act VII of 1880, was amply sufficient to justify the order setting aside the sale. The Board of Reveune also had power to interfere in this case under s. 24 of the Act. S. 17 of Bengal Act VII of 1880 applied to orders made after as well as before sales in execution of certificates issued under the Act. The periods of limitation applicable in ordinary cases were not binding on the Commissioner, when he was acting in exercise of his revisional jurisdiction. It is an elementary principle, which is binding on all persons, who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given him n opportunity of being heard. In this case the order of the Commissioner annulling the sale was challenged in a regular suit brought in the Civil Court on the ground that the order was made without hearing the purchaser. *Held,* that the proper remedy of the purchaser was to apply to the Commissioner for a re-hearing. LALITESWAR SINGH *v.* MOHUNT RAM KISHEN DAS (1906) **10 C. W. N. 969**

3. ——— *Public Demands Recovery Act (I of 1895), ss. 10, 12, 15, 17, 24, 26—Certificate sale—Sale to set aside, if lies—Amount of certificate paid after issue—Sale if void—Sale in execution of decree after satisfaction certified—Right of innocent purchaser—Hardship—Speculative purchase.* A certificate which has been properly made for arrears actually due cannot be cancelled or modified on the ground that the demand has been subsequently satisfied, either upon a petition of objection preferred under s. 12 of the Public Demands Recovery Act or in an action under s. 15 of the same Act.

SALE FOR ARREARS OF CESSES— *concld.*

A suit will lie to set aside a sale held in execution of such a decree. It cannot be broadly laid down that in no case is an innocent stranger who has purchased immoveable property sold in execution of a satisfied decree to be deprived of the benefit of his purchase. *Held,* on a review of the authorities, that when a sale has taken place on the basis of a satisfied decree, the satisfaction of which has been certified to the Court, the sale is void and ineffective to pass any title even to a *bonâ fide* purchaser for value without notice. The Public Demands Recovery Act, by ss. 10, 24 and 26, casts upon the certificate officer a duty to enter satisfaction as soon as payment has been made of the amount for which certificate had been issued and authorises him to sell only so long as the certificate remains unpaid. Where, therefore, the amount for which the certificate was issued was two days later deposited in the treasury, but this was overlooked with notice under s. 10 of the Act was issued and served and immoveable property belonging to the judgment-debtor sold and purchased by a stranger, *Held,* that the sale must be set aside as made without jurisdiction. *Abdool Hai* v. *Gujraj, L. R. 20 I. A. 70 : s.c. I. L. R. 20 Calc. 826 (1891),* followed. *Rewa Mahton* v. *Ram Kishen, L. R. 13 I. A. 106 : s.c. I. L. R. 14 Calc. 18 (1886),* explained. *Poorna Chandra* v. *Dinabandhu, 11 C. W. N. 756 : s.c. I. L. R. 34 Calc. 811 : 5 C. L. J. 96,* referred to. A person who with his eyes open makes a speculative purchase of a valuable estate for next to nothing cannot complain of hardship when the sale is set aside. JANUKDHARI LAL *v.* GOSSAIN LAL BHAYA GAYWAL (1909) . . . **13 C.W. N. 710**

4. ——— **Public Demands Recovery Act (Beng. I of 1895), sale under—***What interest passes—Recorded tenants, decree against, when binds the interest of unrecorded tenants—Doctrine of representation and estoppel—Question should be raised as an issue.* It is settled law that a sale under the Public Demands Recovery Act passes merely the right, title and interest of the persons named as the judgment-debtors in the certificate. The doctrine of representation and the principle of estoppel upon which the decision of the majority in *Bishambur Haldar* v. *Bonomali Haldar, I. L. R. 26 Calc. 414,* is based are not to be extended to cases of sales under the Public Demands Recovery Act. *Semble :* The question of estoppel should be definitely raised and proper materials placed on the record before a decree against the registered tenants can be held to bind the interests of the unregistered tenants. RAJA KOER *v.* GANGA SINGH (1909) . . . . . **13 C. W. N. 750**

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1. ACT VIII OF 1835.

1. ——— **Procedure**—*Sale of under-tenure—Beng. Reg. VII of 1799.* Sales of under-tenures under Act VIII of 1835 for arrears of rent were not required to be according to the procedure laid down in Regulation VII of 1799, but according to the procedure prescribed by s. 2 of Act VIII of 1835. MONOSHEE *v.* ABDOOL HOSSEIN . **7 W. R. 297**

2. ——— **Effect of sale**—*Right of purchaser—Itmamee tenure.* When rights and interests in a talukh were sold for arrears of rent under Act VIII of 1835, the purchaser obtained no power to destroy the itmamee tenure. SOOBULCHUNDER PAUL *v.* ATTUR ALI . . . **11 W. R. 32**

3. ——— *Right of purchaser—Incumbrances.* A sale of an under-tenure under Act VIII of 1835 passed only the right, title, and interest of the judgment-debtor, and did not void the incumbrances created by the old tenant. MANICK CHUNDER DOSS *v.* DWARKANAUTH DOSS . . . . **2 Hay 502**

4. ——— *Right of purchaser—Act XI of 1859, s. 52. Semble:* The purchaser of a holding in a khas mehal sold under Act VIII of 1835 could claim the position or privileges accorded by ss. 37 and 52 of Act XI of 1859 to purchasers of permanently settled estates, or of estates sold in districts not permanently settled, sold for arrears of revenue. KYLASH CHUNDER SHAHA *v.* SHURNOMOYEE DOSSEE
7 W. R. 318

5. ——— *Incumbrances—Howladari tenure.* The plaintiff held certain lands in talukh Q under a howladari pottah. Q was sold for arrears of rent under Act VIII of 1835, and purchased by the defendant. After purchase, the defendant dispossessed the plaintiff from his lands, on the ground that he had purchased the talukh free from all incumbrances created by the late defaulting talukhdar. The plaintiff brought this suit to recover possession of his lands from the defendant. *Held*, that a purchaser of a tenure under Act VIII of 1835 did not necessarily acquire it free from all incumbrances. Case remanded for trial of the genuineness of the plaintiff's pottah. JASIMUDDIN *v.* MANSUR ALI
6 B. L. R. Ap. 149 : 15 W. R. 11

(*Contra*) DWARKANATH DOSS *v.* MANICK CHUNDER DOSS . . . . . **3 W. R. 197**

RAMJEEBUN CHOWDRY *v.* PEARY LALL MUNDUL
4 W. R., Act X, 30

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SALE FOR ARREARS OF RENT—*contd.*

1. ACT VIII OF 1835—*concld.*

6. ——— *Right of purchaser—Attachment—Tender of arrears.* In a suit to set aside a sale in execution of a decree for arrears of rent due up to Aghran 1262, the plaintiff, who claimed under a deed of conditional sale, was *held* not entitled to a decree on the following grounds. He was not a registered tenant at the time of the sale, but as a sezawal was legally in possession. The plaintiff never tendered the arrears for which the sale was made. Under Act VIII of 1835, no separate attachment of a mehal or notification of sale in the mofussil is necessary in order to render the sale valid. In this case, not the rights and interests of the defaulter, but the tenure itself, passed for the arrears due upon it. Attachment by the appointment of a sezawal is no bar to a sale for arrears due before such attachment. FORBES *v.* PROTAP SINGH DOOGUR . . . . **7 W. R. 409**

7. ——— *Beng. Reg. VII of 1799—Tuppa right, extinguishment of. Semble:* A tuppa right is annihilated by a sale held under Act VIII of 1835 and cl. 7, s. 15, Regulation VII of 1799. ZEENUT BEBEE *v.* RAHATOONISSA **7 W. R. 243**

2. DEFAULTERS.

1. ——— **Disabilities of defaulters—***Purchase—Beng. Reg. VIII of 1819—Sale of patni.* A defaulter cannot, under Reg. VIII of 1819, purchase a patni sold on account of his default to pay the patni rent, either in his own name or in that of any other person. MAHOMED NASSEER *v.* KISHEN MOHUN GOYEE . . **W. R. F. B. 92**

2. ——— *Purchase—Sale of patni.* Not merely recorded shareholders, but all actual defaulters (such as joint patnidars), are prohibited from being purchasers of patni. GOUREE KOMUL BHUTTACHARJEE *v.* RAJ KISHEN NATH **5 W. R. 106**

3. ——— *Purchase—Right to sue—Suit by another defaulting co-sharer to set aside sale.* A suit by a sharer to set aside a sale having been dismissed on the ground that plaintiff being a defaulter the suit would not lie, plaintiff brought a second suit to claim possession of his share of the dar-patni talukh, on the ground that the sale must be inoperative, inasmuch as the purchaser, a co-sharer, was also a defaulter. *Held,* that, until the sale was set aside, plaintiff was not in a position to claim possession of his share. GOUREE KOMUL BHUTTACHARJEE *v.* RAJ KRISTO NATH . . . . . **14 W. R. 369**

4. ——— *Purchase—Suit by other defaulters to set aside sale—Joint owners—Dar-patnidar—Constructive trust.* Of three joint owners of a dar-patni, two held a 4 annas share, and the third an 8 annas share. Default having been made by all three in the payment of the rent, the patnidar brought a suit and obtained a decree for the arrears. In execution of this decree, proclamation was made that a dar-patni would be sold on the 5th of October 1877. Up to the commencement of the sale the 4 annas shareholders were unable to pay their proportionate amount of the decree; the 8 annas shareholder declined paying his share, and, when the sale took place, he became the purchaser of a dar-patni. In a suit brought by the 4 annas shareholders to recover their shares from the purchaser, the lower Appellate Court, reversing the decree of the Court of first instance, decided in favour of the plaintiffs. *Held,* on second appeal, that, the sale having taken place as much through the default of the plaintiffs as through the default of the defendant, the former had no equity against the latter; and that therefore the suit should be dismissed. RAM LOLL MOOKERJEE *v.* DEBENDER NATH CHATTERJEE **I. L. R. 8 Calc. 8**

S.C. RAM LOLL MOOKERJEE *v.* JADUNATH CHATTERJEE . . . . . **9 C. L. R. 337**

5. ——— **Defaulter for period later than that causing the sale—***Suit for damages by dar-patnidar.* When a patni is sold for default on the part of the patnidar in paying his rents, a dar-patnidar who has paid his rent to the patnidar for the period to which the default relates may sue for damages, although himself a defaulter for a later period. MADHUB ANUND MOITRO *v.* JOY KOOMAREE BIBEE . . . **5 W. R. 201**

3. UNDER-TENURES, SALE OF.

1. ——— **Beng. Act VIII of 1865—***Applicalion of Act—Chota Nagpore.* Bengal Act VIII of 1865 applied to the district of Lohardagga in Chota Nagpore. GOBIND RAM *v.* BHUPAL SINGH **10 C. L. R. 76**

2. ——— **s. 30.—"** *Proceeding"—Sale.* A sale under Bengal Act VIII of 1865 was a "proceeding" within the meaning of s. 30 of that Act. DWARKANATH SEIN *v.* CHUNDER MOHUN MITTER **12 W. R. 326**

3. ——— **Act X of 1859, s. 105—***Sale of transferable tenure—Act X of 1859, s. 151.* The plaintiff sued to bring a transferable occupancy tenure to sale in satisfaction of a decree for arrears of rent, by cancelment by an order passed under Act X of 1859 relating to the execution of the decree. *Held,* that, in so far as the suit sought to set aside the order, it was barred by the provisions of s. 151 of Act X of 1859, and was not admissible by reason of the repeal of the Act: in so far as, irrespectively of the order, the suit sought to recover the amount of the decree by the sale of the holding on which the arrear accrued, at the time it was instituted s. 105 of the Act had ceased to be law in these provinces, and could not be cited in support of the claim. RAM KHILOWAN RAM *v.* FOX . . . . . **7 N. W. 239**

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SALE FOR ARREARS OF RENT—*contd.*

3. UNDER-TENURES, SALE OF—*contd.*

4. ——— *Purchase by zamindar at sale in execution of decree of Civil Court.* A zamindar who had obtained a decree against a registered tenant for arrears of rent was fully justified in proceeding to sale under s. 105 of Act X of 1859, notwithstanding the tenure was purchased subsequently to the date of the above decree at a sale in execution of a decree of the Civil Court. SUFUROONISSA *v.* SAREE DHOOPEE
8 W. R. 384

5. ——— Under s. 105, Act X of 1859, an under-tenure might be sold in execution of a decree, provided there was an arrear of rent adjudged. SUTTEESCHUNDER ROY *v.* MODHOOSOODUN PAUL CHOWDHRY
W. R. 1864, Act X, 91

6. ——— *Procedure by proprietor of under-tenure—Act X of 1859, s. 106.* Under s. 105, Act X of 1859, an under-tenure was liable to sale in execution of a decree for arrears of rent for eleven years. Any party wishing to stay the sale, on the ground of his being the proprietor of the under-tenure, had to comply with the provisions of s. 106. DOORGA PERSAD BOSE *v.* SREEKISTO MOONSHEE
W. R. 1864, Act X, 48

7. ——— Beng. Act VIII of 1869, ss. 59 64—*Procedure.* Where an under-tenure is sold under the provisions of Bengal Act VIII of 1869 in execution of a decree obtained by the zamindar for rent due to him as the separate proprietor, after batwara of a share of the talukh in which the tenure is situated, the sale is properly conducted, not under s. 64, but under s. 59 of the above law. SURUT SOONDUREE DEBIA *v.* SUMEERODEEN TALUKHDAR . . . . **22 W. R. 530**

8. ——— Effect of sale—*Right, title and interest of debtor—Act X of 1859, s. 105.* In a sale under s. 105, Act X of 1859, only the judgment-debtor's property can pass. MEAH JAN MUNSHI *v.* KURRUNA MAYI DEBI . . . **8 B. L. R. 1**

9. ——— "*Tenure,*" *meaning of—Non-registration of names—Act X of 1859, s. 105.* By the word "tenure" as used in s. 105, Act X of 1859, is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease, and it is the latter which is sold on a sale under s. 105. Therefore where *A*, at a sale in execution of a decree for debt, bought the right, title, and interest of the holder of a transferable under-tenure, and previous to the confirmation of such sale the zamindar sued the tenant for arrears of rent and obtaind a decree, under which he sold the tenure to persons who conveyed it to *B*, and *A*, under the circumstances, neither registered the transfer to him nor made any deposit of rent as allowed by s. 6, Bengal Act VIII of 1865:—*Held* that he was not entitled to recover possession from *B*. SHAMCHAND KUNDU *v.* BROJONATH PAL CHOWDHRY
12 B. L. R. F. B. 484 : 21 W. R. 94

SALE FOR ARREARS OF RENT—*contd.*

3. UNDER-TENURES, SALE OF—*contd.*

GIRISH CHUNDER MITTER *v.* JHAKU
12 B. L. R. 488 note : 17 W. R. 352

ANUND LOLL MOOKERJEE *v.* KALIKA PERSAD MISSER . **12 B. L. R. 489 note : 20 W. R. 59**

RUGHOOBUR THAKOOR *v.* SYEFOOLLAH KHAN
23 W. R. 289

BANEE MADHUB BUKSHEE *v.* RADHA MADHUB MOZOOMDAR . . . . **22 W. R. 196**

10. ——— *Non-registration of tenants' names—Right of person in permissive possession of tenure.* A sale in execution of a decree for arrears of rent (at an enhanced rate) of a subordinate talukh, which has been obtained against a party who is in possession of the talukh by permission of the owners, but who has no other right or title to it, will not bind those owners, even though their names be not recorded as tenants in the books of the zamindar. *Sham Chand Kundu* v. *Brojo Nath Pal Chowdhry, 12 B. L. R. 484*, distinguished. RIDOY KISSEN DUTT *v.* RAM COOMAR SEN . **3 C. L. R. 231**

11. ——— *Non-registration of purchase of under-tenure in the landlord's serishta.* In a case governed by Act X of 1859, it was *held* that a person, who had purchased a transferable jote, but who did not get his name registered in the landlord's serishta, had no *locus standi* against a subsequent auction-purchaser of the jote in execution of a decree obtained against the recorded tenant, and had no right to impugn the title of the auction-purchaser under the sale. *Sham Chand Koondoo* v. *Brojo Nath Pal Chowdhry, 12 B. L. R. 484 : 21 W. R. 94*, followed. PATIT SHAHU *v.* HARI MAHANTI . . . . **I. L. R. 27 Calc. 789**

12. ——— *What passes a sale of under-tenure—Growing crops—Beng. Act VIII of 1869, s. 66.* At the sale of an under-tenure for arrears of rent under s. 66 of Bengal Act VIII of 1869, the growing crop standing on the land passes to the purchaser at the auction-sale, except when it has been specially excepted by the notification of sale, or a custom to the contrary has been proved. AFATOOLLA SIRDAR *v.* DWARKA NATH MOITRY
I. L. R. 4 Calc. 814 : 4 C. L. R. 95

13. ——— *What passes at sale of under-tenure—Certificate of sale.* *B B* held 1 anna of a 10 annas in a jumma which had been purchased by *B L H*, and had paid rent to the kutkinadar on such 1 anna share, and had his name registered as owner of such 1 anna share in the sherista of the kutkinadar. The kutkinadar having afterwards brought a suit against *B L H* alone for arrears of rent of the entire 10 annas and having obtained a decree and in execution of this decree put up to sale entire 10 annas share:—*Held*, that, as the sale certificate related only to the share of *B L H*, *B B's* 1 anna share did not pass under such sale. BHUGEERUTH BERAH *v.* MONEERAM BANERJEE
I. L. R. 4 Calc. 855

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SALE FOR ARREARS OF RENT—*contd.*

3. UNDER-TENURES, SALE OF—*contd.*

14. ——— *What passes at sale of under-tenure—Beng. Act VIII of 1869, ss. 59, 60—Sale certificate—Proclamation of sale. Held,* on the construction of a sale certificate and a proclamation of sale, purporting to be made under ss. 59 and 60 of the Rent Act (Bengal Act VIII of 1869), that what passed by the sale was not an under-tenure, but merely the right, title and interest of the judgment-debtor therein. The declaratory portion of a sale proclamation is not by itself sufficient to override the description of the property in the body of the document. DWARKA NATH *v.* ALOKA CHUNDER SEAL
I. L. R. 9 Calc. 641

15. ——— *Sale in execution of decree under Civil Procedure Code, 1859—Beng. Act VIII of 1869, ss. 59, 60, 66—Right of purchaser.* In execution proceedings under Act VIII of 1869, whether the property attached is an under-tenure or an ordinary leasehold interest, only the right, title, and interest of a judgment-debtor can be sold; while by virtue of a sale of a tenure under s. 59 of Act VIII of 1869, the purchaser acquires it under ss. 59, 60, and 66 free of all incumbrances which may have accrued thereon, by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder. DOOLAR CHAND SAHOO *v.* LALLA CHABEEL CHAND. DOOLAR CHAND SAHOO *v.* LALLA BISHESHUR DYAL
L. R. 6 I. A. 47 : 3 C. L. R. 561

16. ——— *Beng. Act VIII of 1869, ss. 59, 61—Right of auction-purchaser.* Where an under-tenure was sold in execution of a decree which had been passed in the terms of a compromise effected between the landlord and all the sharers in the tenure but one, and the representative of the latter sought to assert his right to his share against the auction-purchaser :—*Held,* that, in a sale under Act VIII of 1869, a tenure is sold outright, and that this tenure did not pass to the auction-purchaser with any incumbrances. GRISH CHUNDER GHOSE *v.* KALEE TARA . **25 W. R. 395**

17. ——— *Right of mortgagee—Right to notice of sale—Adjudication of title, suit for.* The right, title, and interest of *A* in a certain under-tenure was sold in execution of a decree for rent obtained against him by *B* and purchased by *B* himself. *B* at the time held another decree against *A* for arrears of rent for the same under-tenure. *C*, to whom *A* had previously mortgaged the under-tenure, thereupon having foreclosed the mortgage, instituted a suit for possession against *A* and *B* and obtained a decree for possession. After this decree, but before *C* got actual possession, *B* caused the under-tenure to be sold in execution of his other decree against *A* and again became himself the purchaser. *C*, having shortly afterwards obtained possession under his decree, was dispossessed by *B*, who took possession through the

SALE FOR ARREARS OF RENT—*contd.*

3. UNDER-TENURES, SALE OF—*concld.*

Court under his second purchase. *C* thereupon instituted proceedings under s. 269, Act VIII of 1869, in which he was successful, and consequently regained possession. In a suit brought by *B* to set aside those proceedings and for adjudication of title :—*Held*, that *B* had a good title to the under-tenure, and that he was not bound, before bringing the under-tenure to sale under his second decree, to give notice to *C*. *Nobeen Kishen Mookerjee* v. *Shib Prosad Pattuck*, *8 W. R. 96*, considered. LAIDLEY *v.* GUNNESS CHUNDER SAHOO
I. L. R. 4 Calc. 438

S.C. WATSON *v.* GONESH CHUNDER SAHOO
3 C. L. R. 240

18. ——— **Procedure**—*Setting aside sale—Material irregularities—Civil Procedure Code (Act X of 1877), Ch. XIX, ss. 311, 647.* The procedure to be followed upon the sale of an under-tenure is now that prescribed by the Civil Procedure Code. S. 311 does not apply only to sales made under Ch. XIX of the Code, and the sale of an under-tenure may be set aside upon any of the grounds mentioned in that section. AZIZOONESSA KHATOON *v.* GORA CHAND DASS . **I. L. R. 7 Calc. 163**

S.C. AZIZOONISSA KHATOON *v.* KALLY CHURN SEN
8 C. L. R. 498

19. ——— *Execution of decree—Bengal Rent Act (Bengal Act VIII of 1869), ss. 59, 60, 64—Decree for arrears of rent against Hindu heiress—Rent accrued due after death of full owners—What passes by sale, whether limited or absolute estate.* In execution of a decree for arrears of rent, obtained in a suit under the Bengal Rent Act (Bengal Act VIII of 1869) by some only of several co-sharer landlords against a Hindu daughter for arrears accruing after her father's death, an under-tenure of which she was in possession and in enjoyment of the rents and profits was sold under the provisions of s. 64 of the Act. *Held*, by the Judicial Committee (affirming the judgment of the High Court), that only the limited interest which she took as her father's daughter, and not an absolute interest in the estate, passed by the sale. The liability for rent ought to be regarded as his personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure to sale under the special provisions of the Rent law. JIBAN KRISHNA ROY *v.* BROJO LAL SEN (1903)
I. L. R. 30 Calc. 550
s.c. 7 C. W. N. 425
L. R. 30 I. A. 81

4. PORTION OF UNDER-TENURE, SALE OF.

1. ——— **Judgment-debtor in receipt of whole rent**—*Beng. Act VIII of 1869, ss. 61, 64.* It is only where the judgment-debtor is in receipt of the entire 16 annas share of the rent that in execution of a decree for rent the under-tenure can be sold. DWARKA NATH CHAKRAVUTI *v.* SUVRIDRA NATH CHOWDHURI . **8 C. L. R. 407**

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SALE FOR ARREARS OF RENT—*contd.*

4. PORTION OF UNDER-TENURE, SALE OF —*contd.*

2. ——— **Sale under decree obtained by sharer in undivided estate.** If a decree is given in favour of a sharer in a joint undivided estate for his share of the rent of an under-tenure situate in such estate, he is not allowed by law to put up for sale a portion of the under-tenure. GOBIND CHUNDER ROY CHOWDHRY *v.* RAM CHUNDER CHOWDHRY . **22 W. R. 421**

3. ——— *Act X of 1859, s. 108—Effect of sale.* Where a sharer in an undivided talukh after obtaining a decree for money, due to him on account of his share of the rent, brings to sale a portion of the tenure corresponding with the share of the rent for which he obtained a decree, the sale has no further effect than any other sale in which rights of the judgment-debtor are sold. NUND LALL ROY *v.* GOOROO CHURN BOSE . . . . . **15 W. R. 6**

PITAMBUREE CHOWDHRAIN *v.* NOBIN KRISTO MOOKERJEE . . . . . **18 W. R. 205**

4. ——— **Act X of 1859, s. 108**—*Beng. Act VIII of 1865, s. 4—Sale of under-tenure—Execution of decree for rent.* A suit by a sharer in a joint undivided state for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate fell within the provisions of s. 108, Act X of 1859. Where the owner of an undivided estate lets his share to a tenant by giving a pottah and taking a kabuliat, a suit for the rent of such undivided share, treated as a separate and distinct under-tenure, came under the provisions of s. 4, Bengal Act VIII of 1865. DWARKANATH CHUCKERBUTTY *v.* DHUN MONEE CHOWDHRAIN . . . . . **15 W. R. 524**

5. ——— ——— *Right of purchaser on sale of portion of tenure.* Where a suit was for rent and the balances due under the decree were on account of a 7 annas rukkum of a tenure, and the sale certificate passed the right and interest of the defaulting under-tenant, it was *held* that Act X of 1859, s. 108, was applicable to the case, and that such right and interest only, and not the whole tenure, became vested in the auction-purchaser. AUKHIL CHUNDER MOOKERJEE *v.* CHUNDER COOMAR MITTER **22 W. R. 414**

6. ——— **Beng. Act VIII of 1866, s. 64**—*Right of purchaser—Effect of sale.* The Full Bench decision in *Sham Chand Kundu* v. *Brojonath Pal Chowdhry, 12 B. L. R. 484 : 21 W. R. 94*, by which the right of a purchaser in execution of a rent-decree prevails over that of an earlier purchaser, has no application to the case of a sale under Bengal Act VIII of 1869, s. 64, which provides for the sale, not of the tenure, but of the right, title, and interest of the judgment-debtors. LUCHMUN RAMONOOJ DOSS *v.* RAM HUREE ROY **22 W. R. 67**

7. ——— *Landlord and tenant—Sale of a portion of a tenure—Beng. Act VIII of 1869, ss. 59, 60—Co-sharers—Parties.* A portion of a tenure cannot be the subject of a sale under s. 64, Bengal Act VIII of 1869, so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss. 59 and 60. A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale *A*, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee, who proceeded to oust *A*. In a suit by *A* to recover possession of his half share of the tenure on the footing of his purchase :—*Held*, that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss. 59 and 60 of Bengal Act VIII of 1869 ; and that, as it appeared that the mortgagor, whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co-sharers, who were not parties to the suit, *A* was not entitled to the relief he sought. REILY *v.* HUR CHUNDER GHOSE **I. L. R. 9 Calc. 722 : 12 C. L. R. 398**

See SHAMCHAND KUNDU *v.* BROJONATH PAL CHOWDHRY . . . . . **12 B. L. R. 484**

8. ——— *Right, title, and interest of registered shareholder in tenure—Effect on joint shareholders.* Where a judgment-debtor was alone registered in the serishta of the zamindar as owner of a tenure, but it appeared that his two brothers who were joint in estate with him were entitled to an equal share with him in the tenure, but that the judgment-debtor was the manager ; and when it appeared that the zamindar being only entitled to a share in the zamindari, had obtained a decree against the judgment-debtor alone for arrears of rent and in execution thereof proceeded to sell his right, title, and interest under s. 64 of the Rent Act :—*Held*, that, as the judgment-debtor represented his brother, and as they were equally liable to pay the amount of the decree upon the principle set out above, the latter were not entitled to recover their share of the tenure which the auction-purchaser had obtained possession of in execution of the decree against the judgment-debtor. *Doolar Chand Sahoo* v. *Lalla Chabeel Chand, L. R. 6 I. A. 47 ;* and *Bissessur Lall Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233*, commented on. JEO LALL SINGH *v.* GUNGA PERSHAD . . . . **I. L. R. 10 Calc. 996**

9. ——— *Sale of right, title and interest of a registered tenant—Effect of sale of a tenure in execution of a decree for arrears of rent obtained by a co-sharer landlord against the registered tenant alone.* In a suit brought by the plaintiffs to set aside the sale of a shikmi talukh or in the alternative for a declaration that the sale did not affect their rights, on the allegation

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that defendants Nos. 3 and 4, who were the proprietors of a certain share of the estate under which the said talukh was held, having obtained a collusive decree for arrears of rent for the years 1298 and 1299 (B. S.) against defendant No. 1, who was a joint owner of the talukh with the plaintiffs, in execution thereof fraudulently caused the disputed property to be sold, and defendant No. 1 purchased it, in the benami of defendant No. 2, the defence (*inter alia*) was that the sale was not brought about by fraud or collusion, and that the rent suit having been brought against the registered tenant defendant No. 1, the whole tenure passed by the sale. *Held* by BANERJEE and HILL, *JJ.* (RAMPINI, *J.*, dissenting), that inasmuch as it appeared that the share sold away stood in the name of defendant No. 1 alone; that the zamindar used to sue defendant No. 1 rent for the said share; that the defendant No. 1 used to realise a rateable share of costs, road cesses, etc., which he was bound to pay under rent decrees obtained against him, from the plaintiffs sometimes amicably and generally by contribution suits; and that the defendants Nos. 3 and 4, who were the fractional shareholders of the zamindari, sued the defendant No. 1 as usual for rent for the years 1298 and 1299 B. S., and obtained a decree, the sale, though in terms only a sale of the right, title, and interest of the judgment-debtor, really passed the right, title, and interest, not only of the registered tenant, but also of the unregistered co-owners whom he represented. *Jeo Lall Singh* v. *Gunga Pershad, I. L. R. 10 Calc. 996*, followed. NITAYI BEHARI SAHA PARAMANICK *v.* HARI GOVINDA SAHA . . . **I. L. R. 26 Calc. 677**

10. ——— *Sale of a jumma in execution of a decree for rent obtained against one of the heirs, of the last recorded tenant, from whom the landlord chose to accept rent separately and who was not recorded in the landlord's serishta —Effect of such a sale.* An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant. The plaintiffs sued to recover possession of their share of certain rent-paying lands on the allegation that they were entitled to a one-third share of these lands by inheritance from the last recorded tenant, and another one-third share by purchase from one of his heirs; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share; that for some years they and the said defendants have been paying rent to the landlord and obtaining separate rent receipts; that the defendants Nos. 2 and 3 in collusion with the landlord allowed a decree to be passed against them in respect of the entire jumma, in execution of which the said lands were sold and purchased by defendant No. 1. The defence of defendant No. 1, *inter alia*, was that, as the rent suit brought by the landlord was against the person who was the sarbarakar or manager of the jumma, therefore by the sale in execution of a decree obtained in that suit the

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entire jumma passed. *Held*, that, as the landlord was bound to recognise the plaintiffs as tenants in the place of the last recorded tenant, and also as he chose to accept rent from the plaintiffs, and the defendants Nos. 2 and 3 separately, he had no right to ignore the plaintiffs and proceed only against the defendants. The entire jumma did not pass by the sale, and the plaintiffs' right was not affected thereby. *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha, I. L. R. 26 Calc. 677*, distinguished. ANNADA KUMAR NASKAR *v.* HARI DASS HALDAR . . . **I. L. R. 27 Calc. 545**
4 C. W. N. 608

11. ——— *Sale of gantidari rights.* In a suit for arrears of rent, where defendants denied the relation of landlord and tenant to exist between themselves and the plaintiffs, it was found that plaintiff had been the sole owner of an estate which formed a 12 annas share of the under-tenure of a gantidar, who was liable to pay the rent of other 4 annas to the owner of the neighbouring estate. In execution of a decree for arrears of rent due on the 12 annas share, plaintiff caused the ganti to be sold and purchased it himself, and the proceeds not being sufficient to pay the amount of the decree, he caused the tenant-right of the 4 annas share to be sold and purchased that also. *Held*, that Bengal Act VIII of 1869, s. 64, did not apply, because plaintiff was not a sharer in a joint undivided estate; and that, by his purchase, plaintiff had become the absolute owner of the 12 annas ganti, and had acquired the right, title, and interest of the last registered tenant in the 4 annas share. The result was to place him in the position of holding the 16 annas gantidari right as against the under-tenants, who were bound to pay rent to him as *de facto* gantidar. JOGENDRO CHUNDER GHOSE *v.* SHONA KALEE . **24 W. R. 313**

12. ——— *Sale of immoveable property—Beng. Act VIII of 1869, s. 65.* Where one co-sharer obtains a decree for money due to him on account of his share of the rent of an ijara, and in execution of that decree attaches, in the first instance, the immoveable property of his debtor, such attachment is void and will not invalidate a conveyance of the property by the judgment-debtor made during its continuance. It is not unless and until all the moveable property of the judgment-debtor has been sold and the sale-proceeds are found insufficient to satisfy the decree, that the judgment-creditor can proceed under s. 64 or 65, Bengal Act VIII of 1869, to seize and sell the immoveable property of his debtor. SARODA PROSAD GANGOOLY *v.* TARUCK CHUNDER BHUTTACHARJEE . . . **2 C. L. R. 325**

13. ——— *Landlord and tenant—Sale of portion of under-tenure—Suit for arrears of rent.* There is nothing in s. 64, Bengal Act VIII of 1869, which necessarily leads to the conclusion that under that section a share of an under-tenure cannot be sold so as to render

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the sale binding upon the judgment-debtor; and there is no substantial difference between the sale of a portion of an under-tenure under that section and under the Civil Procedure Code. Where therefore a plaintiff, who was the owner of a share in a zamindari, had obtained a decree against *X* who held a talukh in such zamindari, for arrears of rent due in respect of such share, and in execution of such decree brought a share of such taluk to sale, corresponding with his share in the zamindari, and himself became the purchaser, and where such plaintiff subsequently instituted a suit against *X*, who was also the owner of a howla and nim-howla under the said talukh, for arrears of rent due in respect of the share of the talukh so purchased by him; and where it appeared that the sale at which the plaintiff became the purchaser was afterwards confirmed; and that he had obtained a sale certificate:—*Held*, that such suit was not liable to be dismissed merely on the ground that the plaintiff had brought a share of an under-tenure to sale in execution of a decree for arrears of rent under s. 64 of Bengal Act VIII of 1869, and had thereby acquired nothing by such purchase, there being nothing in that section to support such a conclusion. *Gobind Chunder Roy Chowdhry* v. *Ram Chunder Chowdhry*, *22 W. R. 421*, and *Reily* v. *Hur Chunder Ghose*, *I. L. R. 9 Calc. 792*, discussed and explained. ASHANULLA KHAN BAHADUR *v.* RAJENDRA CHANDRA RAI
I. L. R. 12 Calc. 464

14. ——— Act VIII of 1869, ss. 26, 59— *Suit for rent—Landlord and tenant—Effect of sale in execution of a dercee for rent.* Where two persons, *B* and *I*, were registered tenants, and on *B's* death no one was registered in his place, and a suit for arrears of rent was brought against the widow and the executors of the sole surviving registered tenant:—*Held*, in view of s. 26 of Act VIII of 1869 (B. C.), that the zamindar was not bound to look for his rent beyond the representative of the surviving registered tenant, and that the entire tenure passed by the sale in execution of a decree for arrears of rent obtained against the representative of the surviving registered tenant. Where the sale proclamation distinctly set out that the sale would be held according to the provisions of s. 59 of Act VIII of 1869, and the property advertised was the tenure and the property sold was the tenure:—*Held*, that the mere insertion of a statement that the sale was of the rights and interests of the judgment-debtor would not have the effect of limiting the sale to such rights and interests and not extending to the tenure itself. MAHOMED SIRKAR *v.* GIRISH CHUNDER CHOWDHURI . . **2 C. W. N. 251**

5. EFFECT OF SALE.

1. ——— Dissolution of relation of landlord and tenant—*Patni tenure.* The sale of a patni dissolves the relationship of landlord and

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tenant between the zamindar and the patnidar. BROJONATH SINGH ROY *v.* BHUGOBUTTY DASSEE
1 W. R. 133

2. ——— Unregistered tenant. A zamindar has a perfect right to bring a tenure to sale for arrears of rent without regard to the rights of the new tenant while he is yet unregistered. NOBEEN KISHEN MOOKERJEE *v.* SHIB PERSHAD PATTUCK . . . . . **9 W. R. 161**

Upholding on review decision in **8 W. R. 96**

3. ——— Registered tenant affected by sale. A zamindar need not ordinarily look beyond the register for sale of a tenure of a registered defaulter. FORBES *v.* PROTAP SINGH DOOGUR
7 W. R. 409

4. ——— Liability of tenant for rent after sale—*Non-registration of transfer.* Where a patni tenure is sold under a decree against the tenant, he is not liable for any rent which may accrue afterwards, notwithstanding the transfer may not be registered. GOPEEKISTO GOSSAMEE *v.* RAM COMUL MISTRY . . . . **Marsh. 212**

S.C. RAM COMUL MISTRY *v.* GOPEEKISTO GOSSAMEE . . . . . **1 Hay 563**

See (*contra*) HOROMOHUN MOOKERJEE *v.* RAM COOMAR MITTER. . . . **1 W. R. 225**

5. ——— Right of inamdars in respect of debts for arrears of rent. The paramount rights of Government in respect of debts due to the Crown are not transferred to alienees (such as inamdars) of Government revenue. If an inamdar fails to recover his rents by any of the special processes provided in the regulations, and is obliged to go into the Civil Court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of land in execution of a decree for any other debt. BALAJI NARAYAN KOLATKAR *v.* RAMCHANDRA GANESH KELKAR . **11 Bom. 37**

6. ——— *Bengal Tenancy Act (VIII of 1885), ss. 160, cl. (g), 163* and *167—Sale of mortgage of dar-patni tenure—Right, title and interest of debtors—Ben. Reg. VIII of 1819, ss. 3 and 4—Incumbrance—Limitation Act (XV of 1877), s. 7—Where limitation is determined by the provisions of the Bengal Tenancy Act, whether a minor is entitled to a further period of limitation under the Limitation Act.* The terms "right, title and interest of the debtors," as used in the sale certificate and order, must be construed with reference to the circumstances under which the suit was brought, and the true meaning of the decree under which the sale took place, as well as the proceedings leading up to the sale. In a case where proceedings were taken under the provisions of the Bengal Tenancy Act, and application was made for the simultaneous issue of the order of attachment and proclamation as provided in s. 163 of the Act, what was intended to be sold was the entire tenure, and not merely the right,

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title and interest of the defaulter therein. *Jotendro Mohun Tagore* v. *Jogul Kishore, I. L. R. 7 Calc. 357*, and *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha, I. L. R. 26 Calc. 677*, referred to. A mortgage created by a *darpatnidar* of his interest in the *taluk* does not amount to a "protected interest," with the meaning of s. 160, cl. (*g*), of the Bengal Tenancy Act. When a mortgagee of a tenure had enforced his lien and obtained his decree, it would no longer remain as an incumbrance on the tenure which could be avoided under the provisions of s. 167 of the Bengal Tenancy Act. S. 7 of the Limitation Act allows a minor a further period of limitation in the case of a suit or application for which the period of limitation is provided in the third column of the second Schedule to that Act. But, in a case where the limitation is determined by the provisions of s. 167 of the Bengal Tenancy Act, s. 7 of the Limitation Act cannot have any application, and the minor is not entitled to any fresh period of limitation. *Girija Nath Roy Bahadur* v. *Patani Bibee, I. L. R. 17 Calc. 263*, referred to. The purchaser of the interest of a judgment-debtor is his representaive for the purpose of execution proceedings. *Ishan Chunder Sirkar* v. *Beni Madhab Sirkar, I. L. R. 24 Calc. 62*, referred to. AKHOY KUMAR SOOR *v.* BEJOY CHAND MOHATAP (1902) . . . **I. L. R. 29 Calc. 813**

7. ———— *Tenure, sale of—Recorded tenant. rent decree against—Execution as money decree—Sale if passes entire enure—Estoppel.* A sale in execution of a money decree obtained against the registered tenant passes only his right, title and interest in the tenure and not those of his unregistered co-sharers as well. *Doolar Chand Sahoo* v. *Lala Chabeel Chand, L. R. 6 I. A. 47 : s.c. 3 C. L. R. 561*, referred to. *Jeo Jal Singh* v. *Gunga Pershad, I. L. R. 10 Calc. 996*, distinguished and doubted. DOORGADHUR BISWAS *v.* HURO MOHINEE DABEE (1888) **13 C. W. N. 270**

6. INCUMBRANCES.

1. ———— **Subordinate tenures, effect of sale on**—*Beng. Reg. VIII of 1819—Sale of patni talukh.* On the sale of a talukh under the provisions of Regulation VIII of 1819, all subordinate tenures, such as ousut talukhs, howlas, nimhowlas, did not necessarily lapse : it depended very much upon the terms of the pottah or grant under which the original talukh was created. DWARKANATH DOSS BISWAS *v.* MANICK CHUNDER DOSS **9 W. R. 200**

2. ———— **Tenures created by defaulter**—*Beng. Reg. VIII of 1819—Sale of patni tenure.* A sale under Regulation VIII of 1819 did not *ipso facto* annul all tenures created by the defaulting patnidar, by the purchaser, if he thought proper, could avoid them. MADHUSUDUN KUNDU *v.* RAMDHAN GANGULI **3 B. L. R. A. C. 431 : 12 W. R. 383**

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6. INCUMBRANCES—*contd.*

3. ———— **Tenures created by patnidar**—*Patni tenure—Act X of 1859, s. 105—Beng. Reg. VIII of 1819.* The provisions of Regulation VIII of 1819 with respect to the sale of undertenures for arrears of rent being applicable to sales under decrees for rent made under s. 105, Act X of 1859 :—*Held*, that, where a sale had been effected of a "patni talakh" under that section, it must be presumed, in the absence of evidence to the contrary, that the tenure was one transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate must be brought to sale, in other words, it must be presumed to be a tenure such as is described in the preamble to Regulation VIII of 1819, and the effect of the sale was to annul all incumbrances created by the patnidar. BRINDABUN CHUNDER SIRCAR CHOWDHRY *v.* BRINDABUN CHUNDER DEY CHOWDHRY **13 B. L. R. 408 : 21 W. R. 324 L. R. 1 I. A. 178**

s.c. in the High Court, BRINDABUN CHUNDER CHOWDHRY *v.* BRINDABUN CHUNDER SIRCAR CHOWDHRY . . . . **8 W. R. 507**

4. ———— **Decree as to liability to enhancement**—*Beng. Reg. VIII of 1819—Right of purchaser—Suit for enhancement of rent—Patni tenure.* The purchaser of a patni talukh at a sale for arrears of rent under Regulation VIII of 1819 sued for a kabuliat at an enhanced rent. The former patnidar had brought a similar suit, and the Court had declared that the rent was not liable to enhancement. *Held*, that the purchaser was bound by that decree. TARAPRASAD MITTRA *v.* RAM NRISING MITTRA **6 B. L. R. Ap. 5 : 14 W. R. 283**

5. ———— **Purchase by grantor of patni tenure**—*Beng. Reg. VIII of 1819, s. 11, cls. 1 and 3—Rate of rent—Patni tenure.* The grantor of a patni tenure who subsequently purchases the lands granted by him in patni at the sale of the patni tenure does not revert *ipso facto* to the possession he formerly held as proprietor, and is not entitled to recover rent from the tenants at the rate he was receiving when he granted the patni, without reference to the rents realised by the patniholder in the interim. MAJORAM OJHA *v.* NILMONEY SINGH DEO **13 B. L. R. 198 : 21 W. R. 326**

6. ———— **Right to annul tenures**—*Right of lessee claiming under purchaser—Tenures not annulled by purchaser.* Where an auction-purchaser did not avail himself of the power vested in him by law to avoid and annul a tenure created by his predecessor :—*Held*, that it was not open to any person subsequently holding his estates, and still less to a mere lessee claiming under him, to avoid the tenure. TARA CHAND DUTT *v.* WAKENOONISSA BIBEE . . . . **7 W. R. 91**

7. ———— **Power to make incumbrances**—*Patni lease, construction of—Beng. Reg. VIII of 1819.* A patni lease containing word

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to the effect that the patnidar could give no darpatni or mokurari lease at a jumma less than the jumma of the patni was held to confer no such power as that described in cl. 1, s. 11, Regulation VIII of 1819, *viz.*, that of making incumbrances. A portion of a patni tenure cannot be sold under the provisions of Regulation VIII of 1819; and if an auction-purchaser acquires any of the rights of the patnidar, he is bound by the acts of the latter as regards the grant of leases. MOHADEB MUNDUL v. COWELL . . . . . **15 W. R. 445**

Upheld on review. COWELL *v.* MOHADEB MUNDUL . . . . . **17 W. R. 182**

See MONOMOTHONATH DEY *v.* GLASCOTT. **20 W. R. 275**

SHAM CHAND MITTER *v.* JUGGUT CHUNDER SIRCAR . . . . . **22 W. R. 50**

Upheld on review . . . **22 W. R. 541**

8. ——— **Right of ejectment**—*Right of purchaser of patni tenure—Waiver by acceptance of rent.* The receipt of rent for fifteen years by the purchaser of a patni talukh sold for arrears of rent under Regulation VIII of 1819 was *held* to be a waiver on his part of his right to evict the tenant under cl. 2, s. 11, of that Regulation. WOOMANATH ROY CHOWDHRY *v.* ROGHOONATH MITTER . . . **5 W. R., Act X, 63**

9. **Bengal Rent Act, 1869, s. 66 (Beng. Act VIII of 1865, s. 16)**—*Khodkasht raiyats.* The object of s. 16, Bengal Act VIII of 1865, was to protect not merely any one class of tenants, but the leaseholder of the particular land leased: the expression "khodkasht raiyats" as used there meaning "resident and hereditary cultivators." KOONTEE DEBEE *v.* HRIDOY NATH DURREEPA . . . . . **16 W. R. 206**

10. ——— *Purchaser of rights of holder of fractional share.* S. 16 of Bengal Act VIII of 1865 did not apply to the purchaser of the rights and interests of the holder of a fractional share in an under-tenure. HARASUNDARI DASI *v.* KISTOMANI CHOWDHRAIN **5 B. L. R. Ap. 37 : 13 W. R. 257**

11. ——— *Right of purchaser to eject tenants.* Where the rights and interests of a judgment-debtor were sold in execution under Bengal Act VIII of 1865, the tenure itself did not pass, much less did it pass free from all incumbrances; and the purchaser was not entitled to eject tenants who had been occupying and cultivating the land for more than twelve years. RAJ KISHEN MOOKERJEE *v.* DUSRUTH SOOTRODHUR . . . . . **15 W. R. 234**

12. ——— *Under-tenure, sale of—Act X of 1859, s. 105.* Under-tenure sold for arrears of rent under s. 105 of Act X of 1859, other than tenures upon which the right of selling for arrears of rent had been especially reserved by stipulation in the engagement interchanged on the creation of the tenures, did not pass free from incumbrances. *Semble:* It was to get rid of this that s. 16 of Bengal Act VIII of 1865 was enacted. SHAHABOODEEN *v.* FUTTEH ALI **B. L. R. Sup. Vol. 646 2 Ind. Jur. N. S. 135 : 7 W. R. 260**

MOHIMA CHUNDER DEY *v.* GOOROO DOSS SEN **7 W. R. 285**

INDUR CHUNDRA DOOGUR *v.* RUTTUN KOOMAREE BIBEE . . . . . **7 W. R. 376**

The above Full Bench decision did not apply where the tenure itself was not sold. DOORGA SOONDUREE DEBIA *v.* DINOBUNDHOO KYBURTO DOSS . . . . . **8 W. R. 475**

13. ——— *Sale of sub-tenure—Beng. Reg. VIII of 1831.* Where a sub-tenure had been granted, but no power was reserved to the grantor in the sanad to sell the tenure free from incumbrances in case of default in payment of rent:—*Held*, that, in a sale for arrears of rent under Regulation VIII of 1831, the purchaser did not take free from incumbrances created by the grantee. The decision in *Shahaboodeen* v. *Futteh Ali, B. L. R. Sup. Vol. 646*, affirmed. FORBES *v.* LUTCHMEPUT SINGH **10 B. L. R. 139 : 17 W. R. 197 14 Moo. I. A. 330**

MOHESH CHUNDER BANERJEE *v.* CHUNDER MONEE DEBI **10 B. L. R. 150 note : 15 W. R. 237**

14. ——— *Beng. Act VIII of 1865.* An auction-purchaser under Act VIII of 1865 was not at liberty without notice of his intention to cancel a pre-existing under-tenure, or other act on his part, to avoid any incumbrance. GOBIND CHUNDER BOSE *v.* ALIMOODDEEN **11 W. R. 160**

15. ——— *Survival of incumbrances.* The sale of a tenure under s. 16 Bengal Act VIII of 1865, did not *ipso facto* annul all incumbrances, but certain incumbrances were recognized by this section to survive such sale. UMASUNDARI DASI *v.* BIRBUL MANDAL **3 B. L. R. A. C. 183**

S.C. WOOMA SOONDUREE DOSSIA *v.* BEERBUL MUNDUL . . . . . **11 W. R. 563**

16. ——— *Voidable incumbrances.* Under Bengal Act VIII of 1865, s. 16, under-tenures became void *ipso facto* by the sale and were not merely voidable at the option of the purchaser. UNNODA CHURN DASS BISWAS *v.* MOTHURA NATH DASS BISWAS **I. L. R. 4 Calc. 860 : 4 C. L. R. 6**

17. ——— *Suit to set aside incumbrances.* The right which an auction-purchaser has, under the Rent Law, s. 66, to do away with under-tenures cannot be executed without a suit first having been instituted, the mere fact of purchase being insufficient to set aside incumbrances. RAJ BULLUBH MITTER *v.* SREERAM SIRCAR . . . . . **25 W. R. 109**

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SALE FOR ARREARS OF RENT—*contd.*

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18. ——— *Patni tenure—Dar-patni tenure—Under-tenure—Incumbrance—Beng. Act VIII of 1869, ss. 59, 60.* The sale of a patni tenure of its own arrears under ss. 59 and 60, Bengal Act VIII of 1869, does not *per se* avoid the dar-patni tenures, but only renders them voidable at the option of the purchaser. An under-tenure is an incumbrance within the meaning of s. 66, Bengal Act VIII of 1869. TITU BIBI *v.* MOHESH CHUNDER BAGCHI . **I. L. R. 9 Calc. 683**

S.C. TITU BIBI *v.* IBRAHIM MOLLAH **12 C. L. R. 304**

19. ——— *Brick-built house.* A brick-built house was not an "incumbrance," or a tenure within the meaning of that word in s. 16 of Bengal Act VIII of 1865 which a purchaser at a sale for arrears of rent could remove. SHIBDAS BANDAPADHYA *v.* BAMANDAS MUKHOPADHYA . **8 B. L. R. 237 : 15 W. R. 360**

20. ——— *Mortgage by defaulting tenant—Act X of 1859, s. 105.* A mortgage created by a defaulting under-tenant, on account of a debt contracted by him, could not continue to the prejudice of the auction-purchasersoof the tenure sold for arrears of rent under s. 105, Act X of 1859. KALEE KANT CHOWDHRY *v.* ROMONEE KANT BHUTTACHARJEE . **3 W. R. 217**

21. ——— *Title acquired—Adverse possession.* If the holder of an under-tenure allowed his tenant to occupy the land rent free for more than twelve years, the interest thus created in the latter was an incumbrance upon the under-tenure as much within the reason of Bengal Act VIII of 1865, s. 16, as if the holder had made a rent-free grant or given a nominal lease. MAHOMED ASKUR *v.* MAHOMED WASUCK **22 W. R. 413**

22. ——— *Right of occupancy under Act X of 1859, s. 6—Right of purchaser—Incumbrance.* A purchaser of a tenure sold under Act VIII of 1865 for arrears of rent could not, under s. 16, eject a raiyat who had acquired a right of occupancy under s. 6, Act X of 1859, under the former tenant. NILMADHAB KARMOKAR *v.* SHIBU PAL **5 B. L. R. Ap. 18 : 13 W. R. 410**

PUREDAG SINGH *v.* PURTAB NARAYAN SINGH **5 B. L. R. Ap. 20 : 11 W. R. 253**

BHOLANATH GHOSSAL *v.* KEDARNATH BANERJEE **19 W. R. 106**

EMAM ALI MESTORY *v.* ATOR ALI KHAN . **22 W. R. 133**

23. ——— *Intermediate holding—Howla tenure.* An auction-purchaser at a sale held under Bengal Act VIII of 1865 had a right to get rid of an intermediate holding such as a howla so far as to substitute himself for the howladar in respect of the collection of the raiyat's rents. MOHIOODDEEN MAHOMED *v.* RAM KISHORE KOONDOO . . . . **22 W. R. 311**

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24. ——— *Rights of a purchaser at an auction-sale held under Beng. Act VIII of 1865 when in collusion with the former proprietor.* A proprietor of a talukh, which was about to be sold, for arrears of rent, entered into an arrangement with the plaintiff whereby, in consideration of a share of a purchase, he agreed to use his influence to urge on the sale, and to secure the purchase to the plaintiff. Under this arrangement, the plaintiff became the purchaser of the tulukh, and the former proprietor obtained a share in the purchase. A suit by the plaintiff to oust the under-tenants was dismissed; the plaintiff took only as a purchaser at an ordinary execution-sale, and did not obtain the benefit of s. 16 of Bengal Act VIII of 1865. SRINATH GHOSE *v.* HARONATH DUTT CHOWDHRY . . **9 B. L. R. 220 : 18 W. R. 240**

25. ——— *Shikmi tenure.* Where a shikmi tenure was sold under Bengal Act VIII of 1865 and the shikmidar was found to be the under-tenant of the zamindar, the shikmi pottah not giving the privilege of making incumbrances, the purchaser was *held* entitled under s. 16 to receive the tenure free of all incumbrances, *e.g.*, the incumbrances of a jummai tenure of a person who was not a khodkasht raiyat. HUREE NARAIN CHATTERJEE *v.* WOOMA CHURN MOOKERJEE . . . **19 W. R. 169**

26. ——— *Shikmi tenure.* At a sale held under Bengal Act VIII of 1865 the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by the plaintiff for recovery of possession thereof, on the ground that the property in dispute was a lakhiraj tenure, created by the Rajah of Tipperah, and that the plaintiff was owner thereof, partly to purchase and partly by inheritance. The lower Appellate Court found as a fact that the late shikmidar, and not the Rajah, had granted the lands in dispute as brahmatar, but not in favour of the person through whom the plaintiff claimed. It, however, passed a decree in favour of the plaintiff, as he had been unlawfully dispossessed. *Held*, that, under s. 16, Bengal Act VIII of 1865, the incumbrances created by the former holder were voidable by the auction-purchaser, and that the plaintiff should show that the former holder could create such right. ISWAR CHANDRA CHUCKERBUTTY *v.* BISTU CHANDRA CHUCKERBUTTY **3 B. L. R. Ap. 97 : 12 W. R. 32**

See SRINATH CHUCKERBUTTY *v.* SRIMANTO LASHKAR . **8 B. L. R. 240 note : 10 W. R. 467**

27. ——— *Incumbrance created with sanction of zamindar.* In a suit by a purchaser at a sale under Bengal Act VIII of 1865 to get rid of an under-tenure set up by the defendants where, in reliance upon the latter clause of s. 16, it was urged that the pottah under which the defendants held was created by the late holder with the express sanction of the zamindar:—*Held*, that under the strict provision

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of that section no sanction of the zamindar would avail, unless the right was vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, or his representatives. ESHAN CHUNDER MOJOOMDAR *v.* HURISH CHUNDER GHOSE **21 W. R. 137**

28. ———— *Avoidance of incumbrance—Beng. Act VIII of 1869, ss. 59, 60.* On a partition of a joint family property, a certain ganti tenure, which had been purchased by the three members of the family at a sale, on the 3rd August 1874, under the provisions of ss. 59 and 60 of Bengal Act VIII of 1869, was allotted to the plaintiff, who brought a suit claiming to be entitled, under the statutory provisions of s. 66 of that Act, to evict the defendant, who was alleged to be in possession by virtue of an under-tenure of the land covered by the ganti tenure. It appeared that the tenure under which the defendant held the land was created, not by the owner of the ganti tenure, but by the superior landlord before the creation of the ganti tenure. *Held*, that, inasmuch as the tenure had not been created by the owner of the ganti tenure, the plaintiff was not entitled to avoid it as an incumbrance under s. 66 of Bengal Act VIII of 1869. DURGA PROSONNO GHOSE *v.* KALIDAS DUTT . . . **9 C. L. R. 449**

29. ———— *Beng. Reg. VIII of 1819, s. 11—Cancelment of under-tenures.* Lands appertaining to a certain talukh which was sold under Regulation VIII of 1819 for arrears were held from the owner of the talukh under a kaimi jumma tenure, under which the plaintiff who sued the purchaser for confirmation of his title, cultivated the land through persons called burgaits, with whom he shared the profits in some way. *Held*, that under s. 11 of the Regulation the plaintiff's tenure was cancelled. Compare *Unnoda Churn Das* v. *Muthura Nath Dass, I. L. R. 4 Calc. 860 : 4 C. L. R. 6. Surnomoyee* v. *Sutlees Chunder Roy Bahadoor, 10 Moo. I. A. 123*, cited and discussed. MOHINI CHUNDER MOZUMDAR *v.* JOTIRMOY GHOSE **4 C. L. R. 422**

30. ———— **Beng. Reg. VIII of 1819, s. 11**—*"Defaulting proprietor"—"Defaulter"—Incumbrances created by previous patnidar—Mokurari lease, avoidance of—Voidable incumbrances.* In 1839 a mokurari lease was granted to the predecessors of the defendants by the then patnidar of a patni created in 1819. In 1848 the patni was sold for arrears of rent under the provisions of Bengal Regulation VIII of 1819, but the purchaser at that sale did not interfere with the mokurari. In 1885 the patni was again brought to sale under the same Regulation for arrears of rent, the default being made by one of the successors of the purchaser in 1848, and at this sale it was purchased by the plaintiffs. In 1890 the plaintiffs sued to set aside

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the mokurari lease, contending that they were, by virtue of their purchase, entitled to avoid all encumbrances created by any patnidar, and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of s. 11 of the Regulation restricted the plaintiffs to avoiding incumbrances the acts of the immediate defaulter, and that, as the purchaser in 1848, and his successors in title previous to the defaulter in 1885, had not interfered with the mokurari lease, the plaintiffs could not have it set aside. *Held* (RAMPINI, *J.*, dissenting), that the plaintiffs were entitled to avoid the mokurari. *Held, per* GHOSE and BEVERLEY, *JJ.*, that having regard to the policy and principle of the Regulation, a zamindar is entitled to bring a patni to sale in the same condition in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors. *Per* GHOSE, *J.*—The mokurari lease was an incumbrance upon the patni, but inasmuch as s. 11 distinguishes in cls. 1 and 2 between "incumbrances" and "leases" it might be regarded as the latter. If treated as an incumbrance, it must be held to have accrued upon the patni by reason of the defaulting zamindar not having set it aside, though entitled to do so within the meaning of those words in cl. 1. If treated as a lease, the words in cl. 2, "holder of the former tenure," are wide enough to include any patnidar whether the defaulting or a previous holder. *Per* BEVERLEY, *J.*—The words "defaulting proprietors" used in cl. 1 of s. 11 must be read as the "proprietor of the tenure in default," and were not intended to be restricted to the particular proprietor for whose default the tenure is brought to sale, and the word "defaulter" used in cl. 2 of that section must be given a similarly wide interpretation. GOPENDRO CHUNDER MITTER *v.* MOKADDAM HOSSEIN . **I. L. R. 21 Calc. 702**

31. ———— **cl. (3)**—*Occupancy or non-occupancy holding, whether an incumbrance.* An occupancy or non-occupancy holding, if not held by a khodkasht raiyat, *i.e.*, a resident and hereditary cultivator, is an incumbrance and not protected from ejectment by the terms of cl. 3, s. 11, of Regulation VIII of 1819, and may be annulled by a purchaser at a sale under the said Regulation. JOGESHWAR MAZUMDAR *v.* ABED MAHOMED SIRCAR . . . **3 C. W. N. 13**

32. ———— **Bengal Tenancy Act (VIII of 1885), s. 161**—*Exchange of land—Suit for recovery of possession of land.* Exchange of land is an incumbrance within the meaning of s. 161 of the Bengal Tenancy Act. CHUNDRA SAKAI *v.* KALLI PROSONNO CHUKERBUTTY **I. L. R. 23 Calc. 254**

33. ———— **and s. 171**—*Payment by person interested to prevent sale—Mortgage—Incumbrance.* A mortgage created by the operation of s. 171 of the Bengal Tenancy Act (VIII of

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1885) is not an incumbrance within the meaning of s. 161 of that Act, and is not liable to be annulled as such at the instance of a purchaser of a holding at a sale in execution of a decree for arrears of rent. PASUPATI MOHAPATRA *v.* NARAYANI DASSI . . . **I. L. R. 24 Calc. 537**
1 C. W. N. 519

34. ——— and s. 167—*Notice—Mortgage.* A sale purporting to be under s. 161 and the following sections of the Bengal Tenancy Act (VIII of 1885) does not *ipso facto* cancel incumbrances. Notice must be given under s. 167 according to the procedure laid down in that section. BENI PROSAD SINHA *v.* REWAT LALL
I. L. R. 24 Calc. 746

35. ——— s. 167—*Effect of service of notice—Annulling of incumbrance—Property in possession of a person other than the purchaser.* Service of notice under s. 167 of the Bengal Tenancy Act has the effect of annulling an incumbrance. It is not necessary for the purchaser to bring a declaratory suit to have it declared that the incumbrance is annulled. The incumbrance would be annulled even if the property be not at the time of the service of the notice under s. 167 in the possession of the purchaser, but of some body else. PEARI LALL ROY *v.* MOHESHWARI DEBI
I. L. R. 25 Calc. 551

36. ——— and ss. 65, 148, 161, and 176—*Estoppel—Mortgagor and mortgagee—Order in execution-proceedings against mortgagee—Res judicata—Decree obtained before Bengal Tenancy Act came into force—Execution under former Rent Law—Incumbrance—Mode of annulling incumbrance—Sale for arrears of rent—Charge of rent as first charge on tenure—Sale in execution of mortgage-decree—Decree for sale.* By a mortgage-bond, dated the 22nd August 1884, and registered, *K* created a charge in favour of the plaintiff on six talukhs for re-payment of the mortgage-debt, in respect of two of which talukhs suits had been brought by the zamindar for arrears of rent, and decrees obtained on the 6th June 1885, before the coming into operation of the Bengal Tenancy Act (VIII of 1885). After that Act had come into force, these decrees were assigned to *G*, a benamidar for *P*, for execution, and on his seeking to execute them, he was opposed by *K* on the ground that, as the transfer of the decree by assignment, and the subsequent application for execution, were made after the Bengal Tenancy Act had come into force, and as *G* the assignee had acquired no interest in the talukhs, his application for execution could not be granted under s. 148, cl. (*h*), of that Act. On the 9th July 1886, the Court overruled this objection, and ordered execution to issue, holding that, as the decree in the rent-suits were passed before the Tenancy Act came into operation, the execution should proceed under the old law. In execution of the decrees, the two talukhs were put up for sale, and purchased by *G* as benamidar for *P*. In

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a suit brought by the plaintiff, the mortgagee against *K* and *P* (and others representing others of the six talukhs) it was contended, so far as the two talukhs were concerned, that the plaintiff, though not a party to the execution-proceedings, was bound by the order of the 9th July 1886, made in the course of those proceedings; that *P*, having purchased the two taluks at sales for arrears of rent, had acquired them free from all incumbrances; that the plaintiff's mortgage was not a notified incumbrance within the meaning of s. 161 of the Tenancy Act, and that he was therefore not entitled to have his mortgage-lien declared against the two talukhs. *Held* (affirming the judgment of the lower Appellate Court), that the plaintiff was not bound by the order of the 9th July 1886, *K*, the mortgagor, not representing his interest sufficiently to make that order binding on the plaintiff as mortgagee. *Dooma Sahoo* v. *Joonarain Lall, 12 W. R. 362 : 4 B. L. R. A. C. 27 note; Tribhobun Singh* v. *Jhono Lall, 18 W. R. 206; Bonomali Nag* v. *Koylash Chunder Dey, I. L. R. 4 Calc. 692; Madho Pershad Singh* v. *Purshan Ram, I. L. R. 4 Calc. 520;* and *Sitaram* v. *Amir Begam, I. L. R. 8 All. 324*, referred to. The proprietor of an estate cannot be said to represent the whole estate after he had mortgaged it, and this distinguishes the case of a mortgagor as representing an estate from that of a Hindu widow, or shebait, who are held to represent the estate so as to bind the reversioner or the succeeding shebait. The interest of a mortgagee in an estate may be greater than that left in the mortgagor, or, as in the present case, where it was no part of the mortgagor's interest to protect the incumbrance, the interests of the mortgagor and mortgagee are not identical; the balance of justice and expediency therefore is in favour of not allowing a mortgagee to be bound by an order made against his mortgagor. Nor is there anything in the provisions of the rent-law against that view. A decree for rent of a tenure obtained against the registered tenant binds an unregistered transferee of the tenure, who can show no sufficient cause for not registering his name, and may be enforced by sale of the tenure [*Sham Chand Kundu* v. *Brojonath Pal Chowdhry, 12 B. L. R. 484 : 21 W. R. 94*]; but whether any such sale was in sufficient conformity with the rent-law to be operative in annulling a prior mortgage, or other incumbrance, must be determined in the presence of the party claiming the benefit of the incumbrance. *Tirbhobun Singh* v. *Jhono Lal, 18 W. R. 206*, and *Madho Pershad Singh* v. *Purshan Ram, I. L. R. 4 Calc. 520*, referred to. *Held*, also, that, though the rent-decrees were passed under the rent law, the assignment and the application by the assignee for execution having been made after the Bengal Tenancy Act came into force, cl. (*h*), of s. 148 of that Act applied to the execution-proceedings (*Ranjit Singh* v. *Meherban Koer, I. L. R. 3 Calc. 663*), and the sale on such an application, which is prohibited by that clause, must be held to be no sale

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under the rent law. The clause does not affect any vested right. All that it prohibits is an application for the enforcement of the decree by an assignee and that is a matter of procedure. If any right is affected, it is not a right of the decree-holder, but the right of the assignee of the decree to apply for execution, and in this case there was no such assignee before the Bengal Tenancy Act came into force. The mode provided by s. 167 of the Bengal Tenancy Act is the only mode in which incumbrances can be annulled by purchasers of tenures for arrears of rent, and that mode not having been followed in this case, the incumbrance on the two talukhs was not annulled. S. 65 of the Tenancy Act, which provides that "the tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon, only intends what is laid down in Ch. XIV of the Act, namely, that the charge should be enforced by the sale of the tenure or holding free of incumbrances; and if in any case the decree for rent either has not been, or cannot be, enforced by the sale of the tenure, the charge created by s. 65 cannot be enforced in any other way. No reason, therefore, could be shown under that section for making the sale in satisfaction of the plaintiff's mortgage, subject to the rent decree as a first charge. SOSHI BHUSAN GUHA *v.* GOGAN CHUNDER SHAHA . **I. L. R. 22 Calc. 364**

37. ——— and s. 165—*Notice to annul incumbrance, whether necessary when the purchaser and incumbrancer are the same person.* After a mortgage-deed was passed, the mortgaged property was sold in execution of a decree for rent and was purchased by the mortgaged decree-holder. The mortgage decree provided that the mortgaged property should be sold in the first instance, and if that should prove insufficient, other properties would be sold; the mortgagee, however, applied to sell the other properties without proceeding against the mortgaged property which he had purchased. The lower Appellate Court held that there was not sufficient evidence to show that the mortgaged property which had been sold in execution of the decree for rent had been sold with power to avoid all incumbrances, and even if the sale was so held, the incumbrance had not been cancelled by the necessary notices under s. 167 of the Bengal Tenancy Act in spite of the fact that the incumbrancer and the purchaser were one and the same person. The mortgagee decree-holder preferred a second appeal. *Held*, that, even if the sale was under s. 165 of the Bengal Tenancy Act, the incumbrance had not been annulled by proceedings under s. 167 and the appeal ought to be dismissed. GOLUK CHUNDER DAS *v.* RAM SUNKER SUTT . . **4 C. W. N. 268**

38. ——— "*Purchaser,*" *meaning of—Incumbrance, annulment of, when purchaser himself is the incumbrancer—Transfer of Property Act (IV of 1882) s. 101.* The purchaser contemplated by s. 167 is a purchaser independently of the incumbrancer, and where the incumbrancer himself purchases the property encumbered to him, in execution of a decree for arrears of rent, it is not necessary for him to give notice of annulment of his incumbrance under s. 167 of the Bengal Tenancy Act. Under s. 101 of the Transfer of Property Act, which is of general application, his incumbrance is extinguished unless he evinces an intention to keep it alive. Where a mortgagee has purchased the mortgaged property in execution of a rent decree, he is entitled to proceed against the other properties of the mortgagor. *Goluk Chunder Das* v. *Ram Sunkar Sutt, 4 C. W. N. 268*, dissented from. MASTULLAH MANDAL *v.* GYAN MAMUD SAH . . . . . **4 C. W. N. 735**

39. ———Madras Rent Recovery Act, s. 38—*Incumbrance.* As the tenancy of an ordinary pottahdar only confers on him a right of occupancy until default in payment of rent and the determination of the tenancy under the provisions of the Rent Act, any incumbrance created by such pottahdar on the land cannot affect the landholder's statutory power of sale under the Act or the rights of the purchaser at such sale. KONDI MUNISAMI CHETTI *v.* DAKSHANAMURTHI PILLAI **I. L. R. 5 Mad. 371**

40. ——— *Purchase by creditor—Civil Procedure Code, 1882, ss. 376, 295—Sale of tenant's interest by landlord pending attachment by Civil Court.* The interest of a tenant in certain land having been attached by his creditor in execution of a decree for money, the landlord attached the same land for arrears of rent, brought it to sale, and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. In a suit by the landlord to have the sale to the creditor declared invalid:—*Held*, that the landlord's purchase was subject to the creditor's attachment. SUBRAMANYA *v.* RAJARAM . . . . . **I. L. R. 8 Mad. 573**

41. ——— *Sale of tenant's interest—Prior incumbrance—Rights of purchaser.* A sale by a landlord of a tenant's interest in his holding for non-payment of rent under the provisions of s. 38 of the Rent Recovery Act (Madras Act VIII of 1865) does not defeat existing incumbrances. *Munisami* v. *Dukshanamurti, I. L. R. 5 Mad. 371*, overruled. RAJAGOPALASHARI *v.* SUBBARAYA MUDALI . . **I. L. R. 7 Mad. 31**

See ZAMINDAR OF RAMNAD *v.* RAMAMANY AMMAL . . . . . **I. L. R. 2 Mad. 234**

42. ——— *Mulageni lease—Encumbered tenancy.* *A* demised land to *B* on a mulageni lease. *B* mortgaged his tenancy to *A*. The rent under the mulageni lease fell into arrears, and *A* obtained a decree against *B* for the amount. *Held*, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by

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the tenant. *Rajagopal* v. *Subbaraya, I. L. R. 7 Mad. 31*, followed. PADAKANNAYA *v.* NARASIMMA **I. L. R. 10 Mad. 266**

43. ——— Defective application— *Bengal Tenancy Act (VIII of 1885), s. 167—Application to avoid an incumbrance, mentioning a wrong person as the incumbrancer—Another application after the period of limitation, for amending the previous application, effect of—Collector's power to amend such application.* An application to avoid an incumbrance under s. 167 of the Bengal Tenancy Act was made by an auction-purchaser within one year from the date on which he had notice of the incumbrance, mentioning therein a wrong person as the incumbrancer. After the period of limitation, another application was made by him, to amend the previous application by substituting the name of the real incumbrancer, which was allowed by the Collector. *Held*, that the Collector, who was merely a ministerial officer in the matter, had no power to make any such amendment; and that the application to serve a notice on the real incumbrancer, not having been made within one year from the date on which the purchaser had notice of the incumbrance, was barred by limitation. NRITYA GOPAL HAZRA *v.* GOLAM RASOOL (1900) **I. L. R. 28 Calc. 180**

44. ——— Notice of annulment— *Bengal Tenancy Act (VIII of 1885), s. 167—Annulment of incumbrance, notice for—Notice, contents of—Notice, joint, to several persons.* A notice to annul an incumbrance under s. 167 of the Bengal Tenancy Act is not bad, although it does not specify the particulars of the land held by the tenant or the rent payable by him. Such a notice, if addressed to several tenants jointly, is not bad if it is served in accordance with the prescribed rules. JOGABUNDHU MAJUMDAR *v.* RASHO MONJAN DASSYA (1900) **5 C. W. N. 272**

45. ——— *Bengal Tenancy Act (VIII of 1885), s. 167—Notice to annul incumbrance—Jurisdiction to issue such notice by a Sub-Divisional Officer not specially authorized by Local Government—Collector—Bengal Tenancy Act, s. 3, cl. (16).* A Sub-divisional Officer not specially appointed by the Local Government to discharge the functions of a "Collector" under s. 167 of the Bengal Tenancy Act has no power to receive an application, nor has he jurisdiction to issue notice, annulling an incumbrance, under that section. MOHABUT SINGH *v.* UMAHIL FATIMA (1900) . . . . **I. L. R. 28 Calc. 66**

46. ——— Tenants' mortgage— *Bengal Tenancy Act (VIII of 1885), s. 65—Sale of a holding in execution of a decree for rent—Charge—Mortgagee, suit by, to enforce mortgage—Transfer of Property Act (IV of 1882), s. 101.* Where, in execution of a decree for arrears of rent, a *raiyati* holding was sold, and purchased by the landlord, and the plaintiff, a mortgagee of the *raiyati* holding, whose mortgage was not annulled, brought a suit to enforce the mortgage:—*Held*, that the

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mortgagee was entitled to enforce the mortgage on payment of the money due under the rent-decree. *Held*, that the landlord, when he made the purchase in execution of the rent-decree, might be taken to have become absolutely entitled to the property, and it followed from s. 101, Transfer of Property Act, that the landlord's charge for rent, which was for his benefit, continued to subsist after his purchase. *Held*, also, that the plaintiff (mortgagee) might be regarded as a second mortgagee. MEHERUNNESSA *v.* SHAM SUNDER BHUIYA (1902) . **6 C. W. N. 834**

47. ——— Tenant's sub-lessee— *Bengal Tenancy Act (VIII of 1885), s. 167—Landlord and under-raiyat—Sub-lease given by a tenant without the landlord's consent—In a suit for khas possession by a landlord on purchase of a holding sold for arrears of rent, whether necessary for the landlord to avoid the incumbrance so created—Bengal Tenancy Act, ss. 22 (1) and 85 (1).* In a suit brought by the plaintiff (landlord) to recover *khas* possession of a holding on the allegation that he had purchased it at a sale held in execution of a decree for arrears of rent obtained against the tenant, the defendant pleaded that he was an under-tenant with a right of occupancy, and that the plaintiff was not entitled to set aside the under-tenancy, inasmuch as he did not proceed in accordance with the provisions of s. 167 of the Bengal Tenancy Act:—*Held*, that, inasmuch as the sub-letting was otherwise than by a registered instrument and without the landlord's consent, it was valid as against him [s. 85 (*1*) of the Bengal Tenancy Act], and therefore it was not necessary for him to follow the procedure prescribed by s. 167 of the Bengal Tenancy Act. The rights under such an under-*raiyati* lease are not protected by sub-s. (*1*) of s. 22 of the Act. PEARY MOHUN MOOKERJEE *v.* BADUL CHANDRA BAGDI (1900)

I. L. R. 28 Calc. 205 : s.c. 5 C. W. N. 310

48. ——— Notice to annul encumbrance— *Rights and liabilities of purchaser—Protected interest—Incumbrance, annulment of——Bengal Tenancy Act (VIII of 1885), s. 160 (g), s. 167.* A clause in a patni lease to the effect that, if the patnidar should grant a dar-patni, the dar-putnidar shall act according to the terms of the putni kabuliat does not amount to a permission to the putnidar to create a dar-putni within the meaning of s. 160, cl. (*g*), of the Bengal Tenancy Act. Knowledge on the part of the proprietor of the creation of the dar-putni and acceptance by him of the putni rent from the dar-putnidar are not sufficient to constitute the dar-putni at protected interest within the meaning of that section. Where an application under s. 167 of the Bengal Tenancy Act was made to the Collector and both the application and the notice issued bore the seal of the Collector and the notice was duly served:—*Held*, that the provisions of the section were complied with, although the application was received by a Deputy Collector in charge and the notice was signed by a Deputy Collector

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6. INCUMBRANCES—*concld.*

"for the Collector." It is not necessary that the Collector should personally receive the petition or personally cause the notice to be served. *Akhoy Kumar Soor* v. *Bejoy Chand Mohatap, I. L. R. 29 Calc. 813*, approved on this point. MAHOMED KAZEM *v.* NAFFAR CHUNDRA PAL CHOWDHRY (1905) . . . **I. L. R. 32 Calc. 911**

7. RIGHTS AND LIABILITIES OF PURCHASERS.

1. ——— **Right of purchaser**—*Right to khas possession.* A raiyat's tenure having been sold for arrears of rent under an Act X decree, the purchaser was *held* to be entitled to be put in khas possession of the entire tenure as it originally stood, notwithstanding that the sons of the raiyat had been occupying huts on the land for more than twenty years. The circumstance that the purchaser happened to be the superior landlord did not diminish his right. TEELOTTUMA DEBEE *v.* BROJO LALL SHAMUNT . . . . **8 W. R. 478**

2. ——— *Right to nij-jote land.* The right to hold nij-jote lands necessarily passes with the sale to the auction-purchaser. JOY DUTT JHA *v.* BAYEE RAM SINGH . **7 W. R. 40**

3. ——— *Right to rent due at time of sale.* A purchaser of patni sold in execution buys it with all its liabilities, including instalments due to the zamindar, and cannot recover them from the original patnidar. KHODA BUKSH *v.* DEGUMBUREE DOSSEE . . **W. R. 1864, 207**

4. ——— *Right to rent—Liability of patnidar for rent—Beng. Reg. VIII of 1819, s. 8, cl. 3.* Where a patnidar's possession is disturbed by the zamindar, and he is prevented from collecting the rents of certain kists, he is not liable for those kists. Where a talukh is sold for arrears, the patnidar who is sold out is not liable for the rent of the month in which the zamindar presented the petition enjoyed by cl. 3, s. 8, Regulation VIII of 1819. DARIMBA DEBIA *v.* NILMONEE SINGH DEO **15 W. R. 180**

5. ——— *Right to rent—Liability of surety of patnidar.* The purchaser of the rights and interests of a patnidar in a patni talukh sold for arrears of rent purchases the talukh subject to whatever claims the zamindar has against it for rent, and has no claim against the surety of the patnidar by reason of the name of the latter appearing as the owner of the talukh in the zamindar's papers or otherwise. He may sue the other sharers for the money which he has paid on their account. OBHOY CHUNDER BUNDOPADHYA *v.* NILAMBUR MOOKERJEE . . **W. R. 1864, 73**

6. ——— *Sale under Beng. Act VIII of 1865—What passes at sale.* As a general rule, when a tenure was sold in execution of a decree under the provisions of Bengal Act VIII of 1865, the whole tenure passed, unless there was some

SALE FOR ARREARS OF RENT—*contd.*

7. RIGHTS AND LIABILITIES OF PURCHASERS—*contd.*

reservation made at the time of the sale. HURO GOBIND BISWAS *v.* DUMOUNTEE DABEE **13 W. R. 304**

7. ——— *Purchaser of shareholder's rights—Sale under Beng. Act VIII of 1865.* The purchaser of a partnership in a tenure—in other words, of a shareholder's rights—acquired no right to retain possession against a person who bought the tenure itself when sold for arrears under Bengal Act VIII of 1865. HURO NARAIN GIREE *v.* DURGA CHURN GIREE . . **15 W. R. 319**

8. ——— *Purchase by shareholders—Ousut howlas, effect of sale on—Recorded tenants.* A shareholder is not precluded from purchasing the whole of a howla sold *bonâ fide* for arrears of rent due from himself and his co-sharer. All ousut howlas created by the co-sharers fall with the sale of a howla unless specially protected by the howla lease. A zamindar may bring a suit for arrears only against the tenant whose name is recorded in his serishta and in execution of a decree obtained in such a suit the whole tenure may be sold, though others, not recognized by the zamindar as his tenants, may be interested in the lease. HUREE CHURN BOSE *v.* MEHAROONISSA BIBEE . . . . **7 W. R. 318**

9. ——— *Liability of co-sharers on sale of tenure.* Where a decree was for arrears of rent due upon a tenure, it was *held* that, though the sale-proceedings specified that the rights and interests of certain parties were sold, yet the tenure itself was sold, and all the co-sharers were jointly liable. ALIMOODDEEN *v.* SABIR KHAN **8 W. R. 60**

(*Contra*) LALLA SABIL CHAND *v.* GOODUR KHAN **22 W. R. 187**

10. ——— *Right of purchaser of transferable under-tenure to void leases—Right to enhance rent.* The purchaser of a transferable under-tenure in execution of a decree for rent may void any lease or holding within the tenure not specially protected by law, and consequently may sue for a kabuliat at rates paid for similar lands in the neighbourhood. SRISHTEEDHUR MUNDUL *v.* GOBIND SURUCKAR . . . **6 W. R. Act X, 15**

11. ——— *Act X of 1859, s. 105—Beng. Reg. VIII of 1819, s. 11—Title created by purchaser.* Where a tenant committed default, and purchased the tenure when it was sold in execution of a decree against himself, he could not claim the benefit of the law relating to auction-purchasers under s. 105 of Act X of 1859 and s. 11, Regulation VIII of 1819, and asked the Court to set aside the title of a third party which had been created by himself. Where he himself has sold to a third party, he is bound to recognize that party's purchase, and also all *bonâ fide* leases under that party. Where the lease by which a howla tenure is created does not expressly reserve it for sale for non-payment of rent, the rights of an auction-purchaser cannot arise

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SALE FOR ARREARS OF RENT—*contd.*

7. RIGHTS AND LIABILITIES OF PURCHASERS—*contd.*

under Regulation VIII of 1819. MEHEROONISSA BIBEE *v.* HUR CHURN BOSE . **10 W. R. 220**

12. ——— *Principle with regard to purchasers at revenue sales.* The principle laid down in the case of *Surnomoyee* v. *Suttees Chunder Roy, 2 W. R. P. C. 14 : 10 Moo. I. A. 123,* with respect to the rights of purchasers at sales for arrears of revenue is applicable to sales for arrears of rent under Regulation VIII of 1819. WOMANATH ROY CHOWDHRY *v.* ROGHOONATH MITTER **5 W. R., Act X, 63**

13. ——— *Rent accrued due against Hindu female heir after death of last full owner —Effect of sale in execution under Beng. Act VIII of 1869—Personal execution against female heir.* A claim for arrears of rent against a female heir accrued due after the death of the last full owner is a personal claim against her; therefore by a sale held under the provisions of Bengal Act VIII of 1869 in execution of a decree for arrears of such rent obtained against her by some of the co-sharer landlords only the limited estate of the female heir passed unless the said landlords proceeded to bring the tenure itself to sale. *Baijun Doobey* v. *Brij Bhookun Lall, I. L. R. 1 Calc. 133 : L. R. 2 I. A. 275,* and *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry, 15 B. L. R. 142 : 23 W. R. 174,* followed. BRAJA LAL SEN *v.* JIBAN KRISHNA ROY . **I. L. R. 26 Calc. 286**

14. ——— **Liability of purchaser—** *Date from which purchaser's liability for rent commences.* The purchaser of a tenure at a sale for arrears of rent was *held* to be liable for rent from the date on which the sale was confirmed, for until confirmation he could not obtain the certificate of purchase. BEEPIN BEHAREE BISWAS *v.* JUDOONATH HAZRAH . . **21 W. R. 367**

15. ——— *Liability to condition in lease—Right of re-entry.* A dar-patni lease granted upon the payment of a bonus contained a condition that, if the annual rent remained for a longer period than one month in arrear, the lessor should have a right of re-entry. The lessor, upon default in payment of rent, without availing himself of the forfeiture, instituted a summary suit for the arrears of rent, and upon an award therein the lands were sold for such arrears. *Held,* that the purchaser, who bought the patni tenure without notice of the condition for forfeiture, was not subject to that condition. DEENDYAL PARAMANICK *v.* JUGGESHUR ROY . . . . **Marsh. 252 : 2 Hay 21**

16. ——— *Liability to decree in ejectment suit—Previous purchase by mortgagee of portion of tenure—Right of purchaser to question by suit the validity of decree for ejectment if not a party to the rent suit.* In a suit for arrears of rent by a mokuraridar against his dar-mokuraridar, a decree was passed ejecting the latter, and, as a consequence, the tenure of the dar-mokuraridar was cancelled. *Held,* that a mortgagee from the dar-

SALE FOR ARREARS OF RENT—*contd.*

7. RIGHTS AND LIABILITIES OF PURCHASERS—*contd.*

mokuraridar, who had, previously to the rent suit, obtained a decree on his mortgage and purchased himself at the auction-sale, and who had not been made a party to the rent suit, was entitled to question by suit the validity of the decree obtained in the rent suit ordering ejectment of the dar-mokuraridar. MADHOO PROSHAUD SINGH *v.* PURSHAN RAM . . **I. L. R. 4 Calc. 520**

17. ——— *Priority of auction-purchasers—Sale set aside by an ex parte decree and afterwards confirmed—Notice.* The plaintiff and the defendant purchased the same tenure at successive sales, held in execution of two decrees under the provisions of s. 59 of Act VIII of 1869, for arrears of rent due in respect of different periods. Defendant's sale was first in point of time, but was set aside on the judgment-debtor obtaining an *ex parte* decree against the defendant. The suit was, however, restored and ultimately dismissed, and the defendant's purchase remained undisturbed. In the meantime, however, after the *ex parte* decree, but before the dismissal of that suit, the tenure had been again sold for further arrears of rent, which had accrued before the defendant's purchase and was bought by the plaintiff. *Held,* that the defendant's title must prevail, being prior in point of time, and that the defendant was under no obligation to discharge the arrears of rent for which the second decree was obtained, or to give notice of his purchase to the plaintiff. RAM CHUNDER SADHU KHAN *v.* SAMIR GAZI . . . **I. L. R. 20 Calc. 25**

18. ——— *Patni tenure, sale of—Registration in zamindar's serishta—Rights of zamindar—Beng. Reg. VIII of 1819, ss. 5, 7—Bengal Tenancy Act (VIII of 1885), s. 13.* A patni talukh was sold in execution of a decree, but the auction-purchaser, although he obtained possession, did not get himself registered in the zamindar's serishta. In a suit by the zamindar against the former holder of the patni for rent due for a period previous to the sale:—*Held,* that the suit lay against him, and that the rights of the zamindar were not affected by the existence of the remedy provided by s. 7 of Bengal Regulation VIII of 1819. *Lukhinarain Mitter* v. *Khetter Pal Singh Roy, 13 B. L. R. 146,* referred to. SURENDRONATH PAL CHOWDHRY *v.* TINCOWRI DASI **I. L. R. 20 Calc. 247**

19. ——— *Liability of auction-purchaser for arrears of rent prior to purchase—Bengal Tenancy Act (VIII of 1885), ss. 65 and 169, cl. (c)—Rent, suit for.* The plaintiffs sued the first five defendants for arrears of rent due in respect of a certain tenure, and obtained a decree on the 16th April 1888. In execution of that decree, the tenure was sold on the 8th April 1891, the defendants 6, 7, and 8 being the auction-purchasers. On the 18th of April 1891 the plaintiffs sued all eight defendants for the arrears of rent which had become due between the 16th April 1888 and the 8th April 1891. *Held,* that the auction purchasers

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SALE FOR ARREARS OF RENT—*contd.*

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(defendants 6, 7, and 8) were not liable, the arrears of rent sued for having become due prior to their purchase. FAEZ RAHAMAN *v.* RAMSKUH BAJPAI **I. L. R. 21 Calc. 169**

20. ——— *Sale on basis of decree on compromise—Auction-purchaser, title of—Liability of purchaser for rent accruing due after his purchase, but before confirmation of sale—Effect of compromise as against purchaser—Rent, accrual of—Bengal Tenancy Act, s. 53.* A tenant, when sued for arrears of rent of a jote, compromised the case by executing a solehnama agreeing to pay rent at 13 annas per bigha on 4,300 bighas. Subsequently the jote was sold, in execution of a decree passed on the basis of the solehnama, and was purchased by the defendant on the 20th March 1889, the sale being confirmed on the 7th August 1889. In a suit, instituted by the landlord against the auction-purchaser for arrears of rent for the whole year 1296 (13th April 1889 to 12th April 1890) :—*Held*, that the purchaser was liable for the whole instalment of rent accrued due after the date of his purchase, but before the confirmation of the sale, notwithstanding that his title was not perfected until the latter date. Rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or in the absence of any contract according to the general law laid down in s. 53 of the Bengal Tenancy Act. *Held*, also, that he was liable for rent under the terms of the solehnama irrespective of any question as to whether the quantity of land there mentioned was correct or not. SATYENDRA NATH THAKUR *v.* NILKANTHA SINGH . . **I. L. R. 21 Calc. 383**

21. ——— *Bengal Tenancy Act (VIII of 1885), ss. 11, 12, and 13—Sale of a tenure in execution of a decree not for arrears of rent—Effect of non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.* Under s. 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, and the landlord's fee prescribed by s. 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid. BABAR ALI *v.* KRISHNAMANINI DASSI **I. L. R. 26 Calc. 603**

22. ——— **Right of purchaser**—*Sale of enant's interest by creditor—Subsequent sale by landtord for arrears of rent—Right of purchaser.* The right, title, and interest of a tenant in certain land having been attached, sold, and purchased in execution of a decree upon a mortgage by his creditor in 1874, the landlord, in pursuance of a notice under s. 39 of the Rent Recovery Act (Madras Act VIII of 1865), issued prior to the Civil Court's sale, sold the land at auction for arrears of rent due by the tenant. *Held*, that the tenant's rights having passed to the purchaser at the Civil Court's sale, there was no interest of the tenant available for sale by the landlord under the provisions of s. 38 of the Rent

SALE FOR ARREARS OF RENT— *contd.*

7. RIGHTS AND LIABILITIES OF PURCHASERS—*contd.*

Recovery Act. VIRAPPA NAYAK *v.* KATHANA TALAVACHI . . . . **I. L. R. 6 Mad. 428**

23. ——— *Sale of occupancy holding at the instance of landlord in execution of money-decree—Subsequent sale of the same for arrears of rent—Bengal Tenancy Act (VIII of 1885), s. 22—Damages—Refund of purchase-money.* Defendant No. 10, the landlord, in execution of a decree for money, put to sale the occupancy holding of an occupancy raiyat, the defendant No. 1, and, having purchased it himself, made a settlement of the same with defendants Nos. 2, 3, and 4; the landlord subsequently brought a suit against defendant No. 1 for recovery of rent due from him for the past years and brought to sale the same holding which was thereupon purchased by the plaintiff. In a suit by the latter for recovery of possession :—*Held*, that the plaintiff did not acquire any title, inasmuch as the landlord by his own act had brought the raiyati right of the defendant No. 1 to a termination, and there was no subsisting right in that defendant such as the plaintiff could acquire by sale. *Held*, further, that the plaintiff was entitled to get a refund of the purchase money from the landlord, and that a separate suit for that purpose was not necessary. RAM SARAN PODDAR *v.* MAHOMED LATIF . **3 C. W. N. 62**

24. ——— *Mortgage of dar-talukh—Its subsequent transformation into a patni talukh—Purchaser in execution of a decree for arrears of patni rent—Right of the purchaser in execution of the mortgage-debt.* After the mortgage of a dar-talukh, the mortgagor, with the consent of the landlord, got the dar-talukh transformed into a patni talukh, which was, however, sold in execution of a decree for its own arrears, and purchased by the principal defendants. In a suit for possession of the dar-talukh by the plaintiffs, who respresented the purchaser at a sale in execution of the mortgage-decree :—*Held*, that the old dar-talukh having been transformed into a patni, which passed to the principal defendants by the sale in execution of a decree for its own arrears, there was nothing of which the plaintiffs could recover khas possession. *Held*, also (*per* BANERJEE, *J.*), that the creation of a mortgage gives certain rights to the mortgagor over the mortgaged property; but it does not necessarily prevent third parties from dealing with the mortgagor still as the owner of the property, nor is the mortgagee entitled in every case to ignore the rights arising out of such dealings in favour of third parties, but this rule is subject to one qualification, namely, that the transactions between the mortgagor and third parties, if free from fraud and collusion, are binding on the mortgagee and persons deriving title from him. *Byjnath Lall* v. *Ramoodem Chowdhry, L. R. 1 I. A. 106 : 21 W. R. 233; Hem Chunder Ghose* v. *Thakomoni Debi, I. L. R. 20 Calc. 533;* and *Lala Initteyal* v. *Raj Chunder Roy, 15 W. R. 448,* followed in principle. JOTINDRA MOHUN PAL *v.* GODADHUR MADAK **2 C. W. N. 29**

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SALE FOR ARREARS OF RENT—*contd.*

7. RIGHTS AND LIABILITIES OF PURCHASERS—*concld.*

25. ——— **Liability for rent**—*Bengal Tenancy Act (VIII of 1885), ss. 65, 195 (e)—Patni Regulation (VIII of 1819), s. 17—Contribution—Decree for rent for a period anterior to sale.* There is no conflict between s. 65 of the Bengal Tenancy Act and s. 17 (*3*) of the Patni Regulation. Antecedent balances may be mere personal debts, which cannot be summarily recovered under the procedure prescribed by the Patni Regulation, but they may be also a charge on the talukh, and the talukh may be sold subject to them. Where the purchaser of a patni talukh paid off a decree for rent obtained against the old tenant for a period anterior to that of the rent-decree in execution of which the tenure was sold:—*Held*, that the purchaser was not entitled to contribution from the old tenant against whom the rent-decree was obtained. *Maharani Dasya* v. *Harendra Lal Rai, 1 C. W. N. 458*, followed. PEARY MOHAN MUKHOPADHYA *v.* SREERAM CHANDRA BOSE (1902) . . **6 C. W. N. 794**

26. ——— *Sale in execution of decree for arrears—Liability of purchaser for rent for a period anterior to sale—Notification of sale—Bengal Tenancy Act (VIII of 1885), s. 65.* Where a tenure or holding was sold in execution of a decree for rent, with a notice that it was saddled with liability for arrears of rent for a period anterior to the date of sale :—*Held*, that the purchaser was liable for the rent for such period. *Alim* v. *Satis Chandra Chaturdhurin, I. L. R. 24 Calc. 37*, referred to. *Faez Rahaman* v. *Ram Sukh Bajpai, I. L. R. 21 Calc. 169*, distinguished. HARADHAN CHATTORAJ *v.* KARTICK CHANDRA CHATTOPADHYA (1902) . . . **6 C. W. N. 877**

27. ——— *Sale notification, statement of annual rent of a tenure in—Deduction for bhadran mahakup—Liability of purchaser.* The object of a sale notification is to make known to intending purchasers the rent for which they would be liable if they bought the property under sale. Where an application for execution of a decree for arrears of rent, and the sale notification, and the sale certificate, stated a certain amount as the annual rent payable, out of which a certain sum was kept in abeyance as *bhadran mahakup*, and the balance was stated as the net annual rent :—*Held*, that the purchaser was entitled to the deduction of the amount stated in the sale proclamation on account of *bhadran mahakup*. SHARIAT MONDUL *v.* SURJA KANT ACHARJA BAHADUR (1903) **7 C. W. N. 386**

8. SECOND SALE.

1. ——— **Sale for prior arrears after sale for arrears of rent.** Where a tenure has once been sold for its own arrears, it cannot be again put up to sale for the arrears due on account of a previous period. *Lutifun* v. *Meah Jan, 6 W. R. 112*, followed. PRANGOUR MOZOOMDAR *v.* HIMANTA KUMARI DEBYA . **I. L. R. 12 Calc. 597**

SALE FOR ARREARS OF RENT—*contd.*

9. SURPLUS PROCEEDS OF SALE.

1. ——— **Right to surplus proceeds**—*Attachment in hands of Collector.* The surplus proceeds of a sale made for default of payment of patni rent, though under attachment by a Civil Court in the hands of the Collector, continues to be the property of the patnidar until ordered to be paid away by an order from such Court. SADFOOLLAH KHAN *v.* LUCHMEEPUT SINGH DOOGUR **13 W. R. 58**

2. ——— *Priority—Surplus proceeds of sale under s. 59, Beng. Act VIII of 1869—Decree against dar-patnidar after sale of his tenure.* A patnidar caused to be sold the tenure of his dar-patnidar, under s. 59 of Bengal Act VIII of 1869, for the arrears of rent due up to 12th April 1876. This sale took place on the 7th November 1876, and after satisfaction of the decree the surplus proceeds remained in the Collectorate to the credit of the dar-patnidar. Afterwards in December 1876 the patnidar brought another suit for the dar-patni rent due in respect of the period between April and October 1876, and having obtained a decree attached the surplus proceeds in the Collectorate, which were at the same time attached by two other holders of ordinary decrees. *Held*, that the decree of the patnidar, although for rents of the current year, had no priority over the other decrees ; and that the surplus proceeds of the sale of the dar-patni tenure formed part of the assets of the late dar-patnidar, and were not hypothecated to the patnidar for the rent of the year current. GRISH CHUNDER MUNDUL *v.* DOORGA DOSS . . **I. L. R. 5 Calc. 494**

3. ——— *Beng. Reg. VIII of 1819, s. 17, cl. (5)—Patni talukh—Attachment—Priority.* The patnidar of a talukh granted a dar-datni to the defendants on the 10th of February 1859. The same patnidar afterwards mortgaged the patni talukh to the plaintiffs, who obtained a decree on their mortgage on the 28th September 1874. The patni was sold for its own arrears on the 17th November 1876 ; and after payment of rent and all expenses, there remained a surplus in the hands of the Collector, which was attached by the plaintiffs in execution of their decree on the 9th of November 1876. On the 12th January 1877, the defendants instituted a suit against the partnidar, under cl. 5, s. 17, Regulation VIII of 1819, for compensation for the loss of the dar-patni, and obtained a decree, which the Court directed should be satisfied out of the surplus sale-proceeds ; and the Collector, notwithstanding the plaintiffs' attachment, allowed the defendants to obtain the amount decreed out of the surplus sale-proceeds. In a suit by the plaintiffs to recover the amount paid for compensation, on the ground that the plaintiffs' attachment was prior to the defendants' suit :—*Held*, that the defendants' decree must, notwithstanding the plaintiffs' attachment, be satisfied out of the surplus sale-proceeds in priority to the plaintiffs' decree. SURNOMOYEE DASSYA *v.* LAND MORTGAGE BANK OF INDIA **I. L. R. 7 Calc. 173 : 8 C. L. R. 341**

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SALE FOR ARREARS OF RENT—*contd.*

9. SURPLUS PROCEEDS OF SALE—*contd.*

4. ——— *Sale of patni—Mortgage security, conversion of—Surplus sale proceeds, charge of mortgagee upon—Transfer of Property Act (IV of 1882), s. 73.* A patni talukh having been sold for arrears of rent under Regulation VIII of 1819, the surplus sale-proceeds held in deposit in the Collectorate were drawn out at intervals by the holders of money decrees against the patnidars. The plaintiff, who held a mortgage of the talukh, sued to recover from these decree-holders the amount of his unsatisfied claim. Two of the defendants pleaded that, over and above the amount taken by them, there remained in deposit sufficient money to satisfy the plaintiff, and that the other unsecured creditors who had drawn out this balance should alone be held liable. *Held*, that the surplus sale-proceeds were to be regarded as the shape into which the plaintiff's security was converted, and as before such conversion the security could not be spilt up into parts, the plaintiff was entitled to realize the balance due to him out of the whole of the surplus, as otherwise his security would be diminished. GOSTO BEHARY PYNE *v.* SHIB NATH DUTT . . . . **I. L. R. 20 Calc. 241**

5. ——— *Transfer of Property Act (IV of 1882), s. 73—Rights of purchasers—Mortgage.* S. 73 of the Transfer of Property Act only gives a right to the mortgagee over the residue of the sale-proceeds and refers to cases where the law otherwise provided that the effect of the sale is to nullify a mortgage : it is not intended in any way to enlarge the interest of the purchaser at a sale for arrears of revenue or rent. *Prem Chand Pal* v. *Purnima Dasi, I. L. R. 15 Calc. 546*, referred to. BENI PROSAD SINHA *v.* REWAT LALL **I. L. R. 24 Calc. 746**

6. ——— *Beng. Reg. VII of 1819, s. 17—Distribution of surplus sale-proceeds—Claim by se-patnidar.* A se-patnidar is not entitled to a share of the proceeds of a sale of the patni for arrears of rent held under Regulation VII of 1819. MOTI LAL GHOSE *v.* BISSESUR HAZRA **3 C. W. N. 60**

7. ——— *Right of suit by an unregistered tenant for surplus sale-proceeds.* Where in execution of a decree for arrears of rent, the tenure was sold, and an unregistered tenant who was a purchaser of a share of the tenure after the date of the decree brought a suit for recovery of his share of the surplus sale-proceeds :—*Held*, that the suit was maintainable. MATANGINI CHAUDHURANI *v.* SREENATH DAS (1903) **7 C. W. N. 552**

8. ——— *Surplus sale-proceeds—Landlord's right to surplus sale-proceeds—Priority between landlord and mortgagee—Bengal Tenancy Act (VIII of 1885), s. 169.* Where a tenure, which had been mortgaged by the tenure-holder, was sold in execution of a decree for rent obtained by the landlord and the balance of the sale-proceeds, after deducting the costs of the decree-holder and what was due to him under the decree, was paid into Court :—*Held*, that under s. 169 of the Bengal Tenancy Act the landlord was entitled to be paid out of the sale-proceeds in Court the amount of rent due in respect of the tenure between the institution of the suit and the date of the sale in priority to the mortgagee. PRABAL CHANDRA MUKERJEE *v.* JADUPATI CHAKRAVARTI (1907) **I. L. R. 34 Calc. 724**

SALE FOR ARREARS OF RENT—*contd.*

9. SURPLUS PROCEEDS OF SALE—*concld.*

10. DEPOSIT TO STAY SALE.

1. ——— **Right to sue**—*Voluntary payment to stay sale—Act X of 1859, ss. 102, 103.* A person making voluntary payments in his own name to stay a sale in execution of a decree againt others could not sue under s. 102 or 103 of Act X of 1859 for the recovery of the money so paid by him. ABDUL WAHAB *v.* DRUMMOND **2 W. R. Act X, 48**

2. ——— **Party with recognized interest**—*Beng. Reg. VIII of 1819, s. 14, cl. 1.* Cl. 1, s. 14, Regulation VIII of 1819, does not contemplate that any party may, by depositing the amount due, stay a sale of a patni, but only a party having a recognized interest in such patni. According to s. 6 even application for registration is not sufficient : that section provides what can legally be done if registration is refused. KRISTO JEEBUN BUKSHEE *v.* MACKINTOSH . **W. R. 1864, 53**

3. ——— **Sufficiency of interest**—*Suit to recover money deposited.* The plaintiff's mother brought a suit to recover a portion of a talukh which she claimed under a will and which she would be entitled to upon the death of the widow of the deceased owner. While the suit was pending the talukh was put up for sale under Regulation VIII of 1819, and to prevent its being sold she paid the rent. The above suit abated by the death of the plaintiff's mother, and the plaintiff now sued the shareholders to recover the amount paid to save the talukh from sale. *Held*, that the plaintiff's mother's interest in the talukh was such as entitled the plaintiff to recover the money she paid. SHARODA KOOMAREE DOSSEE *v.* MOHINEE MOHUN GHOSE . . . **20 W. R. 272**

4. ——— **Voluntary payment**—*Right of mortgagee to prevent sale of mortgaged property—Voluntary payment.* The mortgagee of a patni talukh paid certain moneys to prevent the sale of such talukh for arrears of zamindari rent. *Held*, that this was not a voluntary payment, and could not be so considered even in the case where the mortgagee, by a covenant in his mortgage-deed, had insured himself against loss by such sale. *Nogender Chunder Ghose v. Kaminee Dossi, 11 Moo. I. A. 241*, followed. MOHESH CHUNDER BANERJEE *v.* RAM PURSONO CHOWDHRY **I. L. R. 4 Calc. 539 : 6 C. L. R. 280**

See DULICHAND *v.* RAMKISHEIN SINGH **I. L. R. 7 Calc. 648**

5. ——— *Sale of transferable tenures under s. 105, Act X of 1859—Right*

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SALE FOR ARREARS OF RENT—*contd.*

10. DEPOSIT TO STAY SALE—*contd.*

of suit. The right to make payments to preserve an interest, and to recover the sums paid, was not given in the case of ganti jummas and other transferable tenures sold for arrears of rent under s. 105, Act X of 1859 ; when such payments are neither expressly nor impliedly authorized, they must be regarded as voluntary payments, for the recovery of which no action will lie. SREENATH HOLDAR *v.* RAM SOONDUR CHUCKERBUTTY

4 W. R. S. C. C. Ref. 4

6. _____ *Right of suit.* An under-tenant who has saved the superior tenure from sale by depositing the amount of rent due, not only has the security of the tenure which he preserves, and of which he can obtain possession on application to the Collector, but he also has a right to recover the amount deposited by him as a loan in an ordinary suit. AMBIKA DEBI *v.* PRANHARI DAS

4 B. L. R. F. B. 77

S.C. UMBIKA DEBIA *v.* PRANHUREE DOSS

13 W. R. F. B. 1

7. _____ *Right of suit—Beng. Reg. VIII of 1819—Non-registrartion of transfer.* *L* and *R*, the holders of a patni estate, granted in 1856 a dar-patni lease to *S* at an annual rent, the lease stipulating that *S* should have full power of sale and gift, but should not sub-let without the patnidars' consent. The lease contained no stipulation for the registration of any vendee or donee. In 1860 *S* sold the dar-patni lease to *K*, the deed of sale which was duly registered providing for mutation of names in the patnidars' books. No such mutation was ever effected by *K*, who was never recognized as their tenant by *L* and *R*, the rent of the dar-patni being paid in the name of *S*. In 1864, the rent due from the patnidars being in arrear, the zamindar proceeded to sell the patni under Regulation VIII of 1819. Thereupon *K*, in order to protect his under-tenure, deposited in the Collectorate, on 17th November 1864, a sum of money, on which the sale was stayed. *K*, being then in arrear in the payment of his dar-patni rent, claimed to set off the amount deposited in the Collectorate against the rent due to *L* and *R*. This *L* and *R* refused to allow, and they brought a suit in the Collector's Court, against *S* and his sureties to recover the arrears of rent. In that suit *K* intervened, claiming the benefit of the set-off, to which, however, the High Court, on 26th June 1866, on appeal held that he was not entitled, the deposit being merely a voluntary payment by *K*. On 30th October 1867 *K* brought a regular suit againt *S* and *L* and *R* to recover the amount of the deposit, and obtained a decree, but the decision was reversed on appeal, and the suit dismissed for want of jurisdiction. On 6th June 1869 *K* filed his plaint in the proper Court. *Held*, that he was entitled to recover the amount deposited by him in the Collectorate. LUCKHINARAIN MITTER *v.* KHETTRO PAL SINGH ROY

13 B. L. R. P. C. 146 : 20 W. R. 380

SALE FOR ARREARS OF RENT—*contd.*

10. DEPOSIT TO STAY SALE—*contd.*

Affirming the decision of the High Court in S.C. KHETTER PAUL SINGH *v.* LUCKHEE NARAIN MITTER

15 W. R. 125

OKHOY COOMAR CHATTERJEE *v.* DHIRAJ MAHTAB CHUND . . . . . **22 W. R. 299**

8. _____ *Payment made by vendee of dar-patnidar—Voluntary payment.* A payment made by the vendee of the dar-patnidar (who has not obtained registration) to save the patni from sale is a voluntary payment and the registered dar-patnidar cannot seek to deduct the amount from the rent due by him. LUKHEENARAIN MITTER *v.* SEETANATH GHOSE

1 Ind. Jur. N. S. 317 : 6 W. R. Act X, 8

9. _____ *Payment of patni rent by dar-patnidar—Beng. Reg. VIII of 1819, s. 13.* In a suit by the purchaser of a patni against a dar-patnidar for arrears of rent of the year 1285 (1878), it appeared that, before the plaintiff's purchase, the dar-patnidar had paid the amount of arrears of patni rent for the year 1284 (1877), in order to save the patni from being sold under Regulation VIII of 1819, and that the amount so paid considerably exceeded the dar-patni rent due at the date of suit. *Held*, that the defendant was entitled to deduct from the rent claimed the amount paid under the Regulation in excess of the dar-patni rent due up to the end of 1284. NOBO GOPAL SIRCAR *v.* SRINATH BUNDOPADHYA

I. L. R. 8 Calc. 877 : 11 C. L. R. 37

10. _____ *Payment by dar-patnidar—Beng. Reg. VIII of 1819—Beng. Act VIII of 1869, s. 62.* The zamindar of an estate, in which the plaintiff and defendant respectively had purchased patni and dar-patni tenures, obtained decrees for arrears of rent accruing before their purchases, though one of the decrees was obtained subsequently to defendant's purchase ; and in execution of these decrees he advertised the patni for sale, and the amounts due were paid into Court by the defendant to protect the tenure from sale. In a suit by the patnidar against the dar-patnidar for arrears of rent accruing due subsequently to the defendant's purchase :—*Held*, that the defendant was, on the construction of s. 13 of Regulation VIII of 1819 and s. 62, Bengal Act VIII of 1869, entitled to set off such payment against the plaintiff's claim. *Nobogopal Sircar* v. *Sreenath Bundopadhya, I. L. R. 8 Calc. 877*, followed. LALIT MOHUN SHAHA *v.* SRINIBAS SEN

I. L. R. 13 Calc. 331

11. _____ *Payment by dar-patnidar—Notice of title to tenants—Beng. Reg. VIII of 1819, s. 13.* A dar-patnidar who has paid a deposit in order to stay the sale of the superior tenure under cl. 4, s. 13, Regulation VIII of 1819, and has come into possession of the tenure, and is entitled to the profits of it is bound to give notice of his title to the raiyats. In the absence of such notice, he cannot recover from them rents already paid by them to the patnidar. NILMONEE ROY *v.* HILLS

4 W. R. Act X, 38

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SALE FOR ARREARS OF RENT—*contd.*

10. DEPOSIT TO STAY SALE—*contd.*

12. ——— *Payment by shikmidar—Money paid to preserve estate from sale.* A shikmidar is not entitled to recover money voluntarily paid by him to preserve an estate from sale. POORNO CHUNDER DOSS CHOWDHRY *v.* SREENATH GOOPTO . . . . . **6 W. R. 173**

13. ——— *Right to contribution from co-sharers*—A shareholder who pays up arrears of rent due from the whole of the tenure in order to save it from sale in execution is entitled to recover contribution from other shareholders who were in possession during the period within which the arrears accrued, even though the tenure should be in the name of another and the decree be nominally against such other alone. ASUDOOLLAH *v.* MONOHUR DOSS . . . **22 W. R. 531**

14. ——— *Compulsory payment—Right to recover.* Plaintiff, to save the patni from sale for arrears of rent of a former year which had been adjudged by an apparently valid decree to be due to the defendant, paid the money. *Held*, that the payment was made under such circumstances as entitled the plaintiff to recover back the money from the defendant. ANDREW *v.* LARMOUR **2 Ind. Jur. O. S. 4 : 1 Hay 309**

15. ——— *Suit to recover money paid—Beng. Reg. VIII of 1819, s. 13, cl. 3—Beng. Act VIII of 1865, s. 6.* A patnidar, in execution of a decree for rent against his mirasidar, attached certain property of his, including a parcel of land belonging to the plaintiff, who, to save that portion, paid the whole amount due, and sued the mirasidar to recover the portion he ought to have paid. The suit was dismissed, no obligation on the plaintiff to pay having been shown. She appealed, alleging that her portion was within and subordinate to the holding of the mirasidar, and to sell would have jeopardized her holding. *Held*, that the case was rightly remanded by the lower Appellate Court, but that the issue to be tried was whether the plaintiff was a party who came under the provisions of s. 6, Bengal Act VIII of 1865, read with s. 13, Regulation VIII of 1819, more particularly with cl. 3. LUCKHEE PREA DEBIA *v.* BRINDABUN DEY . . . . . **12 W. R. 313**

16. ——— *Suit to recover money paid.* The plaintiff purchased an estate at an auction-sale in execution of a decree against the defendant, who was in possession, and after his purchase obtained possession on 6th April 1866. While he was in possession, one *R*, the patnidar, sued the defendant to recover arrears of rent which had become due. During the defendant's possession and before the plaintiff's purchase, and in execution of the decree he obtained in this suit the estate in possession of the plaintiff was attached and ordered by the Collector to be sold ; whereupon the plaintiff paid the amount of the decree to save the tenure from sale. In a suit brought to recover the amount :—*Held*, that the payment by the plaintiff was, as far as the defendant was concerned, a voluntary payment. Mere inconvenience without risk of

SALE FOR ARREARS OF RENT—*contd.*

10. DEPOSIT TO STAY SALE—*contd.*

actual damages is not sufficient to take away the voluntary character of the payment. RAM BAKSH CHETLANGI *v.* HRIDOY MANI DEBI **8 B. L. R. 10 note : 10 W. R. 446**

17. ——— *Suit to recover money paid.* A patni tenure which had been attached by *G* in execution of a decree against *D* was claimed by *S*, whose claim was allowed. Upon this *G* instituted a suit against *S* and others to have the patni declared to be the property of *D*, and, being successful, had the patni sold in execution of his decree against *D*, became the purchaser and got possession. After this he saved the estate from being sold for arrears of rent which had accrued prior to his purchase by paying up the amount due. He subsequently sued *D* and *S* to recover the amount so paid. *S*, who had meantime appealed to the Privy Council, succeeded in obtaining a reversal of the decree under which *G* had sold the patni ; but this reversal did not take place before *G* had instituted the suit for recovering the arrears he had liquidated. *Held*, that *G* was entitled to recover from *S* the amount which had been paid by him to save the patni from being sold. GOPAL CHUNDER CHUCKERBUTTY *v.* UOODOY LALL DEY **10 W. R. 115**

18. ——— *Suit to recover money paid.* The plaintiff purchased at an execution sale a share of *K's* tenure which had been attached on account of a money-decree. Subsequently the whole tenure was advertised for sale in execution of a decree for arrears of rent. On applying to the Munsif, he was told that, if he deposited the whole amount due, the sale would be stayed. He did so and prevented the sale. He now sued *K* to recover the amount deposited. *Held*, that the payment was neither officious nor voluntary, and that *K*, who had enjoyed the profits of the land, was equitably liable for the sum paid to save it from sale. KHETTUR MOHUN BANERJEE *v.* HARADHUN CHATTERJEE . . . . . **19 W. R. 287**

19. ——— *Unconditional tender—Beng. Reg. VIII of 1819.* KEMP, *J.*—A tender to stay a sale under Regulation VIII, 1819, must be of the whole of the zamindar's demand and without any condition as to its being kept in deposit by the Collector. RAM CHURN BUNDOPADHYA *v.* DROPO MOYEE DOSSEE . . **17 W. R. 122**

20. ——— *Payment to zamindar—Beng. Reg. VIII of 1819, s. 13—Payment to stay final sale.* The direction in s. 13 of the Regulation VIII of 1819 that money paid into Court by a talukhdar in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or month for which the notice of sale may have been published, is satisfied by payment not into Court, but to the zamindar. If a strictly literal construction were put upon words "into Court," no payment effectual to stay the sale could be made, for "the Court" has nothing to do with these sales, which are managed by the Collector. TARINY DEBEE *v.* SHAMA CHURN MITTER . **I. L. R. 8 Calc. 954**

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SALE FOR ARREARS OF RENT—*contd.*

10. DEPOSIT TO STAY SALE—*concld.*

21. ——— *Nature of payment—Loan to proprietor—Beng. Act VIII of 1865, s. 6.* Money deposited to protect from sale a tenure advertised under the provisions of Act VIII of 1865 must under s. 6 be considered as a loan made to the proprietor of the tenure, which becomes security to the depositor, who is entitled on applying to obtain immediate possession in order to recover the amount from any profits belonging to the tenure. KARTICK SURMAH *v.* BYDONATH SAEENEE **10 W. R. 205**

22. ——— **Position of person making payment**—*Beng. Reg. VIII of 1819—Suit for share of patni estate—Mortgagee.* Plaintiff claimed an eight annas share of a patni as purchased by the official assignee of an insolvent, *D*, whom the Principal Sudder Ameen found to have been owner in his own right by inheritance of the share of the patni of which defendant's ancestor, *G*, having deposited arrears of rent was in possession as girurdar under the provisions of Regulation VIII of 1819. *Held*, that *G* was substantially in the same position as a mortgagee in possession under an usufructuary mortgage; and that plaintiff, as a purchaser from such a mortgagor, would have no cause of action until the debt was paid off. *Held*, that, as defendant's plea of purchase from the alleged shareholders of the patni, in satisfaction of their ancestor *G's* lien, had proved unfounded, if they were permitted to fall back on their title as girurdars, the plaintiff must be allowed to show that the debt "was realised from the usufruct of the tenure," even though this had not been "established in a suit instituted for the purpose." BOISTUB CHURN BHUDRO *v.* TARA CHAND BANERJEE . . **11 W. R. 357**

11. SETTING ASIDE SALE.

(*a*) GENERAL CASES.

1. ——— **Civil Procedure Code, 1882, s. 310A**—*Civil Procedure Code Amendment Act (V of 1894)—Bengal Tenancy Act (VIII of 1885), s. 174.* S. 310A of the Code of Civil Procedure applies to the sale of a tenure in execution of a decree for its own arrears. JANARDHAN GANGULI *v.* KALI KRISTO THAKUR . **I. L. R. 23 Calc. 393**

KRISHNADHAN NATH *v.* DAMAYANTI DEVI **I. L. R. 23 Calc. 396 note**

BEHARY LAL SEAL *v.* RUSSICK CHUNDER PAL **I. L. R. 23 Calc. 396 note**

BUNGSHIDHAR HALDAR *v.* KEDARNATH MONDAL. **1 C. W. N. 114**

2. ——— *Order under s. 310, Civil Procedure Code, 1882—Notice to purchaser.* An auction-purchaser is entitled to a notice before an order is made under s. 310A. BUNGSHIDHAR HALDAR *v.* KEDARNATH MONDUL **1 C. W. N. 114**

3. ——— S. 310A of the Civil Procedure Code does not apply to sale under Act X of 1859, as the Code of Civil Procedure applies only up to the sale, and not after it. HARISH CHANDRA GHOSE *v.* ANANTA CHARAN PATRA **2 C. W. N. 127**

4. ——— **Mortgagee**—*Civil Procedure Code (as amended by Act V of 1894), s. 310 A—Immoveable property—Sale—Mortgagee—A mortgagee of a tenure sold in execution of a decree for arrears of rent is a person whose immoveable property has been sold, within the meaning of s. 310A. Held*, by the majority of the Full Bench (RAMPINI, *J.*, dissenting), that mortgagee of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it is entitled to make an application under s. 310A of the Code of Civil Procedure, as being a "person whose immoveable property has been sold," within the meaning of that section. PARESH NATH SINGHA *v.* NABOGOPAL CHATTOPADHYA (F.B., 1901) . . **I. L. R. 29 Calc. 1 s.c. 5 C. W. N. 821**

5. ——— **Under-raiyat**—*Civil Procedure Code (as amended by Act V of 1894), s. 310A—Immoveable property—Sale—Whether an under-raiyat is entitled to make an application under that section.* An under-raiyat is not entitled to make an application under s. 310A of the Civil Procedure Code, to set aside the sale of a holding sold in execution of decree for arrears of rent obtained against the raiyat. ABED MOLLAH *v.* DILJAN MOLLAH (1902) . . **I. L. R. 29 Calc. 459**

(*b*) IRREGULARITY.

6. ——— **Beng. Reg. VIII of 1819, s. 8, application of**—*Jungleburi tenures*—S. 8, Regulation VIII of 1819, refers to jungleburi tenures that existed at that time and its provisions do not apply to any tenure created since the passing of that Regulation. MONMOHUN SINGH *v.* WATSON & Co. **2 Hay 398**

7. ——— **Ben. Reg. VIII of 1819, s. 8, construction of**—*Residing in neighbourhood—Attesting witnesses.* By the words "residing in the neighbourhood" in Reg. VIII of 1819, s. 8, the Regulation does not make it imperative that the attesting witnesses shall be residents of the village, but may be taken to include men living within a short distance of the cutchery. MOHINEE DOSSEE *v.* JUGGODUMBA DOSSEE . **W. R. 1864, 382**

8. ——— **Substantial persons**—*Attesting witnesses.* With reference to the provision in cl. 2, s. 8, Reg. VIII of 1819, that the service of notice of sale of a patni talukh shall be attested by three substantial persons:—*Held*, that the word "substantial" must be understood in its ordinary sense,—*i.e.*, men who have some stake in the community, men of local influence or importance and respectability,—and not be taken to mean simply men who can readily be found. GOPAL KISHORE SHOOR *v.* MUDUN MOHUN HOLDAR **2 W. R. 188**

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

MOHINEE DOSSEE *v.* JUGGODUMBA DOSSEE
W. R. 1864, 382

9. _____ "*Substantial persons*"—*Service of notice.* The provisions of cl. 2, s. 8, Reg. VIII of 1819, with regard to the notification of the sale of a patni talukh for the arrears of rent under the Regulation that the serving peon shall "bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot," are merely directory, and where there is proof that the notice was in fact served the sale will not be vitiated by non-compliance with any of these provisions,—*e.g.*, as where one of the witnesses attesting the service of the notice turns out not to be "substantial." A respectable man, of good character, living and well known in the neighbourhood, may properly be considered a "substantial person" within the meaning of cl. 2, s. 8, of the Regulation. It is too limited a construction of that clause to hold that the word "substantial" must be taken to mean a wealthy man from whom damages could be recovered by the patnidar, supposing the attestation to be false. RAMSABUCK BOSE *v.* KAMINEE KOOMAREE DOSSEE
14 B. L. R. 394
S.C. RAM SABUK BOSE *v.* MONMOHINEE DOSSEE
L. R. 2 I. A. 71 : 23 W. R. 113

10. _____ *Substantial persons—Suit to set aside sale for irregularity—Non-service of notices—Omission to tender rent.* In a suit to set aside the sale of a patni for arrears of rent under Regulation VIII of 1819, on the ground that proper notices were not sent, served, and published under s. 8, cl. 2, the objection in order to succeed must be one of substance and not merely of form. The requirements of the Regulation as to the service of the istahar and the signing of the receipt by substantial persons may be held to have been substantially performed where the persons signing are such as are usually expected to attest such a document, persons who are treated with consideration, *e.g.*, ameens, mooktears, chowkidars. PITAMBER PANDA *v.* DAMOODUR DOSS. DASSEE *v.* PITAMBUR PANDA . . **24 W. R. 129**

11. _____ **Service of notice of sale—***Beng. Reg. VIII of 1819, s. 8, cl. 2—Non-service of notice, effect of, on sale.* Where a Court finds that the notice prescribed in cl. 2, s. 8, Regulation VIII of 1819, has been duly served, it need not find whether the peon who served the notice complied with all the directions of the Regulation as to what should be done in verification of such service. Omission to comply with those directions does not vitiate a sale under the Regulation, provided notice is duly served. SONA BEEBEE *v.* LALL CHAND CHOWDHRY . . . . **9 W. R. 242**

SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

12. _____ *Proof of service—Onus probandi—Evidence Act, s. 106.* In a suit against a zamindar to reverse the sale of a patni tenure held under Regulation VIII of 1819, on the ground of non-service of notice, the onus of proving service lies on the defendant, according to the spirit of s. 106 of the Evidence Act. DOORGA CHURN SURMA CHOWDHRY *v.* NAJIMOODDEEN
21 W. R. 397

13. _____ *Proof of service—Beng. Reg. VIII of 1819, s. 8, cl. 2—Publication.* Although the provisions of s. 8, cl. 2, of Regulation VIII of 1819, specifying the manner in which proof should be given of service of notice of sale, are merely directory, it is nevertheless absolutely essential to the validity of a sale under the Regulation that the notice of such sale should be served in strict compliance with the directions given in the same clause and section of the Regulation. BHAGWAN CHUNDER DASS *v.* SUDDER ALLY
I. L. R. 4 Calc. 41 : 2 C. L. R. 357

14. _____ *Beng. Reg. VIII of 1819, s. 8, cl. 2—Proof of publication of notice before sale of patni talukh for arrears of rent.* The due publication of the notices prescribed by Regulation VIII of 1819, s. 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a patni talukh for non-payment of rent is exercised by the zamindar, who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted. Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not matter of controversy (as held in *Sona Bibee* v. *Lalchand Chowdhry, 9 W. R. 242*), yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zamindar,—the finding of the High Court that due publication had not been established by such proofs as were forthcoming was maintained by the Judicial Committee. MAHARAJAH OF BURDWAN *v.* TARASUNDARI DEBI
I. L. R. 9 Calc. 619 : 13 C. L. R. 34
L. R. 10 I. A. 19

15. _____ *Proof of publication of notice—Beng. Reg. VIII of 1819, s. 8—Irregularity in sale—Suit to set aside sale.* It is essential to the validity of a sale, held under Regulation VIII of 1819, of a patni estate for arrears of rent, that the notices of sale prescribed by cl. 2, s. 8 of the Regulation, should have been all duly and regularly published as therein directed. BAIKANTHA NATH SINGH *v.* DHIRAJ MAHATAB CHAND
9 B. L. R. 87 : 17 W. R. 447

HARANATH GUPTA *v.* JAGANNATH ROY CHOWDHRY . . **9 B. L. R. 89 note : 11 W. R. 87**

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

And as to what amounts to publication of notice. RAGHAB CHANDRA BANERJEE *v.* BRAJANATH KUNDU CHOWDHRY
9 B. L. R. 91 note : 14 W. R. 489

16. ——— *Beng. Reg. VIII of 1819, s. 8, cl. 2—Formalities prescribed in that section for due publication of the notice of sale.* In cases where the due publication of the sale notice is in controversy, it is incumbent upon the landlord to show that the formalities prescribed by s. 8 of Regulation VIII of 1819 have been complied with. *Maharajah of Burdwan* v. *Tarasundari Debi, I. L. R. 9 Calc. 619 : L. R. 10 I. A. 19,* and *Maharani of Burdwan* v. *Krishna Kamini Dasi, I. L. R. 14 Calc. 365 : L. R. 14 I. A. 20,* referred to. *Sona Beebee* v. *Lallchand Chowdhry, 9 W. R. 242,* explained. BEJOY CHAND MAHATAB *v.* AMRITA LAL MUKERJEE
I. L. R. 27 Calc. 308

17. ——— *Ground for setting aside sale—Non-service of notice.* The fact of no notice having been served in the mofussil is sufficient ground for setting aside a sale for arrears of rent. NUGENDRO CHUNDER GHOSE *v.* MUSRUFF BIBEE . . . . . **15 W. R. 17**

TARA CHAND BISWAS *v.* RAM JEEBAN MOOSTAFEE
22 W. R. 202

18. ——— *Beng. Reg. VIII of 1819, s. 8—Notice of sale, publication of.* In a case of a sale under Regulation VIII of 1819, where the patni was a small piece of land, upon which there was no town or village or cutchery of any kind, and the peon stuck up the notice in the Collector's office and also at the sudder cutchery of the zamindar and obtained the receipt of the defaulter in the latter place, he was held to have carried out substantially, as far as he could, the provisions of the law regarding notice. HURRY KRISTO ROY *v.* MOTEE LALL NUNDEE . . . **14 W. R. 36**

19. ——— *Beng. Reg. VIII of 1819.* It was held to be a far more exact compliance with the spirit of Regulation VIII of 1819 to serve the notice which it enjoins at the place in which the defendant's gomashta was transacting and did habitually transact business, than at the cutchery, which had not been in use. HUNOOMAN DOSS *alias* NONNAH BABOO *v.* BIPRO CHURN ROY
20 W. R. 132

20. ——— *Beng. Reg. VIII of 1819, s. 8.* In the case of a sale of a patni talukh for arrears of rent, so long as the cutchery at which notice on the defaulter, as required by Regulation VIII of 1819, s. 8, cl. 2, is served is an adjacent one in which all the business of the defaulting patni is carried on, and is on land belonging to the defaulter, publication at that cutchery is a sufficient publication. MUNGAZEE CHAPRASSEE *v.* SHIBO SOONDUREE . . . **21 W. R. 369**

21. ——— *Beng. Reg. VIII of 1819, s. 8—Due publication of notice of sale.* Where there is a cutchery upon the land of a defaulting patnidar, the notice required by s. 8 of Regulation VIII of 1819 must be served there ; but where there is no such cutchery, the notice should be published, in the manner required by the section, at the principal town or village within the talukh. MAHARAJAH OF BURDWAN *v.* KRISTO KAMINI DASI
I. L. R. 9 Calc. 931 : 13 C. L. R. 427

S. C. on appeal to the Privy Council. Publication of the notice of sale of a tenure under Regulation VIII of 1819 is required to be in the manner prescribed in s. 8, cl. 2 ; and personal service on the defaulter is not sufficient. The object of directing local publication of the notice, *viz.*, to warn the under-lessees of the sale-proceedings and also to advertise the sale to those who might bid, would be frustrated if it were sufficient to publish the notice at a distant cutchery or to serve it personally. If there is a cutchery on the land of the defaulting patnidar, meaning the land which is to be sold for arrears of rent, the copy or extract of such part of the notice of sale as may apply to the tenure in question must be published at that cutchery, and if there is no such cutchery on the land held by the defaulter, the copy or extract must be published at the principal town or village on the land. In the description of this in cl. 2 as "the notice required to be sent into the mofussil," the word "mofussil" is opposed to the sudder cutchery of the zamindar, and refers to the subordinate estate, which is the subject of the sale-proceedings. Where a zamindar, selling the tenure of a defaulting patnidar under the Regulation, had caused to be stuck up the requisite petition and notice at the Collector's cutchery, and the notice at the zamindar's cutchery, but not the copy or extract which is directed by the Regulation to be similarly published at the cutchery nor had published it at any other place upon the land of the defaulter :—*Held,* that the zamindar had not observed a substantial part of the prescribed process, and that this was for the defaulting patnidar "a sufficient plea" within the meaning of the Regulation. MAHARANI OF BURDWAN *v.* KRISHNA KAMINI DASI . . . . **I. L. R. 14 Calc. 365**

MAHARANI OF BURDWAN *v.* MIRTUNJOY SINGH
L. R. 14 I. A. 13

See AHSANULLA KHAN BAHADUR *v.* HURRI CHURN MOZOOMDAR . **I. L. R. 17 Calc. 474**

22. ——— *Insufficient publication of notice—Suit for reversal of sale.* Where, in a suit to set aside a patni sale under Regulation VIII of 1819, it was proved that the notice of sale was first stuck up in the cutchery of the ijaradar (the mehal having been let out in ijara by the patnidar), and, on the refusal of the ijaradar's gomashta to give a receipt of service, it was taken down, and subsequently personally served on the defaulting patnidar at his house, which was at some distance from the patni mehal :—*Held,* that the object of the provisions in Regulation VIII of 1819 as to service

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

of notice of sale is not only to give notice of sale to the defaulter, but also to the under-tenants, and to advertise the sale on the spot for the information of intending purchasers. But though those provisions had not been strictly complied with, yet as the plaintiff (the patnidar) did not allege that in consequence of the defective publication there was not a sufficient gathering of intending purchasers, nor that the under-tenants were ignorant of the sale and were prejudiced by such ignorance, nor that the mehal was sold below its value:—*Held*, that the defect did not amount to a "sufficient plea" under s. 14 for setting aside the sale. *Bykantha Nath Sing* v. *Dhiraj Mahatab Chand Bahadur*, *9 B. L. R. 87*, commented on and distinguished. GOUREE LALL SINGH *v.* JOODHISTEER HAJRAH
I. L. R. 1 Calc. 359 : 25 W. R. 141

23. ——— *Publication of notice of sale—Material irregularity—Beng. Reg. VIII of 1819, s. 8, cl. 2.* Cl. 2, s. 8, of Regulation VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the cutchery of the zamindar, is not complied with by serving the notice upon the zamindar himself or his agent. The object of the Regulation is to make known to the holders of under-tenures and raiyats and the residents of the place that the patni will be sold if the arrears are not paid off within the time specified, and if the notice is not stuck up in the cutchery, as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale. GOBIND LALL SEAL *v.* CHAND HURRY MAITY . . **I. L. R. 9. Calc. 172**

24. ——— *Beng. Reg. VIII of 1819, s. 8—Publication of proof of service—Suit to set aside sale.* Compliance with the directions in Regulation VIII of 1819 as to service of notice is essential to the validity of a sale under that Regulation. Where there was evidence of service upon the defaulter personally, but not of service at his cutchery:—*Held*, that this was not sufficient, and that the sale must be set aside. *Maharajah of Burdwan* v. *Tarasundari Debi*, *L. R. 10 I. A. 19 : I. L. R. 9 Calc. 619*, and *Maharajah of Burdwan* v. *Kristo Kamini Dasi*, *I. L. R. 9 Calc. 931*, followed. MAHOMED ZAMIR *v.* ABDUL HAKIM. **I. L. R. 12 Calc. 67**

25. ——— *Patni tenure—Beng. Reg. VIII of 1819, s. 8, cl. 2, and s. 14—Date of publication of notice.* The fact that the receipt of the notice of sale was dated the 15th of Bysack, and therefore did not show that the notice had been published at some time "previous to that day," so as to satisfy the provisions of s. 8, cl. 2, of Regulation VIII of 1819, was *held* not to be sufficient ground for setting aside the sale of a patni tenure for arrears of rent. There being nothing in the receipt to show the date on which the notice was published, no injury to the plaintiff having been proved, and it appearing that more than the time prescribed by the Regulation had elapsed before the sale actually took place, the Court refused to set aside the sale. It would not be a "sufficient plea" within the meaning of s. 14 that the receipt had been obtained, or the notification published on, instead of previous to, the 15th of Bysack. MATUNGEE CHURN MITTER *v.* MOORRARY MOHUN GHOSE
I. L. R. 1 Calc. 175 : 24 W. R. 453

26. ——— *Beng. Reg. VIII of 1819, s. 8—Benami purchase—Validity of sale.* *A* and *B* were co-sharers of a patni which was sold for arrears of rent by the zamindar and purchased by *C*. In a suit by *A* against *B*, *C* and the zamindar, the plaintiff alleged (i) that no sufficient notice had been given, and (ii) that *C* purchased benami for *B*. *Held*, on the question of notice, that once it was found that the notice had been posted up in the cutchery of the defaulter in accordance with cl. 2, s. 8, Regulation VIII of 1819, it was not essential to the validity of the sale that any other notice should have been given to the defaulters themselves or that the service should have been verified in the manner directed by the section. *Held*, also, the benami purchase having been proved, that the sale must be considered good as far as the zamindar was concerned, and therefore the suit as against him must be dismissed with costs; and that as against *B* the parties were in exactly the same position as before the sale, *B* being a constructive trustee for *A*. *Sona Beebee* v. *Lall Chand Chowdhry*, *1. W. R. 242*, and *Koylash Chunder Banerjee* v. *Kali Prosunno Chowdhry*, *16 W. R. 80*, cited and followed. JOTENDRO MOHUN TAGORE *v.* DEBENDRO MONEE . . **2 C. L. R. 419**

27. ——— *Beng. Reg. VIII of 1819, cl. 3, ss. 8, 14—Patni sale—Notices, publication of—Ostum sale.* It is imperative that the notices referred to in cl. 3, s. 8 of Regulation VIII of 1819, be published previously to the 15th Kartick. Non-compliance with such direction is a "sufficient plea" within the meaning of s. 14 of the Regulation for reversal of a sale held thereunder. *Matungee Churn Mitter* v. *Moorrary Churn Ghose*, *I. L. R. 1 Calc. 175 : 24 W. R. 453*, dissented from. SURNOMOYI DABEI *v.* GRISH CHUNDER MOITRA
I. L. R. 18 Calc. 363

28. ——— *Beng. Reg. VIII of 1819, s. 8—Service and publication of notice of sale—Irregularities in preliminaries to sale—Petition for sale—Certificate of Munsif when service is sworn to before him—Form of notice of sale in mid-year sales for six months' arrears.* All the requirements in cl. 2, s. 8, of Regulation VIII of 1819, must be imported into cl. 3 of that section *mutatis mutandis*. Where, therefore, the zamindar is proceeding under cl. 3 to obtain a mid-year sale for six months' arrears of rent, the service of notice of sale is a condition precedent to the sale being held. Such notice must show, as provided by that clause, that the sale may be prevented by payment of the whole of the balance due, or of three-fourths of such balance. In such a case a notice which stated that the sale

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

would take place unless the whole of the balance was paid as if the zamindar was proceeding under cl. 2 for the whole year's arrears was held to be a bad notice and a non-compliance with a substantial requirement of the Regulation such as to justify the reversal of the sale. The publication of the petition to the Collector containing a specification of the balance of rent due, by sticking it up in some conspicuous part of the cutchery as required by cl. 2, s. 8, of the Regulation, is not a substantial portion of the process to be observed by the zamindar previous to a sale for arrears of rent; non-compliance with that provision therefore is not a ground for setting aside the sale. For the same reason, the non-presentation of the petition on the precise day (1st Kartick) specified in cl. 3, s. 8, affords no ground for setting aside the sale. The presentation of the petition on the 2nd Kartick when the 1st was a Sunday was held to be a sufficient compliance with the section. The words "certificate to which effect" in the portion of cl. 2, s. 8, relating to the procedure in case of refusal by the village people to attest the publication of the notice of sale, mean a certificate to the effect that the peon did come before the Munsif or police officer, as the case may be, and did make voluntary oath as to the service of the notice. Where the peon, after serving the notice, made an affidavit as to the mode of service, and took the affidavit before the Munsif to whom it was read and who then signed it, there was held to be a sufficient certificate to satisfy the requirements of the section. AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR **I. L. R. 17 Calc. 474**

Held, by the Privy Council affirming this decision:—The power of sale given to the zamindar by Regulation VIII of 1819, upon default in payment of the rent by a patnidar, is only exercisable subject to a condition as to notice to the defaulter. To bring to operation the provisions of cl. 3 of s. 8, relating to a mid-year sale, the serving a notice, according to that section, intimating to the patnidar that payment of three-fourths of the balance due will prevent a sale, is a condition precedent to the sale. A notice relating to a mid-year sale was *held* to be essentially defective, as it followed cl. 2 instead of cl. 3 of s. 8, and intimated that payment of the whole arrears would be the only way to stay the sale. This objection was taken for the first time in the Appellate Court. *Held*, that, as a defect fatal to the whole proceedings appeared in the notice, the objection was competently taken in that Court. *Macnaghten* v. *Mahabir Pershad Singh, I. L. R. 9 Calc. 656 : L. R. 10 I. A. 25*, distinguished. AHSANULLA KHAN BAHADUR *v.* HARICHARAN MOZUMDAR . . **I. L. R. 20 Calc. 86**
L. R. 19 I. A. 191

28. ———— *Beng. Reg. VIII of 1819, s. 8—Notice, publication of—Reasonable time—Construction of the section—Setting aside sale, ground of.* The provision in s. 8 of Regulation VIII of 1819 requiring the notice of sale to be published before the 15th Bysack applies to the notice to be published in the mufassal and not to the notice to be affixed at the Collectorate. The words in the section "the same shall then be stuck up in some conspicuous part of the cutchery" do not mean that it must be stuck up either immediately or before the service of the other notices referred in the section or at least before the 15th of Bysack. It will be a sufficient compliance with the provision of the section if the same be stuck up in a conspicuous part of the cutchery within a reasonable time before the sale. NIAMAT ULLAH *v.* FORBES . . . **2 C. W. N. 461**

30. ———— *Beng. Reg. VIII of 1819, s. 8, cl. 2—Onus of proof of publication of notice before sale of patni talukh for arrears of rent.* In a suit to set aside a sale of a patni talukh, held under the provisions of s. 8 of Regulation VIII of 1819, on the ground that the notice required by sub-s. 2 of that section had not been duly published, it lies upon the defendant to show that the sale was preceded by the notice required by that sub-section, the service of which notice is an essential preliminary to the validity of the sale. In such a suit, where there was no evidence one way or the other to show that the notice required by that sub-section to be stuck up in some conspicuous part of the Collector's cutchery had been published:—*Held*, that the plaintiff was entitled to a decree setting aside the sale. HURRO DOYAL ROY CHOWDHRY *v.* MAHOMED GAZI CHOWDHRY . . . . **I. L. R. 19 Calc. 699**

31. ———— *Beng. Reg. VIII of 1819, ss. 8, 14, cl. 2—Publication of notice in the Collector's cutchery—Non-publication of notice in manner prescribed, effect of, on the validity of a sale of a patni tenure—"Sufficient plea."* The sticking up or publication in a conspicuous part of the Collector's cutchery of a notice in accordance with the provisions of cl. 2 of s. 8 of Regulation VIII of 1819 is essential to the validity of a sale of a patni tenure under that Regulation. Where a notice of sale, instead of being stuck up and published in some conspicuous part of the Collector's cutchery as required by law, was, in accordance with the practice which prevailed during the incumbency of the Nazir of the Collector's cutchery at Birbhum and of his predecessors in office, kept by the Nazir with other petitions for sale and notices relating to them in a bundle, which was at night locked up for safe custody, and in the daytime kept in a conspicuous place near his seat at the entrance to the cutchery, any person who chose to ask for it or wished to see it being at liberty to inspect the whole bundle:—*Held* by PETHERAM, *C.J.*, and GHOSE, *J.* (TOTTENHAM, *J.*, dissenting), that this was not a publication

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

of the notice within the meaning of cl. 2 of s. 8 of the Regulation and that it was a 'sufficient plea' for the defaulting patnidars within the meaning of s. 14 to have the sale set aside. *Maharaja of Burdwan* v. *Tarasundari Debi, I. L. R. 9 Calc. 619 : L. R. 10 I. A. 19,* relied on. *Ahsanulla Khan Bahadur* v. *Hurri Churn Mozoomdar, I. L. R. 17 Calc. 474,* distinguished. RAJNARAIN MITRA *v.* ANANTA LAL MONDUL. KRISTO LAL CHOWDHRY *v.* ANANTA LAL MONDUL . **I. L. R. 19 Calc. 703**

32. ——— *Act X of 1859—Non-attachment and non-publication of sale proclamation—Civil Procedure Code (Act XIV of 1882), s. 311.* There is no provision in Act X of 1859 under which the sale of a jote in execution of a rent decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation. PATIT SHAHU *v.* HARI MAHANTI **I. L. R. 27 Calc. 789**

33. ——— *Sale after due and proper notice set aside as irregularly conducted—Second sale without fresh notice—Suit to set aside second sale—Madras Rent Recovery Act (Mad. Act VIII of 1865), ss. 18, 39, and 40.* A landlord attached his tenant's holding for arrears of rent in 1889, and within the time prescribed by the Madras Rent Recovery Act, s. 18, put in an application for sale to the Collector and otherwise complied with the procedure prescribed by the Act. The land was sold, but the sale was set aside as having been irregularly conducted. The landlord then made in 1894 an application to the Collector for a fresh sale (which was granted); a fresh sale took place without a fresh notice being given to the tenant under s. 39 of the intention to sell. The tenant now sued to have this sale set aside. *Held,* that a fresh notice was not necessary, and that the plaintiff was not entitled to have the sale set aside. OLIVER *v.* ANANTHARAMAYYAR . **I. L. R. 20 Mad. 498**

34. ——— *Setting aside sale—Irregularity—Bengal Regulation VIII of 1819, ss. 8, 10—Publication of notice of sale—Form of notice—Order as to lots to be sold.* A sale under Regulation VIII of 1819 cannot stand, if the provisions of the Regulation are not strictly complied with. The sticking up of certified copies instead of the original petition and notice as required by s. 8 of the Regulation is a material irregularity. A notice not containing any order as to the lots to be sold is not in proper form; where the notice was stuck up only until the 14th May and the sale actually took place on the 15th, *held,* that this was in contravention of s. 10 of the Regulation. S. 10 would seem to imply that the notice is to remain stuck up, until it should be taken down at the time of the sale. When the notice and the petition were stuck up every day at 10 A. M. and taken down at 5 P. M and they were not stuck up at all on Sundays:—*Held,* that the procedure was not justified by the Regulation. BIJOY CHAND MAHATAP *v.* ATULYA CHARAN BOSE (1905) **I. L. R. 32 Calc. 953**

SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*concld.*

(*c*) OTHER GROUNDS.

35. ——— **Unregistered proprietor's right to sue to set aside sale**—*Patni talukh—Transfer of patni—Registered transferee—Beng. Reg. VIII of 1819, s. 14.* Where a patni talukh has been sold under the provisions of Regulation VIII of 1819, an unregistered shareholder therein is entitled to sue for a reversal of the sale under the provisions of s. 14 of the same Regulation. CHUNDER PERSHAD ROY *v.* SHUVADRA KUMARI SHAHEBA **I. L. R. 12 Calc. 622**

36. ——— *Beng. Reg. VIII of 1819, ss. 3, 5, 6, 14—Sale of patni tenure—Registered patnidars—Suit by unregistered patnidars.* An unregistered proprietor of a patni tenure is entitled to sue to set aside a sale held under Regulation VIII of 1819. *Chunder Pershad Roy* v. *Shuvadra Kumari Shaheba, I. L. R. 12 Calc. 622,* followed. JOYKRISHNA MUKHOPADHAYA *v.* SARFANNESSA . . . **I. L. R. 15 Calc. 345**

37. ——— **Fraud**—*Suit to set aside sale—Beng. Act VIII of 1865—Right of purchaser.* A purchaser at a sale in execution of a decree held under Bengal Act VIII of 1865 could not be ousted from the property purchased by him without proof that the decree and sale were fraudulent and that he (the purchaser) was a party to or had notice of the fraud. DAMUDAR ROY *v.* NIMANUND CHUCKERBUTTY **7 B. L. R. Ap. 1 : 15 W. R. 365**

38. ——— *Collusion—Suit by tenant against purchaser to set aside sale.* Where a tenure had been sold under s. 105, Act X of 1859, in execution of a decree for the rent of land held under a mirasi pottah, a tenant in possession was at liberty to show that the decree had been obtained by fraud and collusion against a person who had then no interest in the premises. BORRADAILE *v.* GREGORY . . . **2 W. R. Act X, 63**

39. ——— *Beng. Reg. VIII of 1819—Invalid sale.* A patni talukh being about to be brought to sale under Regulation VIII of 1819, the agent of the sharers were in attendance at the Collectorate on the day of sale, prepared to pay the rent due. Two of the agents (*T* and *B*) happening to be out of the way at the time, the lot was about to be called up. The third, *K*, without informing the Collector or zamindar's agent of their intention to pay, or giving notice to the others, purhased the patni. *Held,* that *K's* act was one of bad faith, and that the 4 annas shareholders whom he represented could not in equity be allowed to benefit by adopting the fraud. *Held,* also, that, as between the Collector and zamindar and the defaulting patnidars the sale was valid; but that it was void so far as it created a title in favour of the 4 annas shareholders to the 12 annas share,

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*c*) OTHER GROUNDS—*contd.*

and *K* must be treated as having made the purchase on account of, and as a trustee for, the 12 annas shareholders. KOYLASH CHUNDER BANERJEE *v.* KALEE PROSUNNO CHOWDHRY
16 W. R. 80

40. _____ *Collusion—Invalid sale—Reconveyance of share sold.* Where the sale of a tenure for arrears of rent was brought about by collusion between the party in whose name it stood and the purchaser, with a view to get rid of a co-sharer, who had neglected to have his share transferred to his name:—*Held*, that the transaction was a private one and not really an auction sale for the purpose of realizing the zamindar's rent, and that on payment of his share of the rent the above sharer was entitled to have his share reconveyed to him. KISHORE CHUNDER SEIN *v.* KALLY KINKER PAUL CHOWDHRY
20 W. R. 333

See SHIBO SOONDUREE DOSSEE *v.* PANCHCOWREE CHUNDRA . . . . . **14 W. R. 158**

SIDHEE NUZUR ALLY KHAN *v.* OJOODHYARAM KHAN . . . . . **10 Moo. I. A. 540**
5 W. R. P. C. 83

41. _____ *Collusion—Beng. Reg. VIII of 1819—Sale where no arrears are due. Per* AINSLIE, *J.*—It can only be on the ground that a sale is carried out in respect of arrears not really due that fraud and collusion can be imputed. RAM CHURN BUNDOPADHYA *v.* DROPO MOYEE DOSSEE . . . . . **17 W. R. 122**

42. _____ *Beng. Reg. VIII of 1819—Invalidity of sale—Sale where no arrears are due.* A patni sale under Regulation VIII of 1819 is invalid if there was no arrear of rent at the date of sale, whether notice of the fact had been given to the Collector or not at the time of the sale. SHUROOP CHUNDER BHOOMICK *v.* PERTAB CHUNDER SINGH . . . **7 W. R. 219**

43. _____ Sale after arrears have been paid—*Suit to set aside sale—Deposit of rent in Collector's treasury.* An estate was sold under cl. 2, s. 8, Regulation VIII of 1819, for arrears of rent due by a patnidar to the zamindar. Prior to the date of sale, the amount due was paid by the patnidar to an accountant in the Collector's Office, as in satisfaction of arrears, but no notice was given to the the zamindar or Collector. A suit was afterwards brought to set aside the sale, on the ground that, in consequence of such payment, there were no arrears due at the time of sale. *Held, per* NORMAN and MACPHERSON, *JJ.*, that the suit could not be maintained. *Per* MITTER, *J.*—If the custom of the Collectorate was, as alleged by the plaintiff, for payments in satisfaction so to be made to the Collector's accountant, the sale ought to be set aside. KRISHNA MOHAN SHAHA *v.* AFTABUDDIN MAHOMED
8 B. L. R. 134 : 15 W. R. 560

SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*c*) OTHER GROUNDS—*contd.*

44. _____ *Sale by zamindar with notice (though irregularly served) that arrears of rent have been deposited.* Where a zamindar puts up a patni for sale, under Regulation VIII of 1819, knowing that the rent due to him has been paid into Court by the patnidar, the sale is invalid, even if the notice served on the zamindar was illegally served. TARA SOONDUREE DEBIA *v.* RADHA SOONDUR ROY . . **24 W. R. 63**

45. _____ Sale under decree alleged to be against wrong person—*Beng. Act VIII of 1865—Registered tenant.* The plaintiff purchased, on 28th of September 1866, the right, title, and interest of one *H* in a certain tenure of which *G* was the registered tenant. Previously the zamindar had brought a suit against *G* for arrears of rent of the tenure and obtained a decree in execution of which the tenure in question was, on 29th April 1867, sold to the defendant under Bengal Act VIII of 1865. In a suit by the plaintiff for a declaration of his right in the tenure, and for reversal of the sale to the defendant:—*Held*, that the suit by the defendant was rightly brought against *G* who was the registered tenant; and the arrears being actually due and the sale a *bonâ fide* one, such sale was valid and binding as against the plaintiff. FATIMA KHATUN *v.* COLLECTOR OF TIPPERAH
8 B. L. R. 4 note : 13 W. R. 433

46. _____ Sale of an under-tenure in execution of decree for arrears of rent—*Act VIII of 1865—Sale under three separate decrees, each against one of three joint brothers—Execution issued only against one—Joint interest of three brothers in joint possession sold.* A zamindar brought to a judicial sale an under-tenure in execution of three *ex parte* decrees obtained by him for arrears of rent thereof for different periods. The property was held by three Hindu brothers in joint possession. The zamindar purchased it at the sale. At the instance of the zamindar, execution had been issued against only one of the brothers. Another of them, referring to this afterwards, disputed the validity of the sale, and claimed his one-third share, alleging, as the fact was, that the decrees had not, each and all of them, been against each and all of the three brothers, and that the sale was invalid. One at least of the three decrees was against the three brothers, who all understood that they were judgment-debtors under the decrees. They had been served with proper notices under Act VIII of 1865, and separate attachments of the land under each decree, and separate proclamations of sale thereunder, had been made. *Held*, that the sale was a valid one, and operated to transfer the tenure to the purchaser. TARA LAL SINGH *v.* SAROBAR SINGH
I. L. R. 27 Calc. 407
L. R. 27 I. A. 33
4 C. W. N. 533

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(c) OTHER GROUNDS—*contd.*

47. ——— **Decree for sale set aside on review**—*Bonâ fide purchaser—Suit to set aside sale.* *A* purchased a share of *B's* talukh at an auction-sale in execution of an *ex parte* decree obtained against *B* under s. 105 of Act X of 1859. *B* obtained leave under s. 58 of Act X of 1859 to revive the suit and succeeded in getting it dismissed. He now sued to set aside the sale to *A*. *Held*, that the sale to *A* was binding against *B*, notwithstanding that the decree in execution of which it had taken place had been set aside in review, provided the sale was *bonâ fide*. JAN ALI *v.* JAN ALI CHOWDHRY **1 B. L. R. A. C. 56 : 10 W. R. 154**

48. ——— **Decree for sale set aside for fraud**—*Suit to set aside sale.* In a suit to annul the sale of an under-tenure in execution of a decree under Act X of 1859 which was subsequently set aside on the allegation that it had been obtained collusively and by fraud, it was found that neither the decree-holder nor the purchaser was guilty of any fraud. *Held*, that the mere circumstance of the decree under which the sale had taken place having itself been set aside did not invalidate the sale, the plaintiff having failed to show that the purchaser was a party to the fraud which led to the decree and sale. JUGUL KISHORE BANERJEE *v.* ABHAYA CHARAN SARMA **1 B. L. R. A. C. 84**

MOHESH CHUNDER BAGCHEE *v.* DWARKANATH MOITRO . . . . **24 W. R. 260**

49. ——— **Sale while warrant is in force against moveable property**—*Beng. Act VIII of 1869, s. 61—Irregularity in sale—Suit to set aside sale for irregularity.* Under s. 61 of Bengal Act VIII of 1869, a sale for arrears of rent, while a warrant against the moveable property of the debtor is still in force, is not merely irregular, but void. A suit will lie to set aside an auction-sale for arrears of rent where the decree-holder himself becomes the purchaser, on the ground of irregularity in conducting or publishing it unless it be shown that the judgment-debtor has failed to set the sale aside in a proceeding under the Civil Procedure Code or having full opportunity of so doing, has neglected to do so. UJOLLA DASI *v* DHIRAJ MAHATAB CHAND **7 C. L. R. 215**

50. ——— **Want of material injury**—*Beng. Reg. VIII of 1819.* A purchaser under a sale for arrears of rent is not entitled to have the purchase set aside on the ground merely of an irregularity in sticking up the preliminary advertisement, unless he can show that he has been prejudiced thereby. JOYNUB BEBEE *v.* AHMED JAN **Marsh. 31 ; 1 Hay 68**

51. ——— **Want of notice of suit for arrears**—*Suit to set aside sale.* No suit will lie to set aside the sale of an estate in execution of a decree for arrears of rent at enhanced rates according to a prior decree for enhancement subsequently reversed on special appeal, on the ground of want of notice of the suit for arrears of rent. DOORGA PERSHAD PAL CHOWDHRY *v.* JOGESH PROKASH GONGOPADHYA . . . **4 W. R. Act X, 38**

52. ——— **Want of notice of sale**—*Bonâ fide purchaser.* If a patni is sold for arrears of rent without the notice required by Regulation VIII of 1819, the sale is informal and can be set aside notwithstanding the *bonâ fides* of the purchaser. MOBARUCK ALI *v.* AMEER ALI . **21 W. R. 252**

53. ——— *Unregistered tenant—Purchaser—Suit to set aside sale.* The purchaser of a tenure which is liable to be sold under Regulation VIII of 1819, who has not registered his name as tenant, is not entitled on a sale of the tenure to notice of sale, and a suit brought by him for reversal of the sale on that ground was dismissed. DHUNPUT SINGH ROY *v.* VILLAYET ALI **13 B. L. R. 153 note : 15 W. R. 211**

Also BHOBO TARINEE DOSSEE *v.* PROSONNOMOYE DOSSEE . . . . **13 B. L. R. 150 note**

GOSSAIN MUNGUL DOSS *v.* ROY DHUNPUT SINGH **25 W. R. 152**

54. ——— *Beng. Reg. VIII of 1819, s. 14—Patni sale—Se-patni interest—Onus of proof as to requirements of Reg. VIII of 1819.* Certain patnidars having defaulted, their patni right was put up for sale by the zamindar under Bengal Regulation VIII of 1819 and purchased by the defendants. The plaintiffs, being se-patnidars of a portion of the lands let out in patni, were, after the sale, dispossessed by the defendants. The se-patnidars brought a suit against the defendants asking for possession of the mouzahs forming their se-patni, alleging that the notification of sale had not been duly served, and that the proceedings taken by the zamindar were bad, as they were taken in the name of the last deceased holder of the patni. The zamindar was made a party to the suit, but no relief was asked against him. *Held*, that, notwithstanding that the plaint questioned the validity of the sale, the suit was not one under s. 14 of the Regulation, no relief being claimed against the zamindar, and that the plaintiffs' only remedy was a suit under s. 14 of the Regulation to set aside the sale of the entire patni. SURESH CHANDRA MUKHOPADHYA *v.* AKKORI SING . . **I. L. R. 20 Calc. 746**

55. ——— **Vagueness of specification and notice of sale**—*Act X of 1859, s. 104.* Want of clearness in the specification of the arrears and costs for which a sale takes place or in the mode in which the notice is published, is not an irregularity vitiating a sale for arrears of rent if fraud is absent. MAHOMED AYENOODDEEN *v.* KALEE DOSS CHUNDO **15 W. R. 279**

56. ——— **Absence of one shareholder's name from proceedings**—*Irregularity affecting validity of sale.* Where a tenure was duly sold for arrears of rent under Act X of 1859 and Bengal Act VIII of 1865, the absence of a shareholder's name

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*contd.*

(*c*) OTHER GROUNDS—*contd.*

from the proceedings did not as a matter of law invalidate the sale as against him. DOORBIJOY MAHTOON *v.* PRITHEE NARAIN SINGH
14 W. R. 30

57. ——— **Fixing date of sale**—*Era—Custom—Uniformity of practice.* As regards the date fixed for sale and the era to be followed the intention of the Regulation was to lay down a uniform practice in each locality. Uniformity being the essential requirement, and the particular date only the form of enforcing regularity, a practice which has been established for a course of years and which is reasonable and convenient in itself is not liable to objection on a mere point of form. PITAMBER PANDA *v.* DAMOODUR DOSS. DASSEE *v.* PITAMBUR PANDA . . . . **24 W. R. 129**

58. ——— *Era—Error in advertisement of date.* According to Regulation VIII of 1819, the sale of a patni tenure for arrears of rent must take place on a day in the Bengali month of Jeyt. When a sale was advertised to take place on the 5th Jeyt 1269, which date was erroneously stated in the sale notice to correspond with Saturday, May 17th, 1862, whereas the 5th Jeyt was in fact Sunday, May 18th, and the sale took place on Saturday, the 4th Jeyt, the sale was *held* to be illegal, in consequence of its not having taken place on the 5th Jeyt or any subsequent date to which it might have been adjourned after due notice. BECHARAM MOOKERJEE *v.* ISSUR CHUNDER MOOKERJEE . . . . . **W. R. 1864, 4**

59. ——— **Change of date of sale**—*Sale not for full arrears—Fraud—Suit to set aside sale.* In a suit to set aside a sale for arrears of rent due up to Aughran 1262, the plaintiff, who claimed under a deed of conditional sale, was *held* not entitled to a decree on the following grounds. The change of date of sale from a holiday to the next advertised public sale day was not in this case such a postponement of the sale as to require any new distinct notification. A sale is not invalid because it is not for the full complete arrears due at the end of the year; it may take place at the end of the year for such arrears as may then be existing. No fraud or collusion was proved to justify the sale being set aside. FORBES *v.* PROTAP SINGH DOOGUR
7 W. R. 409

60. ——— **Postponement of sale**—*Discretion of Court.* A sale in execution of a decree under Bengal Act VIII of 1869 can be postponed at the discretion of the Court only when the postponement is shown to promise benefit to the judgment-debtor, *i.e.*, that it will put him in a position to satisfy the demand, or when an immediate sale would be likely to entail injury to him while a postponement would cause no serious prejudice to the decree-holder. JANOKEENATH MOOKERJEE *v.* RADHA MOHUN CHATTERJEE . **20 W. R. 130**

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11. SETTING ASIDE SALE—*contd.*

(*c*) OTHER GROUNDS—*concld.*

61. ——— *Mad. Act VIII of 1865 (Rent Recovery Act), s. 33—Adjournment for want of bidders to next day—Duty of officer conducting sale.* A sale of land for arrears of rent under the provisions of the Rent Recovery Act having been advertised for a certain day was, owing to the absence of bidders on that day, adjourned and held on the day following by the officer empowered to sell. *Held*, that the sale was invalid. PALANI *v.* SIVALINGA . . **I. L. R. 8 Mad. 6**

62. ——— **Inadequacy of price**—*Ground for setting aside sale.* Inadequacy of price is no ground for setting aside a sale regularly held for arrears of rent under the patni law. MUNGAZEE CHAPRASSEE *v.* SHIBO SOONDUREE
21 W. R. 369

63. ——— **Irregularity not caused by act or omission of decree-holder**—*Act X of 1859, s. 104—Damages.* S. 104, Act X of 1859, does not enact that the decree-holder is to pay damages whenever it may be found that there has been an irregularity in publishing the sale processes, wholly, irrespective of the question whether such irregularity was caused by his acts or omissions. RAMCHUNDER SURMAH CHUCKERBUTTY *v.* KALEE CHUNDER SINGH . . . . **7 W. R. 307**

64. ——— **Omission to tender before sale**—*Inclusion of irrecoverable charges.* Where there is no tender before sale of the amount of rent due, a sale under Regulation VIII of 1819 cannot be set aside merely because some charges were included which might not strictly be recoverable under the Regulation, where the zamindar in his petition clearly distinguished the amount due for rent from such charges. PITAMBER PANDA *v.* DAMOODUR DOSS. DASSEE *v.* PITAMBER PANDA
24 W. R. 129

65. ——— **Rights of purchaser**—*Landlord having a mortgage of the holding—Transfer of Property Act (IV of 1882), s. 99.* The sale of a holding in execution of a decree for rent obtained by a landlord, who also held a mortgage of the holding, is void, and the purchaser at the sale acquires no title against another mortgagee of the holding, who has purchased it under a decree on his mortgage. *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164*, followed. BASIRUDDIN *v.* KAILASH KAMINI DEBI (1905)
I. L. R. 33 Calc. 113

(*d*) RE-SALE.

66. ——— *Rent Recovery Act (Madras Act VIII of 1856), ss. 33, 39—Sale of distrained property—Bid for one item sufficient to meet arrears of rent—Failure by bidder to complete purchase—Re-sale of item with others—Legality of sale—Satisfaction of arrears.* A landholder distrained the property of a tenant and brought it to sale under s. 33 of the Rent Recovery Act (Madras), 1865)

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SALE FOR ARREARS OF RENT—*contd.*

11. SETTING ASIDE SALE—*concld.*

(*d*) RE-SALE—*concld.*

when a bid was made for the first item, which was sufficient to satisfy the arrear. The bidder, however, paid only a small portion on account of his bid, and failed to pay the balance, and the item was subsequently put up for sale again, with others, and purchased by the landholder. A suit was then brought to set aside the sale, when it was contended that, inasmuch as a bid equal to the amount of the arrear had been made for a portion of the property, the claim of the landholder had been satisfied, under s. 33 of the Rent Recovery Act, although the whole amount bid had not in fact been paid; also that a subsequent sale of the rest of the tenant's property was illegal, and that the landholder's proper remedy lay in taking proceedings against the defaulting purchaser. *Held*, that the contention could not be upheld. An arrear of rent is only satisfied by a sale when the amount bid is paid, till when the debt subsists. *Held*, further, that notice of the second sale was not necessary under s. 39 of the Rent Recovery Act (Madras), 1865. SUBRAHMANIA AYYAR *v.* RANGAPPA KALAKKA THOLA UDAYAR (1900) **I. L. R. 24 Mad. 307**

12. EFFECT OF SETTING ASIDE SALE.

1. ——— **Recovery of purchase-money** —*Decree for purchase-money—Execution—Fresh suit—Interest on deposit.* In a suit to set aside the sale of a patni tenure, where a purchaser is made a co-defendant under s. 14, Regulation VIII of 1819, and it is decreed that the purchaser may recover the purchase-money from the zamindar defendant:—*Held*, that the purchaser may proceed in execution without a fresh suit. If the purchase-money of a patni is in deposit in the Collectorate, and the zamindar, judgment-debtor, fails to assist the judgment-creditor in recovering his dues, he is liable for interest on the entire sum. PREOLALL GOSSAIN *v.* GYAN TURUNGINEE DOSSIA . **13 W. R. 161**

2. ——— *Sale where no patni tenure exists. Held*, by JACKSON, *J.* (MOOKERJEE, *J.*, *dubitante*), that a zamindar who puts up for sale a patni under Regulation VIII of 1819, guarantees to the purchaser that there are some lands appertaining to the patni, and if it turns out that there are no such lands (that there is in fact no such patni), the purchaser will be entitled to recover his purchase-money. KHELUT CHUNDER GHOSE *v.* KISHEN GOBIND DEB . . **16 W. R. 128**

3. ——— **Refund of bonus paid to purchaser on his purchase**—*Lease, construction of—Landlord and tenant—Failure of consideration—Sale subsequently set aside.* The defendants, after purchasing a patni talukh at an auction sale for arrears of rent under Regulation VIII of 1819, granted a dar-patni lease to the plaintiffs (the former dar-patnidars) and received a bonus of R1,199. The auction-sale being five years afterwards set aside:—*Held*, that the plaintiffs were entitled to a refund of the bonus, although they had not been dispossessed, but had simply reverted to their former position as dar-patnidars under the former patnidar. TARACHAND BISWAS *v.* RAM GOBIND CHOWDHRY **I. L. R. 4 Calc. 778 : 4 C. L. R. 20**

SALE FOR ARREARS OF RENT—*concld.*

12. EFFECT OF SETTING ASIDE SALE—*concld.*

4. ——— **Indemnification for payments of rent while sale existed**—*Beng. Reg. VIII of 1819, s. 14, cl. 1.* Where a zamindar sells a patni tenure for arrears of rent and the sale is afterwards set aside, the purchaser can, under Regulation VIII of 1819, s. 14, cl. 1, require the Court to compel the zamindar to indemnify him on account of all payments of rent which he may have made, and if he does not do so, he cannot set up his loss in answer to a liability which he has incurred. TARACHAND BISWAS *v.* NAFAR ALI BISWAS **1 C. L. R. 236**

5. ——— **Position of holder of chahar-patni**—*Sale—Under-tenure—Purchaser, liability of.* The holder of a chahar-patni, or other subordinate tenure, whose tenure has been brought to an end by the sale for arrears of rent, of a superior tenure on which his own was dependent, is, upon such sale being set aside, remitted to his previous position, and is entitled to recover possession of the land comprised in his chahar-patni from the purchaser or any assignee of the purchaser at such sale, and he can do so notwithstanding that he himself took a dar-patni, including the land he had held as chahar-patnidar, from the purchaser at such sale, and that this dar-patni was afterwards sold in execution of a decree against himself, and purchased at such last-mentioned sale by the person whom he seeks to evict on the strength of his original title. SREENARAIN BAGCHEE *v.* SMITH **I. L. R. 4 Calc. 807 : 4 C. L. R. 148**

6. ——— **Order for refund of purchase-money**—*Beng. Reg. VIII of 1819—Notice of sale—Setting aside sale—Refund of purchase-money.* If a patni is sold for arrears of rent without the notice required by Regulation VIII of 1819, the sale is informal and can be set aside, notwithstanding the *bonâ fides* of the purchaser. Where such a sale was so set aside and the lower Appellate Court refused to make an order for refund of the purchase-money, the High Court in special appeal, and with reference to s. 14, cl. 1, of the Regulation, declared the purchaser entitled to a refund with interest. MOBARUCK ALI *v.* AMEER ALI . . . . . **21 W. R. 252**

7. ——— **Rights of auction-purchaser on sale being set aside**—*Interest on purchase-money—Beng. Reg. VIII of 1819, s. 14.* Under s. 14 of Regulation VIII of 1819, when a patni sale is set aside, the auction-purchaser is entitled to get back the purchase-money with interest. BEJOY CHAND MAHATAB *v.* AMRITA LAL MUKERJEE **I. L. R. 27 Calc. 308**

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SALE FOR ARREARS OF REVENUE.

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1. RIGHT TO SELL.

1. ——— **Right of Government.** Whenever the land revenue is in arrear, Government is entitled to sell the land and to realize its due, whoever is the defaulter. BALKRISHNA VASUDEV *v.* MADHAVRAV NARAYAN . **I. L. R. 5 Bom. 73**

2. ——— *Arrears—Beng. Regs. XIV of 1793 and VII of 1799—Beng. Reg. V of 1812.* By Regulations XIV of 1793 and VII of 1799 the Governor General in Council may order a sale for arrears of a monthly instalment of revenue before the close of the year : but in order to warrant that Act, there must be an arrear of a previous year or of a monthly instalment. The existence of a written engagement or kistbandi is not a condition precedent to the right to enforce the payment of the revenue by monthly instalments, provided the monthly instalments be fixed and determined. By Regulation V of 1812, if there be an arrear of the annual assessment, or of a fixed monthly kist or instalment of that assessment, unpaid on the first day of the following month, the Governor General in Council may order a sale, and the Board of Revenue may direct the whole estate of the defaulting zamindar to be sold. When the monthly instalments are fixed and determined, the Government does not forego the right of selling the zamindari on default being made in payment of these instalments, by taking a bond from sureties by which the estates of the sureties also were rendered liable for the payment. KIRT CHUNDER ROY *v.* GOVERNMENT
5 W. R. P. C. 41 : 1 Moo. I. A. 383

3. ——— *Revenue Sale Law (Act XI of 1859), sale under—Kists fixed by the Board of Revenue—Default of payment of one kist—Proprietor of estate, if entitled to pay the whole demand on the date fixed for the last kist.* An estate was sold for arrears of a few rupees, which amount was in arrear on the 12th January of a certain year, the date fixed by the Board of Revenue for one of the *kists* for the payment of revenue. It was contended that the proprietor was entitled to make the payment on the 28th of March, which was fixed as the date for the last *kist*, and that the sale could not take place for default of payment on the 12th January. *Held*, that the plaintiff was not entitled to pay the whole demand of one year on the 28th of March, and the Revenue authorities had every right to sell the estate. KALI PROSUNNO BOSE *v.* KRISHNA CHANDRA (1903) . . . **7 C. W. N. 570**

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SALE FOR ARREARS OF REVENUE—*contd.*

2. PROTECTED TENURES.

1. ——— Act XI of 1859, s. 37—*Power of purchaser to avoid incumbrances—Right of occupancy.* The title of a purchaser at a sale for arrears of Government revenue, to void an under-tenure and eject the tenant, will depend upon whether the tenure is protected under any of the clauses of s. 37 of Act XI of 1859, and whether the tenant has a right of occupancy. If the tenant can prove such a right, he cannot be objected under s. 37. SHEO PURSHUN SINGH *v.* RAJENDRO KISHORE SINGH **12 W. R. 123**

2. ——— *Right of transferee of purchaser at sale for arrears of revenue.* The rights which are conferred upon a purchaser at a sale for arrears of revenue under Act XI of 1859, s. 37, are capable of being transferred to another person, if the transfer follows immediately upon the sale or within a reasonable time thereafter. KOYLASH CHUNDER DUTT *v.* JUBUR ALI . **22 W. R. 29**

3. ——— *Right of purchaser to avoid under-tenure.* When a patni granted by a Hindu widow, though in appearance a duly registered tenure falling within the 3rd exception of s. 37, Act XI of 1859, was in reality a fraud which the owner or reversioner might have avoided :—*Held*, that a revenue sale passes the right of avoiding it to the auction-purchaser. RAM CHUNDER CHUCKERBUTTY *v.* KASHINATH MOITRO **W. R. 1864, 66**

4. ——— *Suit by purchaser to avoid under-tenure—Beng. Act VIII of 1865, s. 16—Resident and hereditary cultivator.* A certain chur having been converted into two estates paying Government revenue, the plaintiffs became the purchasers of one of these estates at a sale for arrears of revenue and of a howla lease of the other at an auction-sale for arrears of rent, and brought a suit, in virtue of s. 37 of Act XI of 1859 and s. 16 of Bengal Act VIII of 1865, to avoid the tenures of the defendants, who held, in shikmi talukhdari and howladari tenure, lands appertaining to both estates. The defendants admitted the alleged nature of their holdings, but claimed exemption from eviction on the ground that their ancestor, more than twelve years before, had cleared and cultivated the land and built a house thereon, and that since his death they themselves had continued to cultivate the land and reside upon it. The lower Courts having found that the defendants were hereditary and resident cultivators, it was *held* that the defendants were entitled to the benefit of the proviso in s. 16 of Bengal Act VIII of 1865, the words of that proviso being wide enough to embrace every resident and hereditary cultivator irrespective of his denomination. MAHOMED ASSANOOLLAH CHOWDHRY *v.* SHANSHIR ALI **4 C. L. R. 165**

5. ——— s. 52—*Plantation.*—The plaintiff was the purchaser at a sale under Act XI of 1859 by the Collector of the 24-Pergunnas for arrears of revenue, of an estate in the Sunderbunds in which the defendant was holder of a mokurari maurasi jungleburi tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. In a suit after notice to quit to eject the defendant, and obtain possession of the land, or to have the defendant's tenure annulled :—*Held*, that the defendant's tenure was not protected as being one of "lands whereon plantations have been made" within the meaning of s. 52 of Act XI of 1859. BHOLANATH BANDYOPADHYA *v.* UMACHURN BANDYOPADHYA. UMACHURN BANDYOPADHYA *v.* BHOLANATH BANDYOPADHYA . . . **I. L. R. 14 Calc. 440**

6. ——— Garden and homestead land with tanks. Where a party had occupied land for about forty years under a howla lease, and had made tanks, gardens, and homesteads, he was *held* to be protected under Act XI of 1859, s. 37. GRISH CHUNDER BANERJEE *v.* GUNGA DOORGA **25 W. R. 60**

7. ——— *Protection from effect of sale—Land planted as garden.*—A landlord cannot, by planting a garden in any portion of his estate, become, *quoad* such plantation, his own raiyat, so as to bring the land so planted under the protection of Act XI of 1859, s. 37, in the event of his estate being sold for arrears of revenue. BOOL CHAND JHA *v.* LUTHOO MOODEE . **23 W. R. 387**

8. ——— *Garden land—Under-tenure—Avoidance of tenure.* Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are, under the provisions of Act XI of 1859, s. 37, cl. 4, protected from avoidance by a revenue auction-purchaser. GOBIND CHUNDRA SEN *v.* JOY CHUNDRA DASS . . . **I. L. R. 12 Calc. 327**

9. ——— *Permanent structures and improvements—Suit to avoid incumbrances.* In a suit to void an under-tenure by the purchasers at an auction-sale for arrears of Government revenue, the defendants contended that the tenure was created prior to the permanent settlement, and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that accordingly it was protected under exceptions 1 and 4 to s. 37 of Act XI of 1859 ; but the lower Court gave a decree to the plaintiffs and annulled the under-tenure. *Held*, by WHITE, *J.*, that, notwithstanding a party may fail to show that his tenure was created prior to the permanent settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding. BHAGO BIBEE *v.* RAM KANT ROY CHOWDHRY **I. L. R. 3 Calc. 293**

10. ——— *Under-tenure-holders—Raiyats, rights of—Improvements on land.* A person holding land which is not protected

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SALE FOR ARREARS OF REVENUE—*contd.*

2. PROTECTED TENURES—*concld.*

from the operation of s. 37 of Act XI of 1859 by any of the first three exceptions is yet entitled to the benefit of the 4th exception in respect of any of the items mentioned therein which may have been established on the land ; and there is nothing in the words of the exception confining the benefit of it to tenure or under-tenure-holders, and excluding the raiyats from it. *Bhago Bibee* v. *Ramkant Roy Chowdhry, I. L. R. 3 Calc. 293,* followed. The benefit of the 4th exception to s. 37, Act XI of 1859, must be limited to improvements effected *bonâ fide* and to permanent buildings erected before the revenue sales, and should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser. Subject to this reservation, it does not matter whether the improvements have been effected by the present holder or by some previous occupier. AJGUR ALI *v.* ASMUT ALI

I. L. R. 8 Calc. 110 : 10 C. L. R. 87

11. ———— *Lease of tank without surrounding land.*—A lease of tank without any portion of the surrounding land is not protected under cl. 4, s. 37, of Act XI of 1859, as it is not, within the meaning of that clause, a lease of land whereon a tank had been excavated. *Ajgur Ali* v. *Asmut Ali, I. L. R. 8 Calc. 110,* referred to. ASMAT ALI *v.* HASMAT KHAN . . **2 C. W. N. 412**

12. ———— *Ejectment—Dwelling-house, tanks, and trees.* The plaintiffs, purchasers at a revenue sale, sought to eject the defendant from a piece of land measuring a little over one bigha. The defendant pleaded that he had his dwelling-houses, tank, and trees on the holding. It was found that the dwelling-houses consisted of certain huts, and that the so-called tank was some two or three cubits in extent. As to the trees, there was no finding that there was anything in the shape of a plantation or garden. *Held,* that a dwelling-house, to be exempted under s. 37 of Act XI of 1859, must be a dwelling-house of a permanent character, and mere huts would not come within that description. That upon the findings no cause had been made out for exemption of any portion of the land. MAKAR ALI *v.* SHYAMA CHARAN DAS

3 C. W. N. 212

3. SALE OF SHARE OF ESTATE.

1. ———— Separation of estate—*Act XI of 1859, ss. 10, 11, and 37—"Shares" of an estate.* The portion of an estate for which a separate account is opened under ss. 10 and 11 of Act XI of 1859 and the portion from which it is separated are equally "shares" within the meaning of s. 10. The latter (though it may for convenience sake be termed the parent estate) cannot be considered an entire estate within the meaning of s. 37, but is still a share and liable to all the incidents of a share. MONOHUR MOOKERJEE *v.* HUROMOHUN MOOKERJEE

1 W. R. 27

SALE FOR ARREARS OF REVENUE—*contd.*

3. SALE OF SHARE OF ESTATE—*contd.*

2. ———— *Act XI of 1859 s. 13—Application for separate account without order of Collector.* S. 13, Act XI of 1859, does not say that when an application has been made for a separate account, but when a Collector shall have ordered a separate account, that he is to put up to sale only the share in respect of which an arrear of revenue may be due. An order setting aside the sale as to the plaintiff's share therefore reversed on appeal. RAJENDRO KISHORE NARAIN SINGH *v.* DOORGA KOONWAR . . . . **7 W. R. 154**

3. ———— *Act XI of 1859, s. 11—Share of estate.* A sharer of a joint talukh, whose share consists of a specific portion of land can obtain protection from a sale for arrears of revenue only under s. 11, Act XI of 1859 ; non-registry of the talukh as a shikmi talukh under that Act will not preclude any person thinking himself wronged by such registry from suing for the cancelment of the same. GOUR CHUNDER GOOPTO *v.* TARA MONEE

6 W. R. 217

4. ———— *Act XI of 1859, s. 11—Separation of shares.* The proprietors of a certain lot having obtained a separation of their shares under s. 11 of Act XI of 1859, there remained one share (comprising one village and one-third of three other villages) which was sold for arrears of revenue, and purchased by *W*. Of this share *W* sold one village to *P*, who agreed to pay a certain sum as his share of the Government jumma, and then applied to the Collector to open a separate account at the rate which had ben agreed upon. The shareholders having objected, the Collector referred the parties to the Civil Court under s. 12. *P* then brought a suit in the Civil Court for a separate account. *Held,* that there was no legal objection to plaintiff having his separate share opened at the rate he mentioned, even if the jumma on the share which remained in *W's* possession was excessive ; for if the whole estate were put up to sale for arrears on account of that remaining share, the other shareholders could always protect themselves by paying the sum due. POORNO CHUNDER BANERJEE *v.* RAM KANAYE GHOSE . . **12 W. R. 243**

5. ———— *Act XI of 1859, ss. 10, 11, and 13—Separation of shares—Suit by purchaser at private sale for possession of specific share.* The proprietors of a joint mehal, the jumma of which had been partitioned under s. 10, Act XI of 1859, were in possession of specific shares under a private arrangement among themselves, but had not obtained separation of shares under s. 11 One of the proprietors sold his share to the plaintiff and the shares of two other proprietors who made default in payment of the revenue were sold under s. 13, Act XI of 1859, and purchased by the defendants. In a suit for exclusive possession of the share purchased by the plaintiff:—*Held,* that the defendants acquired by their purchase an interest in the property as an undivided estate, and the plaintiff was not entitled as against them to have exclusive possession of any

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SALE FOR ARREARS OF REVENUE— *contd.*

3. SALE OF SHARE OF ESTATE—*contd.*

specific share. GUNGADEEN MISSER *v.* KHEEROO MUNDUL . **14 B. L. R. 170 : 22 W. R. 449**

6. ———— *Sale for arrears of revenue—Separate shares, sale of—Notification of sale—Specification of shares—Material irregularity—Proof of substantial injury resulting—Act XI of 1859, ss. 6, 10, 33.* Act XI of 1859 requires that the estate or share to be sold must be specified; the question whether in any particular case the notification sufficiently specifies it, must depend upon the term of the notification. The connection between an irregularity in publishing or conducting a sale under Act XI of 1859 and the inadequacy of price must be established by evidence; the amount or nature of the evidence required in any case must depend upon its own circumstances. ISMAIL KHAN *v.* ABDUL AZIZ KHAN (1905) **I. L. R. 32 Calc. 502 s.c. 9 C. W. N. 343**

7. ———— *Separate shares, sale of—Notification of sale—Specification of share—Residue—Setting aside sale—Material irregularity—Substantial injury resulting, proof of—Act XI of 1859, ss. 6, 10, 33.* The non-specification in a notification under s. 6 of Act XI of 1859 of the exact share to be sold in a case where separate accounts had been opened under s. 10 of the Act, is not a material irregularity, if the notification was sufficient to give notice to an intending purchaser as to what was about to be sold. *Ram Narain Keor* v. *Mahabir Pershad Singh, I. L. R. 13 Calc. 208,* followed. Where there is no evidence, direct or otherwise, on which the relation of cause and effect between a material irregularity and an inadequacy of price coud be held to be established, it cannot, under the provisions of s. 33 of Act XI of 1859, be inferred that the one was due to the other. *Per* RAMPINI, *J.—Semble:* Such relation must be proved by direct evidence. *Macnaghten* v. *Mahabir Pershad Singh, I. L. R. 9 Calc. 656 : L. R. 10 I. A. 25; Arunachellam v. Arunchellam, I. L. R. 12 Mad. 19 : L. R. 15 I. A. 171; Tasadduk Rasul Khan* v. *Ahmad Husain, I. L. R. 21 Calc. 66 : L. R. 20 I. A. 176,* referred to. *Per* MITRA, *J.*—It is open to a Court to consider whether upon the whole case, having regard not only to the irregularity and to the inadequacy of price, but to other circumstances, there could be a necessary inference of substantial loss resulting from the irregularity. ISMAIL KHAN *v.* ABDUL AZIZ KHAN (1905) **I. L. R. 32 Calc. 509 s.c. 9 C. W. N. 348**

8. ———— *Separate shares—Notification of sale—Specification of share—Residue—Material irregularity—Substantial injury resulting, proof of—Evidence—Revenue Sale Law (Act XI of 1859), ss. 6, 10, 11, 33—Bengal Act VII of 1876, s. 70.* Where separate accounts had been opened under ss. 10 and 11 of Act XI of 1859 and s. 70 of Act VII (B. C.) of 1876, and the sale notification did not specify the share to be sold as required by s. 6 of Act XI of 1859, but merely described it as the residue, and stated the amount of the revenue of the entire estate and that of the share to be sold :— *Held,* that, as the amount of revenue would not correspond with an *aliquot* share of the lands in the estate, the sale notification was insufficient and the non-specification was a material irregularity. *Ram Narain Koer* v. *Mahabir Pershad Singh, I. L. R. 13 Calc. 208; Dil Chand Mahto* v. *Baij Nath Singh, 8 C. W. N. 337; Ismail Khan* v. *Abdul Aziz Khan, I. L. R. 32 Calc. 509,* distinguished. *Annada Charan Mukhuti v. Kishori Mohon Rai, 2 C. W. N. 479; Hem Chandra Chowdhry* v. *Sarat Kamini Dasya, 6 C. W. N. 526,* followed. The question whether the relation of cause and effect between an irregularity and a substantial injury is proved is essentially one of fact. The connection must be established by evidence. The presumption of cause and effect from circumstances irrespective of direct evidence may occasionally be so violent as to exclude the hypothesis of any other cause and may thus be *primâ facie* proof. *Saadatamand Khan* v. *Phul Kumar, I. L. R. 20 All. 412,* referred to. NIBARAN CHANDRA CHOWDHRY *v.* CHIRANJIB PRASAD BOSE (1905) . **I. L. R. 32 Calc. 542 9 C. W. N. 487**

SALE FOR ARREARS OF REVENUE— *contd.*

3. SALE OF SHARE OF ESTATE—*concld.*

4. INCUMBRANCES.

(*a*) GENERALLY.

1. ———— **Limit of power to avoid incumbrances—***Act XI of 1859, s. 11—Purchaser of entire estate.* The power of a purchaser at a revenue sale to annul all incumbrances is limited to purchasers of entire estates. KALIDASS GHOSE *v.* CHANDRA MOHINI DASSI . **8 W. R. 68**

MADHUB CHUNDER CHOWDHRY *v.* PROMOTHONATH ROY . . . . **20 W. R. 264**

(*b*) ACT I OF 1845.

2. ———— **Object of Act—***Fraudulent purchaser—Sale by mortgagee.* Act I of 1845 was not designed to protect a fraudulent purchaser as to the question whether a plaintiff could in point of law insist, notwithstanding an auction-sale for arrears of revenue, that as against him the sale ought to be viewed as a private sale. *Held,* that, under the circumstances,—a fraudulent devise to bring about the same being alleged,—the sale must be considered a private sale. The exception that a fraudulent purchaser at an auction-sale by a mortgagee will not defeat the equity of redemption, is an exception to the rule that a sale for arrears of revenue gives a title against all the world. SIDHEE NUZUR ALLY KHAN *v.* OJOODHYARAM KHAN **10 Moo. I. A. 540 : 5 W. R. P. C. 83**

3. ———— **Right to avoid incumbrances—***Right of purchaser. Quære:* Whether the auction-purchaser under Act I of 1845, at a sale for arrears of revenue, was entitled to take free of all

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SALE FOR ARREARS OF REVENUE— *contd.*

4. INCUMBRANCES—*contd.*

(*b*) ACT I OF 1845—*concld.*

incumbrances created by the defaulting proprietor. JUGGODESHURY DOSSIA *v.* UMACHARAN ROY **7 W. R. 237**

4. ———— *Right of auction-purchaser—Act I of 1845, s. 26.* An auction-purchaser of a zamindari at a sale for arrears of revenue is not entitled, under s. 26, Act I of 1845, to eject a holder of a lakhiraji tenure though held under an invalid title. DOORGA PERSHAD CHOWDHRY *v.* RAJENDUR NARAIN ROY . . **2 Hay 121**

5. ———— *Agreement by former owner as to division of chur—Act I of 1845, s. 26.* A purchaser at a sale for arrears of Government revenue, suing to establish his right to chur lands which had accreted to the purchased estate, is not bound by an agreement entered into by the prior owner with the owners of the adjoining estate to divide the chur equally ; such an agreement is an alienation of, or incumbrance on, the purchased estate, and therefore, under s. 26 of Act I of 1845, void as against the purchaser (*dissentiante* CAMPBELL, *J.*). But *per* NORMAN, *J.*, and CAMPBELL, *J.*, it would seem that purchasers under any of the sale laws since Act XII of 1841 may be bound by a decree in a boundary suit against the prior owner. BOYKUNTNATH CHATTERJEE *v.* AMEEROONISSA KHATOON . . . . . **2 W. R. 191**

6. ———— *Act I of 1845, s. 26—Mokurari tenant in Benares, right of.* S. 26 of Act I of 1845, which enables auction-purchasers at sales for arrears of revenue to eject tenants in the province of Benares, was by s. 1 of Act X of 1859 made subject to the modifications contained in the latter Act. Therefore, notwithstanding a sale by auction for arrears of revenue, a mokurari tenant in the province of Benares is entitled to receive a pottah at the fixed rent theretofore paid by him. MUNRO *v.* BALUCK SINGH **1 N. W. 153 : Ed. 1873, 235**

7. ———— *Act I of 1845, s. 26, cl. 3—Purchaser's right to evict—Khodkast kadimee raiyat.* Possession as a khodkast kadimee raiyat having a right of occupancy (but not merely as a khodkast raiyat for twelve years) barred an auction-purchaser's right of eviction under cl. 3, s. 26, Act I of 1845. LOTF ALI KHAN *v.* KASHEE DYAL **1 W. R. 6**

8. ———— *Act I of 1845, s. 26—Embankments.* Embankments are not incumbrances liable to be extinguished under s. 26, Act I of 1845, which refers only to tenures and leases. COLLECTOR OF 24-PERGUNNAHS *v.* JOYNARAIN BOSE **W. R. F. B. 17 : 1 Ind. Jur. O. S. 101**

(*c*) BENGAL REGULATION XI OF 1822.

9. ———— **Right to alter arrangements as to rent**—*Purchase by Government—Position of old proprietors.* An estate having been sold for arrears of revenue under Regulation XI of 1822, it was purchased by Government and the Government as landlord raised the rents throughout the property. *Held*, that the revenue sale cancelled all former arrangements entered into intermediately by the former proprietors, and that the fresh settlement made by Government with the present proprietors would not restore former arrangements and rates because they happen to be the heirs of the former proprietors. GANGAMONEE *v.* LUTEEFOONISSA CHOWDHRAIN . . . . **7 W. R. 196**

SALE FOR ARREARS OF REVENUE *contd.*

4. INCUMBRANCES—*contd.*

(*c*) BENGAL REGULATION XI OF 1822—*contd.*

10. ———— **Right to cancel talukhdari tenure**—*Settlement—Right to eject.* The Government purchased the zamindari rights in a pergunnah, under Regulation XI of 1822 at a sale for arrears of Government revenue, and re-settled one of the talukhs in the pergunnah (which talukh had been created subsequently to the decennial settlement) with the plaintiffs as talukhdars. Subsequently and after the terms for which they had re-settled with the plaintiffs had expired, the Government sold their zamindari rights to the defendant, who ejected the plaintiffs. In a suit to recover possession,—*Held*, that it was the intention of Government to retain talukhdars in possession of their lands during the subsistence of their tenures subject to the condition of having their rents enhanced according to the pergunnah rates ; and as in this case the proceedings which were taken by the Government showed that they did not cancel the plaintiffs' tenure, the defendant who purchased from the Government could not eject the plaintiffs, who were entitled to retain possession, subject to a liability to enhancement. Under the sale law as it existed before 1822, a talukhdar could not be dispossessed at the will of the purchaser ; he was at most liable to pay the full pergunnah rate, and could only be ejected after refusal to pay the enhanced rate ; but under Regulation XI of 1822, dependent talukhs created subsequent to the decennial settlement were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of Government revenue, unless they fell within the class contemplated by the 32nd section of that Regulation. Where an auction-purchaser, under Regulation XI of 1822, intends to cancel a talukhdari tenure (a power which he might or might not exercise), he must take some clear step to declare the avoidance or cancellation of the tenure. ASSANOOLLAH *v.* OBHOY CHURN ROY **13 W. R. P. C. 24 : 13 Moo. I. A. 317**

11. ———— *Right of cancellation by Government as auction-purchaser—Exercise of power of cancellation.* Where the Privy Council, in the case of *Assanoolla* v. *Obhoy Churn Roy, 13 Moo. I. A. 317*, recongizing that the Government had, as the auction-purchaser at a sale for arrears of revenue, the option of cancelling and avoiding the talukhdari tenure in that case, ruled that it was incumbent on Government to

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SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*contd.*

(c) BENGAL REGULATION XI OF 1822—*contd.*

take some clear steps for the purpose of declaring the avoidance or cancellation of the tenure, and, finding that the Government had not exercised that power, declared the under-tenant entitled to retain possession of his land during the subsistence of his tenure:—*Held*, that the decision did not apply to a case in which the proceedings of Government showed that it had exercised the power of cancellation. *Held*, also, that the indulgence in that case referred mainly to tenures purchased between 1817 and 1822, but not to tenures created after Regulation XI of 1822 had informed persons that their rights were liable to be cancelled by a purchaser at an auction-sale for arrears of revenue. AFTABOODDEEN MAHOMED *v.* SANIOOLLAH. SANIAOLLAH *v.* AFTABOODDEEN MAHOMED **23 W. R. 245**

12. ——— Right of Government to annul tenures—*Evidence of cancellation—Presumption.* Though on the sale of a zamindari for arrears of revenue the Government has the right to annul all under-tenures not specially protected, yet it cannot be taken for granted that the Government has enforced its extreme rights and even where the right of Government to do so is asserted in the course of the proceedings, it is a matter which has been decided upon evidence, whether, having asserted its right, the Government afterwards actually enforced it. TRILOCHUN CHUCKERBUTTY *v.* KOMOLA KANT CHUCKERBUTTY. KOMOLA KANT CHUCKERBUTTY *v.* NURRO SINGHO SINGH **25 W. R. 536**

13. ——— *Evidence of cancellation — Settlement — Right to eject incumbrancers.* Where at an auction-sale for arrears of revenue the Government becomes the purchaser of the property, and afterwards makes a settlement with the former proprietors of the under-tenures, the question whether or not the Government cancelled the under-tenures existing at the time of the sale is one to be decided solely according to the effect of the proceedings taken by the Collector in each case. It is a mistake to suppose that their Lordships of the Privy Council in the case of *Assanoollah* v. *Obhoy Churn Roy, 13 Moo. I. A. 317 : 13 W. R. P. C. 24*, intended to lay down a general rule according to which all questions of this nature are necessarily to be decided. SHOOK DEB SHAHA *v.* ALLADI . . . **2 C. L. R. 13**

See GOOROO PERSHAD CHUCKERBUTTY *v.* BENI NATH CHUCKERBUTTY . . **2 C. L. R. 216**

14. ——— Right of purchasers—*Tender of Government revenue by defaulter's mortgagee—Liability of Collector.* The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities, without otherwise depriving the defaulter of his right of occupancy, under s. 36 of the Bombay Survey Act, I of 1865, have only sold his right, title, and interest. *Abdul Gani* v. *Krishnaji Bhikaji, 10 Bom. 416*, and *Gundo Shiddeshvar* v. *Mardan Saheb, 10 Bom. 419*, followed. The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it, and the land is sold, the title of the purchaser is unimpeachable. GHELABHAI BHIKARIDAS *v.* PRANJIVAN ICHHARAM . **11 Bom. 218**

SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*contd.*

(c) BENGAL REGULATION XI OF 1822—*concld.*

15. ——— Right of ejectment—*Beng. Reg. XI of 1822—Under-tenures—Right to impeach sale.* The right to impeach a sale of lands for arrears of Government revenue extends not only to the defaulting proprietor, but to derivative holders under him. By Bengal Regulation XI of 1822, s. 30, all under-leases are extinguished by a Government sale of the proprietor's lands for arrears of revenue, and an auction-purchaser takes the lands clear of all under-tenures. At a sale by Government for arrears of revenue, the Government became purchasers, and afterwards granted a lease of the lands for a term of years, and put their leases into possession. At the time of the sale the lands were subject to an istemrari lease. No suit was brought to reverse the sale, but the Government some time afterwards, in consequence of doubts as to the legality of the sale, offered to give up their rights under the sale, and to restore the lands to the original proprietors, subject to the recognition of the claims of their lessees. This offer resulted in an arrangement between the Government, the original proprietors, and the Government lessees, and eventually the original proprietors upheld the lease to the Government lessees to a part of the lands called the Jungle Mehal for a term of years at a reduced rent. In a suit by the istemrari lessee for possession:—*Held* (reversing the decree of the Sudder Court), that by Bengal Regulation XI of 1822, s. 30, the istemrari lease was determined by the sale for Government arrears, and that the arrangement by which the lands were restored to the proprietors, subject to the rights of the Government lessees, was in the nature of a compromise, and not such an unconditional restoration as amounted to a reversal of the sale, and the consequent revival of the istemrari lease. *Aliter*: If a suit had been brought and a decree made for reversal of the sale. WATSON *v.* SREEMUNT LAL KHAN . . **5 Moo. I. A. 447**

(d) ACT XI OF 1859.

16. ——— Lakhirajdars—*Beng. Reg. VII of 1822, s. 10, cls. 7 and 8—Arrangement by Commissioner for payment of revenue—Payment by all through principal proprietor.* In a suit for ejectment and khas possession by an auction-purchaser under Act XI of 1859 the defendants' case was that after resumption of their lakhiraj tenure a settlement had been made under Regulation VII of 1822 with the principal proprietor; and by that settlement it was arranged that the Government revenue

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SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

payable by all the proprietors, the defendants among them, was to be paid through the principal proprietor, and that the defendants were to hold perpetual possession as shikmidars, and that their rights should be reserved intact. *Held*, that the possession of the defendants as lakhirajdars could not be disturbed as long as they paid the revenue assessed upon them under the settlement. *Held*, also (MARKBY, *J.*, *dissentiente*), that cl. 8, s. 10, Regulation VII of 1822, applied only to cases referred to in cl. 7,— that is, of cultivating proprietors on pattidari or bhyachari tenure, or the like, and not to a case of this kind. RAM GOBIND ROY *v.* KUSHUFFUDOZA . . **14 W. R. 1**

Affirmed on review, where it was held that a Commissioner's amulnama cannot destroy legal rights, even if no protest or objection be made. The order of a Commissioner requiring proprietors having separate jummas, to pay, for the convenience of the Collector, their shares of revenue through one of their number, cannot override their legal right of separate proprietorship allowed under the settlement law and preserved by express record, or transform such right into a joint tenancy. Where therefore such order had been made, and the defendants paid the revenue through one of their number and he made default :—*Held*, that the whole estate was not liable to be sold for his default. RAM GOBIND ROY *v.* KUSHUFFUDOZA . . **15 W. R. 141**

17. ——— **Right to annul incumbrances**—*Encroachments by neighbouring estates.* The principle under which purchasers of estates at revenue sales acquire such estates in the condition they were in at the permanent settlement, is equally recognized by the sale law (Act XI of 1859) as by the laws previous to it, and applies as much to actual encroachments on the talukh or estates by neighbours as to incumbrances or under-tenures created on it by the old proprietor or by his laches. GOLUCK MONEE DOSSEE *v.* HURO CHUNDER GHOSE **8 W. R. 62**

18. ——— *Permanently-settled estate.* An auction-purchaser at a revenue sale of a permanently-settled estate is remitted to all the rights possessed by the original settler at the date of the settlement. In order to abolish tenures and incumbrances subsequently created, his cause of action dates from his purchase. The existence of such tenures at the date of the permanent settlement must be proved by their holders, the presumption in favour of a purchaser resting upon the principle that every bigha of land sold must contribute to the public revenue unless specially exempted. The tendency of recent legislation and decision has been to give force to the contrary presumptions arising from long and undisturbed possession. FORBES *v.* MAHOMED HOSEIN **12 B. L. R. P. C. 210 : 20 W. R. 44**

SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

19. ——— *Suit to annul under-tenures—Right to eject.* When an auction-purchaser at a sale for arrears of revenue creates a patni, he cannot sue to annul an under-tenure within that patni, as his whole power under Act XI of 1859 passes to the patnidar, who alone can institute such a suit. In such a case the patnidar's competency to sue is not affected by the fact of his being a tenant of only a portion of the estate, provided that portion contains the tenure which is sought to be resumed. A patnidar, under such circumstances, though he may recover rent, is not entitled to eject an under-tenant who had been allowed to dig a tank and remain in possession undisturbed by the former proprietor for a long period (say upwards of thirty years), and who must therefore be assumed to have held with the acquiescence of the former proprietor, such acquiescence being equivalent to a lease. SREEMUNT RAM DEY *v.* KOOKOOR CHAND . **15 W. R. 481**

20. ——— *Land subject to mortgage.* Where land in the possession of a mortgagee is sold by the mamlatdars for arrears of Government land revenue :—*Held*, that, as the land revenue is the paramount charge on the land, whoever derives title from the occupant takes it subject to that charge ; and that therefore the purchaser at the sale was entitled to the land free from any mortgage lien. ABDUL GANI *v.* KRISHNAJI BHIKAJI . . . . **10 Bom. 416**

21. ——— **Right acquired by purchaser**—*Act XI of 1859, ss. 11, 13, 54—Sale of share of zamindari.* *A*, in exchange for his lakhiraj land, obtained in 1791 from his zamindar 441 bighas of mâl land, which zamindar thereupon created rent-free. The zamindar fell into arrears, and the zamindari was sold. Subsequently, three persons, who had become owners of the zamindari, applied to the Collector under s. 11, Act XI of 1859, and the Collector opened separate accounts with each of them for the revenue of their respective shares. The revenue due from one of them fell into arrears, and his share, which included the 441 bighas, was sold under s. 13, and purchased by the plaintiff, who now sued the descendants of *A* to recover possession. *Held*, that a sale of a share of a zamindari under s. 13, Act XI of 1859, does not convey to the purchaser the share free from all incumbrances created by the former zamindar, but he acquires the share, as laid down in s. 54, subject to all incumbrances. KASINATH KOOWAR *v.* BANKUBEHARI CHOWDHRY **3 B. L. R. A. C. 446**

S.C. KASHEENATH KOONWAR *v.* BUNKO BEHAREE CHOWDHRY . . . **12 W. R. 440**

22. ——— *Act XI of 1859, s. 32—Right of purchaser to eject holders of howla and nim-howla tenures.* Where certain howla and nim-howla tenures were never set aside by the Revenue Settlement or Revenue Commissioner's

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SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

orders from the time they were recorded as existing rightful hereditary tenures of those classes at the first settlement:—*Held*, that the purchaser of the ousut talukh could not eject the holders of those tenures under s. 32, Act XI of 1859, so long as they paid their jumma according to the settlement jumma-bundi. BURODA KANTH LAHA *v.* GOBIND CHUNDER GOOHO. KALEE KINKUR ROY *v.* GOBIND CHUNDER GOOHO . . . **7 W. R. 50**

23. ——— *Act XI of 1859, s. 37—Incumbrances—Right of purchaser.* A purchaser at a sale for arrears of revenue with a paramount title under s. 37, Act XI of 1859, acquires the estate free from any incumbrance which accrued thereupon from the laches of former proprietors, in the same way as he would have acquired it free from any incumbrance created by sale, lease or mortgage. In the absence of any proof to the contrary, such purchaser must be assumed to be the owner. THAKOOR DAS ROY CHOWDHRY *v.* NUBEEN KISHEN GHOSE . . . . **15 W. R. 552**

24. ——— *Act XI of 1859, s. 37—Suit to cancel under-tenures—Right of purchasers.* On the 13th January 1871 *A* and *B* purchased an estate sold for arrears of Government revenue. The original proprietors asserted their right to collect the rents of a portion of the property by virtue of holding two shikmi talukhs and a howla tenure. This right was affirmed by the High Court in April 1875. *B* had previously sold his interest to *C*. On the 29th May 1876 *A* created a patni of his 8 annas in favour of *D* and *E*, and on the 4th July 1876 *C* purchased all the rights of the original proprietor. On the 18th January 1877 *A* sued under Act XI of 1859, s. 37, to cancel or vary the tenures, making the original proprietors, *C* and various tenants, defendants. *C* objected that *A* had no right of suit or cause of action, as he had parted with all his rights to *D* and *E*, and that, as his entire interest, in the estate was only 8 annas, he could not sue to cancel a part only of the sub-tenures. *D* and *E* then applied to be made parties. *Held* they could not sue, as they were not purchasers of an entire estate within s. 37, Act XI of 1859. Even on the assumption that *D* and *E* were properly made plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of the under-tenure, both before and after the Government sale. *Sreemunt Ram Roy* v. *Kookoor Chand, 15 W. R. 481*, followed. DWARKANATH PAL *v.* GRISHCHUNDER BUNDOPADHYA **I. L. R. 6 Calc. 827**

25. ——— *Act XI of 1859, ss. 37, 52—Sunderbund estate—District of which portion only is permanently settled—District, meaning of—Beng. Reg. IX of 1816 and III of 1828—Estate—Beng. Act VII of 1868.* The plaintiff was the auction-purchaser at the sale under Act XI of 1859 by the Collector of the 24-Pergunnahs for arrears of revenue of the estate in the Sunderbunds on which the defendant was the holder of mokurari maurasi jungleburi tenure, under which he was to clear away the jungle and then to cultivate the land with paddy. The estate was one borne on the register of revenue-paying estates in the Collectorate of the 24-Pergunnahs, and therefore within that Collectorate with regard to the provisions of Bengal Act VII of 1868, s. 10. The district of the 24-Pergunnahs is a permanently-settled district, but the portion of it forming the Sunderbunds was declared by Regulation III of 1828, s. 13, not to be included in the permanent settlement. The Sunderbunds tract was, moreover, under Reg. IX of 1816, formed into a separate jurisdiction for settlement purposes under an officer styled the Commissioner of the Sunderbunds, who is subject to the direct control of the Board of Revenue, and independent of the Collector of the 24-Pergunnahs. In a suit after notice to quit to eject the defendant, and obtain possession of the land, or to have the defendant's tenure annulled:—*Held*, that, whether the term "district" was used with reference to the jurisdiction of the Civil Courts or the Revenue Collector, the plaintiff was the purchaser of an estate in a "permanently-settled district" within the meaning of s. 37 of Act XI of 1859, and not in a district "not permanently-settled" within s. 52 of that Act; and he was therefore entitled to eject the defendant. The position of the estate within the district of the 24-Pergunnahs was not affected by the appointment of the Commissioner of the Sunderbunds as an officer specially invested with the powers of the Collector within a certain portion of that district. *Held*, also, that the defendant's tenure was not protected as being one of "lands whereon plantations have been made" within the meaning of s. 52 of Act XI of 1859. *Held*, further, that, though there was no permanent settlement of the lands sold to the plaintiff, they fell within the definition of an "estate" as given in Bengal Act VIII of 1868. BHOLANATH BANDYOPADHYA *v.* UMACHURN BANDYOPADHYA. UMACHURN BANDYOPADHYA *v.* BHOLANATH BANDYOPADHYA . . . **I. L. R. 14 Calc. 440**

26. ——— *Ejectment, right of—Benami lease obtained by defaulting proprietor from purchaser at revenue sale, effect of, on under-tenures—Act XI of 1859, ss. 37, 53.* A mehal belonging to defendants Nos. 1 and 2 was brought to sale for arrears of Government revenue and purchased by defendant No. 6, from whom the plaintiff obtained a talukhdari pottah of a portion of the land comprised in the mehal. The plaintiff thereupon sued to eject defendant No. 4, who was in possession of the land under a lease which was found to have been granted previous to the revenue sale. In the suit it was found that the plaintiff obtained the talukhdari pottah as mere benamidar

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SALE FOR ARREARS OF REVENUE— *contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

for defendant No. 1. *Held*, that the provisions of s. 53 of Act XI of 1859 applied to the case, and that the plaintiff was not entitled to interfere with the tenancy of defendant No. 4 or eject him, and that the suit had been rightly dismissed. RASH BEHARI BOSE *v.* PURNA CHUNDER MOZUMDAR
I. L. R. 15 Calc. 350

27. ——— *Act XI of 1859, ss. 37 and 53—Adverse possession—Limitation.* The plaintiff had been proprietor of an estate which was sold for arrears of Government revenue and repurchased from the then purchaser by the plaintiff in 1886. He applied under Ch. X of the Bengal Tenancy Act for the measurement of the estate and the preparation of a record-of-rights, and the Revenue Officer deputed for these purposes found that a portion of the estate held by the defendant was mâl land, though it was held as lakhiraj under certain sanads, and as he also found that no rent had ever been paid for it, it was entered on the record-of-rights as mâl land held under those sanads as lakhiraj. The Special Judge on appeal by the plaintiff held that the land having been found to be mâl should have been entered as mâl land unassessed with rent. In a suit to have the land assessed with rent, it was found that the sanads, under which the defendant claimed to hold, were granted not by any predecessor in title of the plaintiff, and were of a date anterior to the Permanent Settlement. *Held*, that the adverse possession set up by the defendant was within the meaning of s. 53 of Act XI of 1859, an incumbrance subject to which the plaintiff, as a proprietor whose estate had been sold, took it on repurchase. If such adverse possession therefore were sufficiently long, the suit would be barred by limitation. The plaintiff could not be regarded as a person who had acquired the estate "free from all incumbrances which may have been imposed upon it after settlement" as provided by s. 37 of Act XI of 1859, and could not therefore claim (as held by the lower Appellate Court) that his suit was not barred, having been brought within twelve years from the date of the sale for arrears of revenue. The case was remanded for findings whether the land was mâl or lakhiraj, and whether the defendant's adverse possession was long enough to bar the suit. KARMI KHAN *v.* BROJO NATH DAS
I. L. R. 22 Calc. 244

28. ——— *Right of auction-purchasers to annul incumbrances—Act XI of 1859, s. 37—Suit to cancel under-tenures—Parties.* The right that is given by s. 37 of Act XI of 1859 to the auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar, and Orissa, sold for arrears of revenue, to avoid and annul an under-tenure, is a right that must be exercised by all the purchasers jointly where there are more purchasers than one. JATRA MOHUN SEN *v.* AUKHIL CHANDRA CHOWDHRY . **I. L. R. 24 Calc. 334**

SALE FOR ARREARS OF REVENUE— *contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

AKHIL CHANDRA CHOWDHRY *v.* JATRA MOHAN SEN . . . . . **1 C. W. N. 314**

29. ——— *Purchaser at a revenue sale—Act XI of 1859, s. 37—"Entire estates"—Partition by Collector, effect of—Estates Partition Act (Beng. Act VIII of 1876), s. 123—"Time of settlement."* A new estate created upon a partition by the Collector comes within the meaning of "entire estate" in s. 37 of Act XI of 1859. The words "time of settlement" in that section mean the time when the contract was made with Government, and in the case of a permanently-settled estate mean the time of permanent settlement. A partition by the Collector merely apportions the amount of revenue; there is no settlement of the revenue in any sense at the time of such partition. KOOWAR SINGH *v.* GOUR SUNDER PERSHAD SINGH
I. L. R. 24 Calc. 887

30. ——— *Act XI of 1859, s. 37—"Eject," meaning of—"Entire estate," meaning of—Notice.* When an estate sold for arrears of revenue is recorded in a separate number in the Collector's rent-roll with a separate revenue assessed upon it, and the specification in the sale certificate granted under s. 28 of Act XI of 1859 in the form prescribed by the Act shows that the estate sold was an entire estate, the mere fact of a portion of the lands of that estate being joint with those of certain other estates cannot stand in the way of its being an entire estate within the meaning of s. 37 of the Act. *Held*, that the signification of the word "eject" in s. 37 of Act XI of 1859 includes such partial ejectment as would result from a decree authorizing realization by the plaintiffs of rent in proportion to their share from the cultivating raiyats on the land. *Kali Prosanna Guho Chowdhuri* v. *Bulgazi* (unreported), distinguished. *Held*, also, that a decree for partial ejectment and joint possession can be made in favour of a co-owner of property. *Hulodhur Sen* v. *Georoo Das Roy*, *20 W. R. 126*; *Radha Prosad Wasti* v. *Esuf*, *I. L. R. 7 Calc. 414*, approved of. *Held*, further that the law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, although the tenure is not *ipso facto* avoided by a sale of the estate for arrears of revenue and is only liable to be avoided at the option of the purchaser at such sale, but such option may be exercised by the institution of a suit within the time allowed by law. *Titu Bibee* v. *Mohesh Chandra Bagchi*, *I. L. R. 9 Calc. 683*, referred to. KAMAL KUMARI CHOWDHURANI *v.* KIRAN CHANDRA ROY
2 C. W. N. 229

31. ——— *Unrecorded co-partners, purchase by—Incumbrances—Act XI of 1859, ss. 37, 53.* *A*, in November 1862, purchased a portion of an estate sold in execution of a decree against the then proprietor. This sale was not confirmed till the 9th February 1863. Default occurred

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SALE FOR ARREARS OF REVENUE— *contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

in the payment of the Government revenue in January 1863, and the entire estate was put up for sale by the Collector and purchased by *A* on the 29th March 1863. *Held*, that *A*, at the time of his second purchase, was an unrecorded co-partner of an estate within the meaning of s. 53 of Act XI of 1859, and therefore took the entire estate subject to all the incumbrances existing at the time of the Government sale for arrears of revenue. ABDOOL BARI *v.* RAMDASS COONDOO . **I. L. R. 4 Calc. 607**

32. ——— *Re-purchase by co-proprietor—Rights of under-tenants—Incumbrances—Act XI of 1859, s. 53.* Under s. 53 of Act XI of 1859, a co-proprietor who purchases an estate at a sale for arrears of Government revenue takes it subject to the incumbrances created by the defaulting proprietor. MAHOMED GAZI CHOWDHRY *v.* LEICESTER . . . **7 B. L. R. Ap. 52**

S.C. MAHOMED GAZEE CHOWDHRY *v.* PEAREE MOHUN MOOKERJEE . . **16 W. R. 136**

And this is so whether he purchases benami or from the benamidar after his purchase. *See* same case and case of ALUM MANJEE *v.* ASHAD ALI **16 W. R. 138**

33. ——— **Act XI of 1859, s. 54**—*Bonâ fide incumbrances.* The object of s. 54, Act XI of 1859, is to protect, not every incumbrance which may be set up, but only *bonâ fide* incumbrances executed in contemplation of an impending sale or in fraud of a possible purchaser. Where surrounding circumstances suggest such creation, it is for the party setting up the incumbrance to establish its *bonâ fide* character. MONOHUR MOOKERJEE *v.* JOYKISHEN MOOKERJEE . . . **5 W. R. 1**

34. ——— *Lease of a share.* A lease of a share is protected under s. 54, Act XI of 1859. KALEE PUDDO GHOSE *v.* MONOHUR MOOKERJEE . . . . **7 W. R. 295**

35. ——— **and s. 13**—*Liability to incumbrances—Mokurari lease—Inquiry as to title of alleged owners of share sold—Benami transfers—Limitation Act (XV of 1877), Sch. II, Art. 114.* After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a mokurari lease, as an incumbrance under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive benami holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, Sch. II, Art. 144, the twelve years' bar commencing from the date of the possession first held adversely. IMAMBANDI BEGUM *v.* KAMLESWARI PERSHAD **I. L. R. 14 Calc. 109**
L. R. 13 I. A. 160

SALE FOR ARREARS OF REVENUE— *contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*contd.*

36. ——— **and ss. 10, 11, 28, 53, and Sch. A**—*Rights of purchaser of share of estate admitted to special registration under ss. 10, 11 of Act—Rights of mortgagee of share against purchaser.* There is a clear distinction between the rights acquired under ss. 53 and 54 of Act XI of 1859. Under the former section, the terms of the certificate given under Sch. A are limited, and a purchaser under that section acquires the estate subject to all incumbrances existing at the time of sale, whether created before or after the default, and even up to the date of the sale; but there is no such limitation to the terms of a certificate given to a purchaser under s. 54, and all incumbrances created after the date on which a purchase under that section takes effect, that is, after the date on which the default was committed are void. A share of a talukh admitted to special registration, under ss. 10 and 11 of Act XI of 1859, was advertised for sale under that Act in default of payment of the June kist of Government revenue. On the 25th July the recorded sharer mortgaged his interest in that share to the plaintiff. The sale took place on the 26th September, and the share was purchased by the defendant who obtained a sale certificate in due form under the Act declaring, in accordance with s. 28, that his title accrued from the 29th June, the day after the latest date allowed for payment of the June kist. *Held*, that the mortgage was of no effect as an incumbrance under s. 54 of the Act. CHOWDHRY JOGESSUR MULLICK *v.* KHETTER MOHUN PAL **I. L. R. 17 Calc. 148**

37. ——— *Act XI of 1859, ss. 13, 14, 28, 29, 37, 54—Share of estate, sale of—Mokurrari lease—Rights of purchaser of share of estate—Merger.* The sale of a share of an estate for arrears of revenue, under the provisions of Act XI of 1859, does not affect, wholly or in part, a valid *mokurrari* lease of lands comprised in the estate, notwithstanding the fact that the lease is held by some of the defaulting proprietors of the share sold, having a fractional proprietary interest therein. *Kasinath Koowar* v. *Bankubehary Chowdhry, 3 B. L. R. (A. C.) 446*, and *Madhub Chunder Chowdhry* v. *Promotho Nath Roy, 20 W. R. 264*, referred to. AFZUL HOSSEIN *v.* RAJBUNS SAHAI (1903) . . **I. L. R. 30 Calc. 1071**

38. ——— *Lease of land—Revenue Sale Law (Act XI of 1859), s. 37, cl. 4—"Permanent building."* The word "lease," in cl. *Fourthly* of s. 37 of Act XI of 1859, does not mean a lease from the *zamindar* only. KIRON CHUNDER ROY *v.* NIMUDDI TALUKDAR (1903) **I. L. R. 30 Calc. 498**

39. ——— *Incumbrances—Act XI of 1859, s. 53—Proprietor—"Sale" or "purchaser," time of—Defaulting proprietors—Debt assigned to mortgagee—Want of diligence in recovering it—Accounts.* The respondent on 17th

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SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*contd.*

(*d*) ACT XI OF 1859—*concld.*

February 1896, purchased an estate sold in execution of a decree of the Civil Court against the then proprietors. He obtained his sale certificate on 21st March and was put into possession on 29th April 1896. Default occurred on 12th January 1896 in payment of the Government revenue on the estate which on 25th March 1896 was sold under Act XI of 1859 for arrears of revenue and purchased by the respondent. *Held*, that at the time of his purchase at the revenue sale the respondent was a proprietor of the estate within the meaning of s. 53 of Act XI of 1859, and therefore took it subject to the incumbrances existing on it at the time of sale. Neither the fact that the sale by the Civil Court was subsequent in date to the default for arrears of revenue nor the further circumstance that under the revenue sale certificate the purchase related back beyond the actual date of the sale and took effect from the 13th January 1896, altered the ownership of the estate nor made the respondent any the less a proprietor. Where "sale" or "purchase" is spoken of in Act XI of 1859 in connection with time, the time meant is that at which the sale actually takes place and not that to which its operation is carried back by relation. S. 53 of the Act is a proviso to, or qualification of, s. 37. There is no implied limitation in s. 53, which restricts its operation to defaulting proprietors. *Abdool Bari* v. *Ramdass Coondoo, I. L. R. 4 Calc. 607*, approved. Mortgagors assigned to their mortgagee a debt due to them from a third person, and in taking the account of what was due to the mortgagee, the Courts in India debited him with the amount of the debt, though he had not received it:—*Held*, that it lay upon the mortgagee to use reasonable diligence to recover it from the debtor, and it appearing that no serious attempt had been made to do so, it had been rightly debited in the account. SHYAM KUMARI *v.* RAMESWAR SINGH (1905) . . **I. L. R. 32 Calc. 27**

(*e*) MADRAS ACT II OF 1864.

40. ———— *Mad. Act II of 1864—Sale of land mortgaged—Purchase by mortgagee—Equity of redemption.* Where land has been mortgaged and while in the possession of the mortgagee sold for arrears of revenue under Madras Act II of 1864, and purchased by the mortgagee at the revenue sale, such sale does not necessarily deprive the mortgagor of his right to redeem. JAYANTI LAKSHMAYA *v.* YERUDANDI PEDDA APPADU . . . **I. L. R. 7 Mad. 111**

(*f*) BENGAL ACT VII OF 1868.

41. ———— *Beng. Act VII of 1868, s. 12—Auction-purchaser, right of—Lakhiraj grant—Onus probandi.* A person seeking to obtain the benefit of s. 12, Bengal Act VII of 1868, must give some *primâ facie* evidence to show that the incumbrance which he seeks to avoid is an incumbrance falling within the terms of the section,—that is, an incumbrance imposed on the tenure by some one who previously held it. The law relating to lakhiraj grants reviewed and explained. KOYLASHBASHINY DOSSEE *v.* GOCOOLMONI DOSSEE **I. L. R. 8 Calc. 230 : 10 C. L. R. 41**

SALE FOR ARREARS OF REVENUE—*contd.*

4. INCUMBRANCES—*concld.*

(*f*) BENGAL ACT VII OF 1868—*concld.*

(*g*) N.-W. P. LAND REVENUE ACT.

42. ———— *N.-W. P. Land Revenue Act (XIX of 1873), ss. 166, 167, 168—Agriculturists' Loans Act (XII of 1884), s. 5—Takavi loans—Sale of house in default of payment of loan—Effect of such sale.* The provisions of ss. 166, 167, and 168 of the N.-W. P. Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was *held* that such sale did not avoid the prior incumbrance. SHEO SAMPAT PANDE *v.* BANDHU PRASAD MISR **I. L. R. 22 All. 321**

5. PURCHASERS, RIGHTS AND LIABILITIES OF.

1. ———— **Purchaser of rights of Government**—*Limitation.* An auction-purchaser of the rights of Government in a talukh sold for arrears of revenue is not privy in estate to the defaulting proprietor. He does not deprive his title from him, and is bound neither by his acts nor by his laches. The purchaser, moreover, is bound by no limitation which would not bind or affect the Government. The talukh in this case having come into the possession of Government by resumption in 1841:—*Held*, that the auction-purchaser could have no better title, and could be in no better position than the Government at the time of resumption. BUZLOOL RAHMAN *v.* PRANDHUN DUTT **8 W. R. 222**

2. —— **Purchaser at sale on default of Purchaser of rights of Government**—*Government proclamation—Act XI of 1859.* The Government having sold its zamindari rights in certain talukhs after a proclamation that the purchaser would be bound to abide by the settlements entered into by it with the defendant talukhdars, one of the talukhs, a mehal, J. C. B., was purchased with this reservation by *M*, who then sued without success to eject the proprietor of the said talukh. After this, *M* having defaulted in the payment of the Government revenue, the mehal was sold for arrears under Act XI of 1859, and purchased by *G*. *Held*, that *G* was in a very different position from *M* (who had purchased the zamindari rights of the Government), and was not bound by the terms of the Government proclamation, but was, as his sale certificate showed, the purchasers of an entire

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SALE FOR ARREARS OF REVENUE— *contd.*

5. PURCHASERS, RIGHTS AND LIABILITIES OF—*contd.*

estate separately recorded on the Collector's rent roll. GHOLAM MUKHDOOM *v.* ASHUCK JAN BIBEE **25 W. R. 86**

3. ——— Right to resume and assess lakhiraj—*Act XI of 1859, s. 54.* When the former proprietor had a right to bring a suit to resume and assess lakhiraj land, the auction-purchaser of his rights and interests acquired the same right under s. 54, Act XI of 1859. DABEE MUNNEE CHOWDHRAIN *v.* FAQUEER CHUNDER SHAHA **W. R. 1864, 293**

4. ——— Period from which title of purchaser dates—*Act I of 1845, s. 20.* The title of an auction-purchaser at a sale for arrears of revenue accrues, not from the date of sale, but from the date on which the sale was confirmed, and certificate granted under s. 20, Act I of 1845. DHEPUT SINGH *v.* MOTHOORANATH JAH **W. R. 1864, 278**

5. ——— Liability for Government revenue—*Right to recover money paid for arrears of revenue—Act XI of 1859, s. 21.* The purchaser of an estate sold for arrears of revenue on the 29th Pous, the latest date of payment of the revenue due for the three months previous to Pous, is not entitled to recover from the defaulter the amount of revenue which he was subsequently obliged to pay for the month of Pous. KHEME SOONDAREE DOSSIA *v.* NUNDKOOMAR GOOPTO . **4 W. R. 75**

6. ——— *Suit for money paid for arrears of revenue—Character of Government revenue—Apportionment of revenue—Purchaser's liability.* Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom of the district in which the lands liable to pay such revenue are situate. It is not therefore liable to apportionment; and the person who is the owner of a revenue-paying estate at a time when the payment of the revenue falls due is the only person liable for its payment. The purchaser of an estate which pays Government revenue takes it subject to all revenue and cesses, whether in arrear or accruing. *Held,* therefore, in a suit by a purchaser for a certain sum for Government revenue and cesses, which became due after the date of, though due for a period previous to, his purchase, which sum he alleged he had been compelled to pay to save his interest in the subject of his purchase that he was not entitled to recover. CHATRAPUT SINGH *v.* GRINDRA CHUNDER ROY **I. L. R. 6 Calc. 389 : 7 C. L. R. 456**

See WOZEER BEGUM *v.* FUZLOONISSA **W. R. 1864, 373**

7. ——— *Registered occupant—Bombay Survey Act, I of 1865.* Government revenue being a paramount charge on the land, it adheres to the land and to every portion of it independently of the hands into which it passes, or the subordinate rights that may have been created

SALE FOR ARREARS OF REVENUE— *contd.*

5. PURCHASERS, RIGHTS AND LIABILITIES OF—*contd.*

by the occupant out of his own qualified proprietorship; so that, even after a valid sale of the land by the occupant to a purchaser who neglects to get his name registered in his books, the Collector may, after giving notice of the failure, to pay the revenue to the registered occupant, in whom alone, according to the Bombay Survey Act, I of 1865, vests the right of conditional occupancy, put up the land for sale, and the purchaser gets occupancy rights free from all claims on the part of the first purchaser. GUNDO SHIDDHESHVAR *v.* MARDAN SAHEB . **10 Bom. 419**

8. ——— *Beng. Reg. XLIV of 1793, ss. 5 and 7—Enhancement of rent.* The object of s. 5, Regulation XLIV of 1793, taken together with s. 7, was not the destruction of the under-tenures upon the sale of the parent estate for arrears of Government revenue. It only empowered the purchaser at such sale to avoid the subsisting engagements as to rent, and to enhance the rent to that amount at which, according to the established uses and rates of the pergunnah or district, it would have stood had the cancelled engagement so avoided never existed. *Quære:* Whether such a power was given only to the purchaser or to him and his heirs, or whether it was a power attaching to the zamindari and passing to subsequent purchasers. SHURNOMOYEE *v.* SUTTES CHUNDER ROY . . . . **2 W. R. P. C. 14**

S.C. SURNOMOYEE *v.* SUTTEES CHUNDER ROY **10 Moo. I. A. 123**

9. ——— *Beng. Reg. XI of 1822, ss. 30, 33—Beng. Reg. XLIV of 1793, s. 5—Beng. Reg. VIII of 1793, s. 51.* A zamindari was sold for arrears of Government revenue under Regulation XI of 1822. The purchaser's representatives sued to enhance the rent of the under-tenure. *Held,* that they had no right to enhance. The rights of the purchaser were defined by ss. 30 and 33 of Regulation XI of 1822, which were repealed by Act XII of 1841, and that Act, with the exception of the 1st and 2nd sections, was again repealed by Act I of 1845. Neither of the two last-mentioned statutes contains any saving of rights acquired under the statutes which it repealed, but expressly limited the enlarged powers which it gave to purchasers at sales for revenue arrears to purchasers at future sales. A sale for arrears of revenue cannot of itself merely, and without any act, proceeding, or demonstration of will on the part of the purchaser, alter the character of an under-tenure. *Semble:* S. 5, Regulation XLIV of 1793, is now of no force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, *viz.*, that of putting a purchaser at a sale for arrears of revenue in the position of a party with whom the perpetual settlement of the estate was made. Where an under-tenure existed at the time of the decennial settlement, the only right which the zamindar could exercise over it was that conferred by s. 51

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SALE FOR ARREARS OF REVENUE— *contd.*

5. PURCHASERS, RIGHTS AND LIABILITIES OF—*contd.*

of Regulation VIII of 1793. The decision in the case of *Surnomoyee* v. *Suttees Chunder Roy, 10 Moo. I. A. 123*, commented on, explained, and reiterated. SATYASARAN GHOSAL *v.* MAHESH CHANDRA MITTER . . . **2 B. L. R. P. C. 23**

S.C. SUTTO SURRUN GHOSAL *v.* MOHESH CHUNDER MITTER **12 Moo. I. A. 263 : 11 W. R. P. C. 10**

S.C. in High Court, SUTTO CHURN GHOSAL *v.* MOHESH CHUNDER MITTER. SUTTO CHURN GHOSAL *v.* TARINEE CHURN GHOSE . . **3 W. R. 178**

10. ——— **Certified purchaser**—*Act XI of 1859, s. 36—Suit by certified purchaser—Benamidar.* A certified purchaser at a sale for arrears of revenue, suing to recover possession of land from which he has been ousted, is not debarred from the benefit of s. 36, Act XI of 1859, unless he has acknowledged himself to be a benamidar. JADUB RAM DEB *v.* RAMLOCHUN MUDDUCK **5 W. R. 56**

Review rejected . . . **19 W. R. 189**

11. ——— *Act XI of 1859, ss. 36 and 53—Purchase by former proprietor.* One of the co-sharers in an estate which had been sold under Act XI of 1859 sued to recover her share from the certified purchaser (*M*), himself one of the original owners. Her case was that she provided a portion of the purchase-money, but that her name was not registered on account of *M's* having no written authority to act on her behalf. *M*, however, executed an ikrarnamah in which he admitted receipt of the purchase-money of plaintiff's 2 annas share, and covenanted to give her possession. Defendant denied having received any contribution or consideration money from the plaintiff, though admitting execution of the ikrarnamah. *Held*, that no separate title was given to the plaintiff by the ikrarnamah, and that the suit was substantially one to oust a certified purchaser on the ground that part of the purchase was made on behalf of another person, and the suit was therefore barred by s. 36 of Act XI of 1859. *Held*, also, that there is nothing in Act XI of 1859 which makes it illegal for a former proprietor or co-sharer to be a purchaser of his estate at a sale for arrears due on that estate. NEYNUM *v.* MUZUFFUR WAHID **11 W. R. 265**

12. ——— *Decree setting aside sale, effect of not executing, within six months—Sale, validity of—Right of auction-purchaser to bring suit for declaration of title and possession—Revenue Sale Law (Act XI of 1859), s. 34.* Certain property having been sold for arrears of Government revenue, the defaulting tenant brought a suit in the Civil Court to have the sale set aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held*, in a suit brought by the auction-purchaser to recover possession of the share he had

SALE FOR ARREARS OF REVENUE— *contd.*

5. PURCHASERS, RIGHTS AND LIABILITIES OF—*contd.*

brought at the sale, that such non-execution of the decree had the effect of restoring the sale so far as it concerned the defaulter, and that the plaintiff was entitled to succeed. ABDUL LOTIF *v.* YOUSUFF ALI **I. L. R. 21 Calc. 255**

13. ——— *Liability of purchaser at a sale, who enters into possession of the purchased property, to account for mesne profits to the person in whose favour the decree is subsequently reversed.* A purchaser of property at a sale under the Madras Revenue Recovery Act, who enters into possession thereof, is in rightful possession until the decree is set aside. He is not therefore a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession ; but he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property. *Dakhina Mohun Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry, I. L. R. 21 Calc. 142 : L. R. 20 I. A. 160*, cited and followed. PERUMAL UDAYAR *v.* KRISHNAMA CHETTYAR . **I. L. R. 17 Mad. 251**

14. ——— *Act XI of 1859, s. 54—Sale of share of Hindu widow—Effect of sale on reversionary interest.* Where a share of an estate held by a Hindu widow was sold for arrears of revenue, it was contended that under, s. 54 of Act XI of 1859, the estate acquired by the purchaser lasted only during the lifetime of the widow. *Held*, that the purchaser did not take any interest limited to the life of the widow, but that the entire share passed by the sale. DEBI DAS CHOWDHRY *v.* BIPRO CHARAN GHOSAL . **I. L. R. 22 Calc. 641**

15. ——— *Act XI of 1859, s. 14—An ijmali portion of an estate in arrear—Arrear separately deposited by co-sharers of other portions—Certificate of sale issued jointly to all the co-sharers—Share of each co-sharer in the purchased portion—Transfer of Property Act (IV of 1882), s. 45—Presumption.* Where an estate was divided into several shares and one of them was left as the ijmali kalam and for others separate accounts had been opened with the Collector, and the owners of the ijmali kalam having failed to pay their share of the revenue it was put up to sale, but could not fetch a price sufficient to cover the sum in arrears and each of the co-sharers paid the entire amount of arrear separately, and the Collector issued a certificate of sale jointly to them :—*Held*, that the different sharers should be entitled to equal shares in the purchased estate irrespective of their shares in the parent estate. That there being no evidence to show how the Collector made up the arrear from the funds which the parties respectively advanced, the presumption was that the Collector took from each of the funds an equal share. DEBI PERSHAD *v.* AKLIO KOER . . **4 C. W. N. 465**

16. ——— *Purchaser at a revenue sale—Act XI of 1859, ss. 28, 35 and 37—*

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SALE FOR ARREARS OF REVENUE —*contd.*

5. PURCHASERS, RIGHTS AND LIABILITIES OF—*contd.*

"*Entire estate,*" *meaning of—Effect of estate being recorded under a distinct number on the rent roll, with a separate revenue assessed upon it—Protected interest.* When an estate is recorded under a distinct number on the touzi or rent-roll of the Collector with a separate revenue assessed upon it and the sale certificate granted to the auction-purchaser under s. 28 of Act XI of 1859 shows that the estate sold was an entire estate, the mere fact of it comprising undivided shares in certain villages does not prevent its being an entire estate. *Kamal Kumari Chowdhrani* v. *Kisan Chunder Roy, 2 C. W. N. 229,* referred to. PREONATH MITTER *v.* KIRAN CHANDRA ROY **I. L. R. 27 Calc. 290**

17. ———— *Mad. Reg. XXV of 1802, s. 12—Madras Revenue Recovery Act II of 1864, ss. 32, 41.* The purchaser at a revenue-sale is *primâ facie* entitled to claim the faisal rate of rent. PALANI *v.* PARAMASIVA **I. L. R. 13 Mad. 479**

18. ———— *Madras Revenue Recovery Act (Mad. Act II of 1864), ss. 1, 39, 42—Rights of jenmi in Malabar—Grant by Government of waste land on a cowle.* The Collector of Malabar in 1869 let defendant 2 into possession of certain waste land under a cowle, and in 1872 granted to him a pottah for it. The cowledar brought the land into cultivation, but subsequently left it uncultivated and failed to pay the assessed revenue; the land was accordingly attached in 1885 for arrears of revenue under the Madras Revenue Recovery Act, 1864, and sold to defendant 3. The plaintiff, who was the jenmi of the land, had no notice of the grant of either the cowle or the pottah; he asserted his right to jenmibhogam in a petition presented to the Collector at the time of the sale, but the sale proceeded without reference to his claim. The present suit was brought to set aside the sale. *Held,* that the interest of the jenmi did not pass by the sale. SECRETARY OF STATE *v.* ASHTAMURTHI . **I. L. R. 13 Mad. 89**

19. ———— *Madras Revenue Recovery Act (II of 1864), ss. 42, 44—Sale of part of a holding for arrears of revenue due on another part.* The plaintiff sued, as the purchaser under a Court-sale, for possession of certain land, which the defendant's vendor had purchased at a sale held under the Madras Revenue Recovery Act for arrears of revenue accrued due on other land belonging to the judgment-debtor. *Held,* that, under the sale for arrears of revenue the land had passed to the defendant's vendor, and that the suits should be dismissed. SAMA *v.* STRINIVASA **I. L. R. 13 Mad. 477**

20. ———— *Madras Revenue Recovery Act (Mad. Act II of 1864), s. 42—Incumbrance—Permanent lease at a low rent.* One of the villages in a mitta was demised by the mittadar to *A* on a permanent lease, at a rate below

SALE FOR ARREARS OF REVENUE— *contd.*

5. PURCHASERS, RIGHTS AND LIABILITIES OF—*concld.*

both the faisal assessment and the proportion of revenue payable upon it. The leasee's interest was brought to sale in execution of a decree and purchased by *B*, and ultimately was sold in 1884 to the plaintiff, who now sued the tenant in possession to enforce an exchange of pottah and muchalka. In the interval, *viz.*, in 1883, the village was sold for arrears of revenue under Madras Act II of 1864 to *C*, and the defendant claimed to hold the land from *C*. *Held,* that the permanent lease was an incumbrance under the Madras Revenue Recovery Act, 1864, s. 42, and was voidable by the purchaser at the revenue-sale, although it had not been declared to be invalid by the Collector. NARASIMMA *v.* SURIANARAYANA . **I. L. R. 16 Mad. 144**

21. ———— *Meaning of the words "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners."* The words "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners," in s. 54 of Act XI of 1859, mean that the purchaser shall not acquire any rights not possessed by the previous owner or owners at some time or another, and shall acquire no more than what was the property of the previous owner or owners. They do not mean any right not possessed by the previous owner or owners at the date of the sale. ANNODA PROSAD GHOSE *v.* RAJENDRA KUMAR GHOSE (1901) **I. L. R. 29 Calc. 223 s.c. 6 C. W. N. 375**

6. DEPOSIT TO STAY SALE.

1. ———— **Tender of full amount of arrears of revenue**—*Madras Revenue Recovery Act, s. 37—Sale for arrears accrued since attachment.* When a defaulter, whose land has been attached and is being brought to sale for arrears of revenue, tenders the full amount of the arrears of revenue on account, of which the land was attached, together with interest and charges under Revenue Recovery Act, 1864, s. 37, the Collector is bound to stay the sale. When therefore a Collector, notwithstanding such tender, proceeded to sell on the ground that arrears had accrued between the date of attachment and the date of tender: *Held,* that the sale was invalid. SECRETARY OF STATE FOR INDIA *v.* RAJA GOUNDAR . . **I. L. R. 22 Mad. 5**

2. ———— **Right of person making deposit**—*Act I of 1845, s. 9.* By Act I of 1845, s. 9, it is enacted, with reference to sales for arrears of revenue, that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit, from any party not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate; and if the party depositing, whose money shall have been so credited as aforesaid, shall prove before a competent Civil Court that the

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SALE FOR ARREARS OF REVENUE— *contd.*

6. DEPOSIT TO STAY SALE—*contd.*

deposit was made in order to protect an interest of the said party which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit, with interest, from the proprietors of the estate. *Held*, that the person so depositing money for arrears does not thereby acquire any lien on the estate. FAGAN *v.* SREEMOTEE DOSSEE **Marsh. 228**

S.C. SREEMOTEE DOSSEE *v.* FAGAN **2 Hay 75**

3. ——— **Right of one proprietor against co-proprietors**—*Right against patnidar of co-proprietor.* A proprietor who has paid his own and his defaulting co-proprietor's share of the Government revenue to save the estate from sale, can recover from him the co-proprietor's share of the revenue, but he cannot recover it from the latter's patnidar, whose only liability was to pay his rent to his lessor. BYKUNTNATH ACHARJEE *v.* GOOROO CHURN BOSE . . **7 W. R. 247**

4. ——— **Right of person both proprietor and mortgagee**—*Payment made as mortgagee to save estate from sale.* A person who is both proprietor and mortgagee is not entitled as mortgagee to claim a deduction on account of Government revenue paid by him to save the estate from sale for arrears of revenue, when after resumption it ceased to be a lakhiraj estate, which payment it was his duty to have made in his capacity of proprietor. DOOLAR CHUNDER *v.* DAMOODUR NARAIN **3 W. R. 162**

5. ——— **Voluntary payment**—*Right of mortgagee to recover revenue paid.* Suit for Government revenue paid by mortgagee in possession of property mortgaged for a debt secured by an instalment-bond executed in his favour by the mortgagor through a mooktear. Although the plaintiff could not prove the execution by the defendant of the power of attorney in the name of the person alleged to have signed the bond for the defendant, yet as the plaintiff had paid the arrears of revenue due on the mortgaged property in the *bonâ fide* belief that he had a rightful interest in it, and would thereby save the property from sale, and be entitled to recover the money so paid, such payment was *held* to be not officious, and the suit was decreed. BADAUM KOOWUR *v.* LALLA SEETUL PERSHAD . . . . . **5 W. R. 126**

6. ——— *Act XI of 1859, s. 9—Suit by mortgagee to recover deposit of arrears of revenue.* A mortgagee who obtained a decree for possession with mesne profits on 11th May 1864 sued the mortgagor, under s. 9, Act XI of 1859, to recover a sum alleged to have been paid by plaintiff on account of Government revenue for the quarterly kist falling due on the 25th June following. *Held*, that as at the time the deposit was made the plaintiff was the proprietor of the estate in arrears, he was not a party contemplated in s. 9, and the suit did not lie. JUSSODA DOSSEE *v.* MATUNGINEE DOSSEE . . . **12 W. R. 249**

SALE FOR ARREARS OF REVENUE —*contd.*

6. DEPOSIT TO STAY SALE—*contd.*

7. ——— *Sale afterwards set aside—Payment by purchaser made pending proceedings to set aside sale to save estate from further sale.* Plaintiff, the inchoate owner of an estate purchased by him at a sale in execution of a decree against it, was held justified, whilst the proceedings with regard to the validity of the sale were pending, in preserving the estate from sale to another, whether for arrears of Government revenue or for the amount of a decree for which the estate had been attached, and when the sale to him was set aside and restored to *A*, entitled to be repaid any amounts *bonâ fide* paid by him for the preservation of the estate. If *A* made any arrangement with mokuraridars by which the latter stipulated to pay the Government revenue for him, plaintiff could not recover from the mokuraridars, there being no privity between him and them. His remedy was against *A*, who again had his remedy against the mokuraridars. HOSSEIN BUKSH KHAN *v.* ROY DHUNPUT SINGH **18 W. R. 289**

8. ——— **Liability of estate held by Hindu widow for debt incurred to person making payment to protect tenure**—*Act I of 1845, s. 9.* An estate mortgaged was about to be sold for arrears of Government revenue, when it was saved from sale by the mortgagee depositing a sum sufficient to discharge the revenue. The mortgagee brought a suit against the person in possession of the talukh, the Hindu widow of the original mortgagor, seeking, under s. 9, Act I of 1845, to obtain repayment from her personally of the money paid to save the sale of the talukh, not making the reversioners defendants, and not praying that the talukh in its entirety might be sold to pay the amount due. A decree was given in that suit to the mortgagee, and on execution of that decree the reversioners intervened. *Held*, that the mortgagee and those claiming under him had no charge on the estate, and were not entitled to have it sold in its entirety to pay the amount which was paid in to stop the sale of the estate. The auction brought under s. 9, Act I of 1845, was only a personal action, and the decree gave no remedy against the land, the sale of which for arrears of revenue had been stopped by the deposit. In such a suit the question is not whether the person who pays the arrears acquires thereby a charge on the talukh which he saves from sale, but whether he seeks to enforce that right: he must do so in a suit properly framed for that purpose and not merely in a suit which is confined to a personal remedy against the person in possession of the talukh. If the person who so pays the arrears of rent seeks repayment only, under the section and law cited, as against the person in possession of the talukh, who has only a limited interest therein, and confines his suit to that object, the decree so obtained against the person in possession can only be made effectual against the property of that

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SALE FOR ARREARS OF REVENUE— *contd.*

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person, including such interest as he had in the talukh. This ruling does not affect the general doctrine that, in a suit brought by a third person the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. NOGENDER CHUNDRO GHOSE *v.* DOSSEE . . . . . **8 W. R. P. C. 17**

S.C. NUGENDER CHUNDER GHOSE *v.* KAMINEE DOSSEE . . . . . **11 Moo. I. A. 241**

9. ——— Payment by patnidar to save tenure from sale—*Mistake in Collectorate in crediting payment as deposit.* The payment of revenue into the Collectorate by a patnidar to save the estate from sale is equivalent to payment of the patni rents to the zamindar. The fact that the zamindar had himself paid money into the Collectorate which he intended as revenue, but which by mistake was credited to a deposit account, and for which he took a receipt showing that the money was received as a deposit, and not as a payment of revenue, does not render the patnidar liable. JOTENDER MOHUN TAGORE *v.* KISHEN MONEE DABEE . . . . **W. R. 1864, Act X, 11**

10. ——— Payment by shareholder—*Voluntary payment of arrear of revenue—Right to reimbursement—Act XI of 1859, s. 13.* A shareholder voluntarily coming forward and paying an arrear of revenue due by a defaulting co-shareholder who has a separate account, before the share of such defaulter has been put up for sale under the provisions of s. 13, Act XI of 1859, cannot claim to be reimbursed by such defaulter, nor is the defaulter under any legal obligation to repay the amount advanced. KISHEN CHUNDER GHOSE *v.* MUDDUN MOHUN MOZOOMDAR **7 W. R. 365**

11. ——— Right of suit to recover amount of deposit—*Act XI of 1859, s. 9—Suit to recover amount paid as deposit to save estate from sale.* Where a party pays into the Collectorate under the provisions of s. 9, Act XI of 1859, arrears of revenue due by a defaulting proprietor of an estate, his suit to recover the amount paid is not inadmissible, merely because there exists no privity between plaintiff and defendant. WOOMAMOYEE BURMONYA *v.* HILLS . . . **11 W. R. 377**

12. ——— Right of suit to recover amount deposited—*Payment made by mokuraridar for predecessor—Payments of revenue in excess of lease — Voluntary payment.* Instalments of Government revenue paid by a mokuraridar on account of his predecessor, being necessary payments made to save the estate from sale, are recoverable, but not under Act X of 1859. Payments on account of Government revenue in excess of lease are not recoverable. BUNWAREE KISHORE *v.* JOY CHUNDER GOSSAIN . . **2 W. R. 262**

13. ——— Obligation of lender of money to stay sale—*Necessity.* A lender is not bound to

SALE FOR ARREARS OF REVENUE— *contd.*

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inquire into the exact amount necessary to be borrowed to save an estate from a sale for arrears of Government revenue. It is sufficient if he satisfy himself of the existence of a necessity to justify him in looking to the estate for repayment. NUFFER CHUNDER BANERJEE *v.* GUDDADHUR MUNDLE **3 W. R. 122**

14. ——— Right to contribution where part-owner pays revenue due on whole estate to save his own interests—*Madras Revenue Recovery Act, s. 35—Contract Act, ss. 69, 70.* In 1881, while the pottah of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable. The claim was decreed, but on appeal by defendants 3 and 4 the suit was dismissed as against them. Plaintiff appealed, making defendant No. 4 alone respondent. *Held*, that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession. SESHAGIRI *v.* PICHU . **I. L. R. 11 Mad. 452**

15. ——— Payment of arrears of village revenue by the assingee of mortgagee of portion of the village property in order to stay the sale—*Madras Revenue Recovery Act (Mad. Act II of 1864), s. 30—Defaulter—Registered and real owners.* The plaintiff was assignee of a mortgagee of 38⅛th pangus in a village consisting of 51⅛th pangus. Having sued the executants of the mortgage and obtained a decree in 1885, he, in 1887 and 1888, paid certain arrears of revenue due, from the village, in order to prevent its sale. In 1888 the plaintiff's 38⅛th pangus were sold in execution of the decree of 1885 to the 85th defendant, subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos. 1 to 84 personally the amount of these arrears. *Held*, that the 85th defendant, as also the 38⅛th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under s. 35 of the Revenue Recovery Act that not only registered proprietors, but real owners and their holdings, may be treated as defaulters within the meaning of s. 35 of that Act. *Seshagiri* v. *Pichu, I. L. R. 11 Mad. 457*, followed. SRINIVASA THATHACHAR *v.* RAMA AYYAN . **I. L. R. 17 Mad. 247**

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SALE FOR ARREARS OF REVENUE —*contd.*

6. DEPOSIT TO STAY SALE—*concld.*

16. ——— Mortgage lien—*Act XI of 1859, s. 9—Act I of 1845—Mortgagee—Part-proprietor—Transfer of Property Act (IV of 1882), s. 72—Cesses—Personal decree—Contract Act (IX of 1872), s. 70—Misjoinder—Civil Procedure Code (Act XIV of 1882), s. 578.* A mortgagee of a share of an estate, who was also a part-proprietor, deposited in the Collectorate revenue and cesses payable by the defaulting mortgagor, to save the property from being sold. *Held*, that, on general principles of justice, equity and good conscience, the mortgagee was entitled to have the amount paid by him on account of revenue added to the amount of the original line. *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee, 11 Moo. I. A. 241*, relied upon. *Kinu Ram Das* v. *Mozaffer Hosain Shaha, I. L. R. 14 Calc. 809*, distinguished. *Held*, also, that the mortgagee was entitled to a personal decree against the mortgagor for the amount paid on account of cesses, regard being had to s. 70 of the Contract Act (IX of 1872). *Smith* v. *Dinonath Mookerjee, I. L. R. 12 Calc. 213*, referred to. UPENDRA CHANDRA MITTER *v.* TARA PROSANNA MUKERJEE (1903)
I. L. R. 30 Calc. 794
s.c. 7 C. W. N. 609

7. SALE-PROCEEDS.

1. ——— Right to surplus proceeds—*Estate subject to mortgage.* When mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceedings which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery. HEERA LALL CHOWDHRY *v.* JANOKEENATH MOOKERJEE
16 W. R. 222

2. ——— Right to payment out of surplus proceeds—*Liability of purchaser to reimburse judgment-debtor—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 146—Act X of 1877, s. 316.* A share of a mehal, arrears of Government revenue being due in respect of the whole mehal, was sold in execution of a decree. The existence of the arrears was notified at the time of sale. The title of the purchaser to the share vested from the date of the sale, Act X of 1877, s. 316, being in force at that date. The Collector attached and realized the amount of the arrears out of the surplus sale-proceeds. *Held*, that, inasmuch as at the date of the realization of the arrears out of the surplus sale-proceeds the purchaser was the proprietor of the share, and it and he were responsible under s. 146 of Act XIX of 1873 (N.-W. P. Land Revenue Act) for the arrears, the payment of the arrears out of the surplus sale-proceeds must be regarded as a payment made *in invitum* by the judgment-debtor for the purchaser, and the judgment-debtor was entitled to be reimbursed by the purchaser. RAM CHAND *v.* FATEH SINGH . **I. L. R. 6 All. 112**

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7. SALE-PROCEEDS—*concld.*

3. ——— Suit for sale-proceeds by mortgagee—*Omission to give notice of charge on estate sold.* *A* purchased certain villages in the name of his son *B*. *A*, being indebted to *C*, executed a mortgage-bond and deposited the title-deeds of those villages with *C* as security for the debt. *C* afterwards sued *A* for recovery of the mortgage-debt, and ultimately obtained a decree in his favour. Pending this suit, *A* died and was succeeded by *B*, his heir, against whom the suit was revived. *B* became a defaulter to Government, when the Government authorities seized the village and took steps for bringing them to sale to satisfy the Government demands. *C* informed the Government officer of his claim, and petitioned to have the sale stayed, but the Collector sold the villages as the property of *B*, suppressing the notice of the equitable charge of *C* upon the villages. *C* then sued *B*, the Collector, and the auction-purchasers, claiming to be entitled to the sale-proceeds of the villages in the hands of the Government in satisfaction of his mortgage-debt. The Sudder Dewany Court dismissed the plaintiff's claim, on the ground that the decree made in the suit against *A* was against the effects of *A*, and only applied to such property as *B* was in possession of at that time; and that, as it had been sold to realize the demands of Government, the decree did not apply to the villages. This decision was reversed on appeal, the Judicial Committee holding, first, that the suit was properly instituted for recovery of the sale-proceeds in possession of Government, as the decree obtained by *C* against *B* operated as a conversion of the estate of *A*, making it assets in *B's* hands, which *C* had a right to follow; secondly, that as the Government had notice of *C's* equitable charge upon the villages, and suppressed that fact at the auction-sale to the purchasers, there was a clear equity in *C* to call upon the Government for payment out of the auction-proceeds received by them, and an account was directed of the amount received by the Collector from the sale of the villages with interest, so far as the amount received would extend to the payment of *C's* mortgage-debt. *Semble:* Where property is sold by Government for general debts and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the vendor a title. DOUGLAS *v.* COLLECTOR OF BENARES . . . . **5 Moo. I. A. 271**

8. SETTING ASIDE SALE.

(*a*) IRREGULARITY.

1. ——— Irregularity in conduct of sale—*Act XI of 1859, ss. 25, 26, 27-33—Substantial injury—Form of petition—Remedy by suit.* The object of the Revenue Sale Law (XI of *1859*) is to give a title to the purchaser which shall not be open to challenge by anybody; and the only ground on which a revenue sale can be set aside is (s. 25) that of irregularity in conducting the sale,

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8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*contd.*

in which case the Commissioner can set it aside on a petition of appeal presented to him within fifteen days of the sale. The petition may disclose a case of hardship or injustice where irregularity does not exist, as, for instance, that the sale has taken place where no arrear is due, and under such circumstances the Government, under s. 26, may set aside the sale. If the Commissioner will not interfere, the party aggrieved may, within one year of the sale becoming conclusive (s. 27), bring an action in the Civil Court under s. 33, and the Court may set aside the sale on proof of irregularity and substantial injury caused thereby. If no irregularity producing substantial injury is proved, the Civil Court cannot entertain an action to set aside a sale for arrears, and the only course open to an injured party is by a suit for damages as provided for in s. 33. WOMESH CHUNDER CHATTERJEE *v.* COLLECTOR OF 24-PERGUNNAHS. WOOMESH CHUNDER CHATTERJEE *v.* ISHARUTOOLLAH

8 W. R. 439

2. ——— Omission to give notice of sale—*Act IX of 1859, s. 33—Material injury—Setting aside sale, ground for.* To sell an estate for arrears under Act XI of 1859, after lulling the proprietor into a false security by failure to give him a notice which the law prescribes as a condition precedent of a sale, is of itself a very material injury irrespective of the amount of purchase-money realized, and one amply sufficient to warrant a Court in annulling the sale under s. 33. MOHABEER PERSHAD SINGH *v.* COLLECTOR OF TIRHOOT

15 W. R. 137

3. ——— Omission to serve notice on minor defaulter—*Madras Revenue Recovery Act (II of 1864), ss. 25, 27—Mad. Reg. V of 1804, s. 20.* A mitta consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Reg. V of 1804, s. 20. The sale was subsequently cancelled; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiff's mother and affixed to the wall of the house on 17th January, and notice under s. 17 was served on 17th February. The sale took place in September, and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale:—*Held*, since service of a demand upon the defaulter is an essential preliminary to sale, that the sale was invalid so far as the share of the plaintiffs was concerned, and the sale

SALE FOR ARREARS OF REVENUE *—contd.*

8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*contd.*

as a whole was vitiated by the irregularity. MEKAPERUMA *v.* COLLECTOR OF SALEM

I. L. R. 12 Mad. 445

4. ——— Irregularity in issue of notice—*Ground for setting aside sale—Damage to defaulter.* A sale under Act XI of 1859 may not be set aside on the ground of irregularity in the issue of notices, unless such irregularity is shown to have caused loss or damage to the defaulter. LULEETA KOOER *v.* COLLECTOR OF TIRHOOT

19 W. R. 283

5. ——— Notification of sale, necessary contents of—*Act XI of 1859, s. 33.* It is unnecessary to specify in the notification of sale the names of the mouzahs included in the property sougth to be sold. All that is necessary is to specify the estates or shares of estates, and the number they bear in the Collector's office. AMIRUNNESSA KHATOON *v.* SECRETARY OF STATE FOR INDIA

I. L. R. 10 Calc. 63

S.C. AMIRUNNESSA KHATOON *v.* BROWNE.

13 C. L. R. 131

ZERKALEE KOOER *v.* LALLA DOORGA PERSHAD.

16 W. R. 149

6. ——— Sale Notification—*Act XI of 1859, s. 6—Description—"Residue" of an estate.* In a notification of sale under Act XI of 1859 the share of an estate intended to be put up for sale must be so described that there can be no mistake about it. Merely advertising that the "residue" of an estate is to be sold without giving further particulars and stating what that residue is, cannot be considered to be a sufficient description. ANNADA CHARAN MUKHUTI *v.* KISHORI MOHUN RAI

2 C. W. N. 479

7. ——— Notification of sale, omission in—*Revenue-paying estate—Sale of share of an estate—Recorded proprietors—Omission of names of proprietors—Irregularity—Act XI of 1859, ss. 6, 33.* When a notification of sale of a share in a revenue-paying estate is issued under s. 6, Act XI of 1859, the circumstance that such notification does not contain the names of all the recorded proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859. SECRETARY OF STATE FOR INDIA *v.* RASHBEHARY MOOKERJEE

I. L. R. 9 Calc. 591 : 12 C. L. R. 27

8. ——— Irregularity in publishing notification of sale—*Suit to set aside sale—Act XI of 1859, ss. 6, 20, 35—Beng. Act VII of 1868, s. 8—Certificate of title.* A notification by the Collector under s. 6 of Act XI of 1859, fixing the 31st May 1879 as the date for holding the sale, was affixed in the places mentioned in the section on the 2nd May 1879. Subsequently, the 31st May being ascertained to be a holiday, and the 1st June being a Sunday, the Collector, purporting to act under s. 20

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SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*contd.*

of the Act, issued a notification on the 26th May, postponing the sale till the 2nd June. On that day the sale was held, and the Commissioner having upheld it on appeal, a certificate of title was given to the purchasers. *Held*, in a suit to set aside the sale, that, inasmuch as the notification under s. 6 of the Act had not been affixed thirty days before the day fixed by it for holding the same, the requirements of that section had not been fulfilled, and the irregularity was not cured by the notification of the 26th May. *Held*, further, that the Court was not bound, under s. 8 of Bengal Act VII of 1868, to presume conclusively that the provisions of s. 6 of Act XI of 1859, as regards the fixing of the date of sale, had been complied with. Under s. 8 of Bengal Act VII of 1868, the effect of a certificate of title having been given to the purchaser is merely that the Court is bound to presume conclusively the due service and posting of notices. BAL MOKOOND LALL *v.* JIRJUDHUN ROY . . **I. L. R. 9 Calc. 271**

S.C. BUL MOKAND LAL *v.* TRIJOODHUN ROY **11 C. L. R. 466**

9. ——— *Material irregularity—Substantial injury—Act XI of 1859, ss. 6, 7, 20, 28, 33—Certificate—Beng. Act VII of 1868, s. 8.—Per* GARTH *C.J.*, MITTER, PRINSEP, and PIGOT, *JJ.*—A non-compliance with the provisions of s. 6, Act XI of 1859, is not a mere irregularity, and is not one of those errors in procedure which are intended to be cured by s. 8 of Bengal Act VII of 1868. Where a sale for arrears of revenue has been held, and non-compliance with s. 6 has been found, such a sale is null and void, as not being a sale under the provisions of Act XI of 1859. *Semble:* That no positive rule can be laid down permitting an inference to be drawn in all cases that the inadequacy of the price realized by a sale is due to the irregularity of the sale-proceedings. *Per* TOTTENHAM, *J.*—Where the date fixed for a sale in the sale notification is less than thirty clear days from the date on which the notification is affixed in the Collector's office, there is a legal defect in the notification, which is not cured by s. 8 of Bengal Act VII of 1868; but a sale held under such conditions is not *ipso facto* null and void, but is liable to be annulled only on proof that the person whose land has been sold has sustained injury by reason of the informality in the notification, that with regard to the existence of the particular legal defect found in the present case, the Court was not at liberty to infer that the inadequacy of the price realized by the sale was due to the irregularity of the sale proceedings. LALA MOBARUK LAL *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 11 Calc. 200**

10. ——— *Civil Procedure Code, 1859, s. 248—Act XIX of 1873, s. 3.* In the case of a sale by the Civil Court of forest land, which formed a grant from Government under a deed describing the property as a "Khalisa Mahal,"

SALE FOR ARREARS OF REVENUE —*contd.*

8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*contd.*

subject to the payment of revenue after a term of years, the sale not having been proclaimed at the site of the grant:—*Held*, that the sale was invalid by reason of irregularity in the publication and because it was not competent to the Civil Court to sell land chargeable with, although not actually paying revenue at the time of sale, such Khalisa Mahals being revenue-paying lands within the meaning of s. 248 of Act VIII of 1859 and s. 3, cl. 1, of Act XIX of 1873, and that therefore the sale should have been held by the Collector. SHOWERS *v.* GOBIND DAS **I. L. R. 1 All. 400**

11. ——— **Irregular publication of sale**—*Act I of 1845, ss. 6 and 14, and Act IX of 1854.* Sale for arrears of revenue set aside,—the sale advertisement being irregular, first, in not being published in conformity with s. 6 of Act I of 1845; and secondly, the mehals not being sold in their consecutive numbers in the towji, or register of the Collector of the district, as provided by s. 14 of that Act. Such an irregularity is not cured by Act IX of 1854, which relates only to technical errors of procedure in the lower Court which are not productive of injury to either party. MAHASHUR SINGH BAHADUR *v.* HURRUCK NARAIN SINGH **9 Moo. I. A. 268**

12. ——— *Sale for arrears of road-cess—Certificate of title—Certificate of unpaid demand—Collector of the district—Defects in service of notice and in proclamation of sale—Act XI of 1859, ss. 27, 28—Beng. Act VII of 1868, ss. 5, 8, 11—Public Demands Recovery Act (Beng. Act VII of 1880), ss. 2, 4, 7, 8 cl. (4), 10, 19—Code of Civil Procedure (Act XIV of 1882), ss. 289, 314.* A certificate of title under Act XI of 1859, s. 28, and Bengal Act VII of 1868, s. 11, issued before the expiry of the period of sixty days required by s. 27 of Act XI of 1859 from the date of sale, is not a certificate duly issued under the provisions of these Acts, and cannot cure defects in the service of notice or in the proclamation of sale. The certificate in execution of which the plaintiff's estate was sold was not made or signed by the Collector of the district, but by a Deputy Collector. *Held*, that under s. 7 of the Public Demands Recovery Act (VII of 1880) a certificate under the Act must be made and filed by the Collector of the district, and not by any officer gazetted to perform the functions of a Collector under Act VII of 1880. MONINDRA NATH MOOKERJI *v.* SARASWATI DASI **I. L. R. 18 Calc. 125**

13. ——— *Public Demands Recovery Act (Beng. Act VII of 1880), ss. 9 (b) and 10—Notice under s. 10 compulsory—Sale.* When the notice required under s. 10 of Bengal Act VII of 1880 was not served, and in execution of the certificate the judgment-debtor's property was sold:—*Held*, that the whole of the proceedings which resulted in the sale were invalid. SARODA

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SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*contd.*

CHARAN BANDOPADHYA *v.* KISTO MOHUN BHATTACHARJEE . . . **1 C. W. N. 516**

14. ——— *Suit to set aside sale—Notice of sale, Publication of—Act XI of 1859, ss. 5 and 7.* Where it was contended that a sale under Act XI of 1859 was bad on the ground that the notices prescribed by ss. 5 and 7 of that Act were not published :—*Held*, that, there being no subsisting attachment on the property at the time it was sold, omission to issue notice under s. 5 did not vitiate the sale. *Held*, that, in the absence of proof that the plaintiff had sustained substantial injury on account of the omission to issue notice under s. 7, such omission did not invalidate the sale. MAHOMED AZHAR *v.* RAJ CHUNDER ROY **I. L. R. 21 Calc. 354**

15. ——— *Madras Revenue Recovery Act (Mad. Act II of 1864), ss. 38, 59—Sale for arrears of peishcush—Material irregularity or mistake in conduct of sale—Grounds for setting sale aside—Posting notice of sale in Collector's office—Jurisdiction of Civil Courts.* A person whose application that a sale of land may be set aside under s. 38 of the Revenue Recovery Act II of 1864 (Madras) is refused by a Collector is a person aggrieved within the meaning of s. 59 of that Act, and is entitled to seek redress in a Civil Court ; and a Civil Court has jurisdiction to entertain such a suit and may set aside such a sale. When a party seeks to set aside a sale in a Civil Court on the ground of material irregularity or mistake in the conduct of the sale, he must establish, as in proceedings under s. 38, that substantial injury has been caused by such irregularity or mistake. A Civil Court cannot cancel the sale unless such substantial injury has been established. The words "except as otherwise is hereinafter provided," which occur in cl. (*1*) of s. 38, refer to the action which the Collector is empowered to take *suo motu*, under cl. (*3*) of the same section, and have no relation to the remedy provided by s. 59. Direct evidence is not necessary to connect inadequacy of price realized with a material irregularity, where the latter has been proved : and the relation of cause and effect between the two may be inferred where such inference is reasonable. But where the only irregularity shown was an omission to display the notice of sale in the Collector's office, and there was no evidence to show that this affected the attendance of buyers at a place many miles distant where the sale actually took place, the inadequacy of price being susceptible of other explanations :—*Held*, that it was not shown that the irregularity referred to had caused substantial loss, and that there was therefore no ground for setting the sale aside. BOMMAYYA NAIDU *v.* CHIDAMBATRAM CHETTIAR **I. L. R. 22 Mad. 440**

16. ——— *Act XI of 1859, s. 5—Attachment by order of Civil Court—Latest day of payment, attachment subsequent to.* In a suit to set aside the sale of an estate for arrears of revenue, one of the grounds taken by the plaintiff was that the estate, which was under attachment by an order of the Civil Court at the time of the sale, was sold without due observance of the formalities prescribed by s. 5, Act XI of 1859. The date fixed for payment of the arrears for which the estate was sold was the 7th June 1890. The date of attachment was 2nd August following. *Held*, that s. 5 of Act XI of 1859 provides for cases in which the attachment has been made at least fifteen days before the last date of payment for which it is sought to bring the estate to sale. That section would not therefore apply to a case like the present in which the attachment was after the last day of payment and after the estate had become liable to sale for arrears of Government revenue. *Bunwari Lall Sahu* v. *Mohabir Pershad Singh, 12 B. L. R. 297 : L. R. I. I. A. 89*, referred to. NOWNIT LAL *v.* RADHA KRISTO BHUTTACHARJEE **I. L. R. 22 Calc. 738**

17. ——— *Bombay Land Revenue Code (Bom. Act V of 1879), ss. 56, 57, 150, and 153—Confirmation of sale by Collector—Omission of Collector to make—Declaration of forfeiture before sale.* A sale of a holding for default of payment of assessment is not invalid, although prior to the sale there has been no declaration of forfeiture by the Collector. The declaration is not so essentially a necessary preliminary of a sale that without it the sale is illegal and invalid. The fact that a sale has taken place is *primâ facie* evidence that forfeiture had been declared. GANPATI *v.* GANGARAM . **I. L. R. 21 Bom. 381**

18. ——— **Irregularity in refusing fine for non-attendance, tendered by proprietors**—*Act XI of 1859—Procedure—Beng. Act VII of 1868—Fine for non-attendance of proprietors before Collector in partition proceedings under Beng. Reg. XIX of 1814.* In sales held by the Collector for the realization of Government demands realizable as arrears of revenue, the procedure laid down in Bengal Act VII of 1868 is to be followed. Therefore, where a fine had been imposed for non-attendance of proprietors before a Deputy Collector for the purpose of a partition under Regulation XIX of 1814, and the amount had been ordered to be paid on a given day but was not so paid but tendered subsequently :—*Held*, that the Collector ought not to have sold the property of the defaulters. He was bound to receive the amount tendered. MOHAN RAM JHA *v.* SHIB DUTT SINGH **8 B. L. R. 230 : 17 W. R. 21**

19. ——— **Irregularity in not accepting highest bid**—*Obligation of Collector to sell to highest bidder.* At a sale for default of payment of Government revenue, the Collector is bound to sell to the highest bidder, even though (as in this

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SALE FOR ARREARS OF REVENUE —*contd.*

8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*contd.*

case) that bidder be the husband of the person in arrear. CORNELL *v.* OODOY TARA CHOWDHRAIN **8 W. R. 372**

20. ——— Description of property sold —*Revenue Sale Law (Act XI of 1859), ss. 6, 33—Sale of the residue of an estate—Sale notification—Inadequacy of price.* Where a notification of sale under Act XI of 1859 described the property to be sold thus :—" According to Act XI of 1859, the joint share excepting the separate share (is to be sold). Save and except these, all other shares are exempted from sale. *Held*, that, inasmuch as the law contemplates that the specification should be such as to inform intending purchasers what may be the precise property that is to be sold, the notification was wholly insufficient under the law. *Annada Charan Mukhuti* v. *Kishori Mohan Rai, 2 C. W. N. 479*, followed. Where the property was sold at an inadequate price, and the sale notification was bad : *Held*, that a Court of Justice may reasonably and legitimately infer that it was due to this irregularity that the property was sold at an inadequate price. HEM CHANDRA CHOWDHRY *v.* SARAT KAMINI DASYA (1902) . . **6 C. W. N. 526**

21. ——— Notice—*Sale—Revenue—Suit—Act XI of 1859, ss. 5, 6, 7, 33—Bengal Act VII of 1868, s. 8—Certificate of sale—Onus of proof—Notice—Irregularity and illegality in form and service—Bengal Cess Act (Ben. Act IX of 1880), s. 52—Evidence Act (I of 1872), s. 114, Ill. (e)—Presumption—Beng. Reg. VIII of 1819, ss. 8, 14.* In a suit to set aside a sale for arrears of revenue, the *onus* of proving that there has been irregularity or illegality in the preparation, service or posting of notice rests on the person who seeks to have the sale set aside. *Ashanullah Khan Bahadur* v. *Trilochan Bagchi, I. L. R. 13 Calc. 197 ;* and *Hurro Doyal Roy Chowdhry* v. *Mahomed Gazi Chowdhry, I. L. R. 19 Calc. 699*, distinguished. The fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of may be either established by direct evidence or inferred, when such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. In a sale for arrears of revenue, after the certificate of title has been issued to the purchaser, s. 8 of Bengal Act VII of 1868 will operate as a bar to a suit to set aside the sale on the ground of irregularity in serving and posting notices under s. 6 of Act XI of 1859. *Lala Mobaruk Lal* v. *The Secretary of State for India in Council, I. L. R. 11 Calc. 200 ;* and *Bal Mokoond Lall* v. *Jirju Dhun Roy, I. L. R. 9 Calc. 271*, distinguished. Omission to serve notice under s. 7 of Act XI of 1859 can hardly render a sale for arrears of revenue liable to be annulled under s. 33 of that Act, especially after issue of the certificate of title to the purchaser. *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi, 13 C. L. R. 1*, and *Mahomed Azhar* v. *Raj Chunder Roy, I. L. R. 21 Calc. 354*, referred to. SHEORUTTON SINGH *v.* NET LOLL SAHU (1902) . . . . **I. L. R. 30 Calc. 1 s.c. 6 C. W. N. 688**

SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*a*) IRREGULARITY—*concld.*

22. ——— *Act XI of 1859, ss. 3, 5, 6—Construction and meaning of words " current year "—Special notice under s. 5—Revenue Recovery Act (Ben. Act VII of 1868), s. 8—Presumption under, extent of—Ground of objection not set forth in appeal to Commissioner.* The expression " current year," in s. 5 of Act XI of 1859 is to be understood as referring to the year in which the latest date for payment falls, as fixed under s. 3, and not the year in which the sale of the property ultimately takes place. In a suit to set aside a sale for arrears of revenue on the ground of irregularity, the Court is not precluded by the provisions of s. 8 of Ben. Act VII of 1868 from receiving evidence to prove that the notice under s. 6 of Act XI of 1859 was not served 30 days before the sale. The presumption arising under that section has reference only to the due service and posting of the notification. *Bal Mokoond Lall* v. *Jirjudhun Roy, I. L. R. 9 Calc. 271*, and *Lala Mobaruk Lal* v. *The Secretary of State for India in Council, I. L. R. 11 Calc. 200*, followed. It is not open to a plaintiff in such a suit to make objection to the sale on a ground which had not been declared and specified in an appeal to the Commissioner. *Gobind Lal Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70*, followed. JAHNNOVI CHOWDHARANI *v.* SECRETARY OF STATE FOR INDIA (1902) . **7 C. W. N. 377**

23. ——— Sale of ancestral property —*Civil Procedure Code (Act XIV of 1882), s. 320—Rules framed by Local Government—Application under Rule 17 (XIIIA).* One of several co-owners of ancestral property, which has been sold by the Collector under the rules framed by the Local Government under s. 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIIIA) to have the sale set aside making at the same time the necessary payments into Court required by the rule. *Held*, that upon the presentation of the latter application under Rule 17 (XIIIA) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). *Net Lall Sahoo* v. *Kareem Bux, I. L. R. 23 Calc. 686*, and *Paresh Nath Singha* v. *Nabogopal Chattopadhya, I. L. R. 29 Calc. 1*, referred to. TUHI RAM *v.* IZZAT ALI (1908) **I. L. R. 30 All. 192**

(*b*) OTHER GROUNDS.

24. ——— Fraud—*Act XI of 1859, ss. 6, 7, 18—Ground for setting aside sale.* In a suit to

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SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

set aside a sale for arrears of Government revenue held on the 26th March 1879, it was alleged as grounds for setting the sale aside (i) that the arrears had been paid into the Collector's treasury on the previous day and a receipt granted for them, and that, according to the custom which had prevailed in the Collectorate of the district on payment of arrears being so made, the property had always been exempted from sale ; (ii) that the notices issued under ss. 6 and 7 of Act XI of 1859 were not served according to law ; and (iii) that the purchaser at the sale had dissuaded other persons from bidding as alleged. *Held*, that the sale was valid, as no order had been made by the Collector in writing exempting the property from sale under s. 18 of Act XI of 1859, mere payment of arrears into the treasury without an order under s. 18 not having in itself the effect of exempting the property from sale. *Held* also, that the object of the notification under s. 7 of Act XI of 1859 being to give notice to the raiyats not to pay rent to defaulting zamindars, non-service of such notification could not be a ground for invalidating the title of the auction-purchaser ; and that, inasmuch as the irregularity in the service of notice under s. 6 of Act XI of 1859 was not taken in the grounds of an appeal which had been presented to the Commissioner, it could not be urged in a regular suit as a ground for setting aside the sale. *Held*, further, that it was no fraud for persons at a sale for arrears of revenue to combine not to bid against each other. See *Bal Mokoond Lall* v. *Jirjudhun Roy, I. L. R. 9 Calc. 271 ; 11 C. L. R., 466.* GOBIND CHUNDRA GANGOPADHYA *v.* SHERAJUNNISSA BIBI . **13 C. L. R. 1**

25. ——— *Act X of 1876, s. 4—Jurisdiction of Civil Court—Fraud of officers conducting sale.* S. 4, cl. (*c*), of Act X of 1876 excepts from the jurisdiction of the Civil Court claims to set aside, on account of irregularity, mistake, or any other ground except fraud, sales for arrears of land revenue. *Quœre :* Whether the exception of fraud in the above enactment is confined to fraud on the part of officers conducting sales for arrears of land revenue. BALKRISHNA VASUDEV *v.* MADHAVRAV NARAYAN . **I. L. R. 5 Bom. 73**

26. ——— *Act XI of 1859, s. 33.* S. 33 of Act XI of 1859 should not be read as meaning that under no possible circumstances can a suit be brought to set aside a sale on the ground of fraud. AMIRUNNESSA KHATOON *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 10 Calc. 63**

S. C. AMIRUNNESSA KHATOON *v.* BROWNE. **13 C. L. R. 131**

27. ——— *Beng. Act VII of 1868—Sale improperly conducted.* In a suit by a mortgagee for possession of the mortgaged property which had been sold under Bengal Act VII of 1868, where plaintiff alleged that the sale was brought about by fraudulent withholding of the rents and that the mortgagor had purchased it benami :—*Held*, that, where a sale has been held under the provisions of Bengal Act VII of 1868, but improperly and irregularly, it can only be questioned by a suit brought within proper time and against proper parties. RAJ LUKHEE DASSEE *v.* PEARUN BIBEE . . . . . **23 W. R. 82**

28. ——— *Bidders, dissuasion of.* In a suit by some of the co-sharers in a mouzah against the others to set aside a sale for arrears of revenue, the finding of the Court of first instance established that a certain co-sharer in a mouzah had intentionally withheld the payment of a small arrear of Government revenue, and had thereby caused the property to be sold under Act XI of 1859, purchasing it himself at a small sum in the name of certain other persons ; and had also dissuaded certain intending bidders from bidding at such sale. *Held*, that the evidence did not warrant such a finding, but that, assuming these facts to have been established, the right of the co-sharer to buy up the estate at the revenue sale was not based upon any right of interest common to himself and his co-sharers, and that, in the absence of misrepresentation or concealment, the fact that he had intentionally defaulted as found, did not constitute fraud ; nor did the fact that he had deterred others from bidding for the property, necessarily constitute an act of fraud. *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar, I. L. R. 3 Calc. 300*, distinguished. DOORGA SINGH *v.* SHEO PERSHAD SINGH . **I. L. R. 16 Calc. 194**

29. ——— *Sale without attachment—Attachment of property sold, not necessary—Sale ultra vires—Act XI of 1859, ss. 5, 17.* The right to set aside a sale for arrears of Government revenue under Act XI of 1859 is not confined to proprietors alone, but extends to all persons, such as mortgagees, having an interest in the property antecedent to its sale. *Watson* v. *Sreemunt Lal Khan, 5 Moo. I. A. 447*, relied on. There is nothing in s. 5 of Act XI of 1859 which indicates that property sold for arrears of Government revenue should be under attachment at the time of sale. A sale in contravention of ss. 5 and 17 of Act XI of 1859 is *ultra vires* and therefore void. The principle laid down by the Full Bench in the case of *Lala Mobaruk Lal* v. *Secretary of State for India in Council, I. L. R. 11 Calc. 200*, applied. GOBIND LAL ROY *v.* BIPRODAS ROY **I. L. R. 17 Calc. 398**

30. ——— *Act XI of 1859 (Bengal Revenue Sale Law), ss. 3, 8, and 33—Bengal Excise Act (Beng. Act VII of 1868), s. 2—Unauthorized sale by Collector—Jurisdiction of Civil Court.* Act XI of 1859, the Bengal Revenue Sale Law, providing for the sale of estates in arrear of payment of revenue, does not sanction, and by

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SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

plain implication forbids, the sale of any estate which is not at the time in arrear of such payment. The whole clauses, in so far as they relate to sales, or to their challenge as well as the provisions of Bengal Act VII of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty. A Collector had sold an estate, purporting to act under Act XI of 1859 for a supposed arrear of revenue. There was, however, only an erroneous debit in the Collectorate books against the estate in excess of the revenue actually assessed upon it, chargeable against it, and due from it. *Held*, that the sale was without authority; that the Civil Court had jurisdiction to declare the sale void and that the provisions of s. 33 of Act XI of 1859, relating to an appeal to the Commissioner of Revenue, did not exclude that jurisdiction. The enactment in s. 8 had no application to such a case. This was not a question about a transfer from the account of one revenue-paying estate to that of another, nor was it a claim for remission or abatement, which had not been duly allowed by the Government. S. 8 has no application, except there be (i) default in payment of the revenue, and (ii) possession by the Collector of money of the defaulter not indisputably placed to his credit. But here there was no default. All moneys paid by the appellants were credited, and their alleged default was based upon erroneous debit entries to which they were not parties. BALKISHEN DAS *v.* SIMPSON

I. L. R. 25 Calc. 833
L. R. 25 I. A. 151
2 C. W. N. 513

31. ——— Sale where no arrears due —*Bonâ fide purchase.* The sale of an estate for arrears of revenue where no such arrears exist is null and void, even though it is regularly conducted and the purchase is made *bonâ fide*. SREEMUNT LALL GHOSE *v.* SHAMA SOONDUREE DASSEE

12 W. R. 276

RAM GOBIND ROY *v.* KUSHUFFUDOZA.

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See BAIJNATH SAHU *v.* LALLA SITAL PRASAD.

2 B. L. R. F. B. 1 : 10 W. R. F. B. 66

and HARKHOO SINGH *v.* BUNSIDHUR SINGH

I. L. R. 25 Calc. 876

32. ——— *Act XI of 1859.* Where there has been a sale under Act XI of 1859 for arrears of revenue, but it is found that no revenue is actually due to Government, the sale must be set aside as not coming within the provisions of the Act. MANGINA KHATUN *v.* COLLECTOR OF JESSORE . **3 B. L. R. Ap. 144 : 12 W. R. 311**

33. ——— *Suit to set aside sale—Sanction of Commissioner.* A suit to set aside a sale for arrears of revenue on the ground that no arrears were due may be brought without previous

SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

sanction of the Commissioner. THAKOOR CHURN ROY *v.* COLLECTOR OF 24-PERGUNNAHS

13 W. R. 336

34. ——— *Act XI of 1859, s. 5—Act XI of 1838—Suit to set aside sale—Costs of partition—Sanction of Board of Revenue—Beng. Reg. XIX of 1814.* On 12th June 1867 some of the proprietors of an estate applied to the Collector for a partition under Regulation XIX of 1814. On the same day the Collector issued a notice to all the shareholders, including the plaintiffs in this suit, calling upon them to come in within one month and show such cause and offer such objections, etc., as they should think fit. It did not appear that the plaintiffs did come in or did anything upon this. Similar applications were made by other shareholders. On the 19th August 1867 the Collector drew out a tabular statement purporting to be in pursuance of s. 4, Regulation XIX of 1814. In it was a column giving the shares into which the expenses of the partition were to be divided. On the same day a notice was issued to the proprietors, ordering in them to pay their respective quotas of the expenses accordingly. It was said by the defendants that the apportionment was confirmed by the Commissioner on the 20th January 1868. On the 6th March 1868 it was ordered by the Collector that a proclamation should be issued in accordance with paragraph 4 of s. 5 of Act XI of 1859, directing the plaintiffs, as defaulters in two sums of R252-3-2 and R9-9-6, to pay the Government revenue. On the 28th March such proclamation was issued accordingly. Subsequently one of the plaintiffs came in, and offered to pay all that was then due and outstanding. His application was rejected, and on the same day, the 8th April, the sale proceeded, and the whole interest of the plaintiffs was sold for R16,900. The plaintiffs appealed to the Commissioner, but their appeal was dismissed. The plaintiffs therefore brought a suit against the purchasers and the Collector for the recovery of the property and for cancelment of the sale. *Held*, that the sale was void. There was no arrear of Government revenue justifying a sale under Acts XI of 1838 and XI of 1859, s. 5. There could be no arrear until demand after sanction by the Board of Revenue and by the Lieutenant-Governor of the estimate of expenses prepared by the Collector and fixed by the Commissioner. The Board must give its sanction in each case, and the defendants failed to show that it had done so. But even if the Commissioner had power finally to determine the amount and date of payment, it was not shown that he had done so, or, supposing that he had, that any fresh demand had been made upon the parties liable. HAR GOPAL DAS *v.* RAM GOLAM SAHI

5 B. L. R. 135 : 13 W. R. 381

35. ——— Unauthorized sale by Collector— *Want of sanction—Subsequent confirmation*

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SALE FOR ARREARS OF REVENUE —*contd.*

8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

—*Accounts—Costs.* The sale by a Collector of a whole talukh in one lot for arrears of revenue without specific authority previously conferred by the Board of Revenue, was held to be an act unauthorized by the general rules and principles of the regulations, and not rendered valid by the subsequent authorized confirmation of it by the Board, and by the appropriation of the surplus proceeds of the money by the defaulting proprietor. The proprietor's acquiescence in a sale made, as he believed, by the authority of the Board of Revenue did not give legal efficacy to a sale altogether void for the want of such authority, or bar his claim to annul the sale on that ground. The Courts below, without entering into any investigation of the profits made by the purchaser during his occupation of the estate, assumed that he had reimbursed himself the amount of the purchase-money and interest out of the profits of the estate. The Privy Council, however, saw no ground for such an assumption, and directed that an account should be taken of the principal and interest due to the purchaser in respect of the purchase-money paid by him, and also of the net profits made by him, out of the estate during his occupation ; and that on payment to him of whatever may appear due to him on taking such account possession of the talukh should be delivered to the proprietor. The Privy Council, further, acquitting the purchaser of all blame in the transaction, reversed so much of the decrees of the Courts below as condemned him in costs, and ordered each party to bear his own costs in all the Courts. MITTERJEET SINGH *v.* HEIRS OF THE WIDOW OF JUSWUNT SINGH . **6 W. R. P. C. 15 : 3 Moo. I. A. 42**

36. ——— Sale for arrears of revenue of mitta held by tenants-in-common during minority of some of the owners—*Mad. Reg. X of 1831, ss. 1, 2, 3—Mad. Reg. V. of 1804, s. 14 (4), s. 20.* A mitta held by tenants in-common was sold for arrears of revenue at a time the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Regulation X of 1831, s. 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned. *Held*, on appeal, that the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management, and therefore s. 2 of Regulation X of 1831 did not affect the sale. KRISHNA *v.* MEKAMPERUMA. COLLECTOR OF SALEM *v.* MEKAMPERUMA **I. L. R. 10 Mad. 44**

37. ——— Payment of arrears of revenue through post office—*Act XI of 1859, s. 2—Payment by postal money-order.* Where the revenue of an estate was sent through the post office by a money-order in sufficient time, but it did not, owing to the negligence of the post office, reach the Collector in due time and the estate was sold for arrears of revenue. *Held*, that the sale was rightly held. Payment to the post office is not equivalent to payment to the Collector, and the post office cannot be considered as the agent of the Collector. BAIKANTHA NATH DUTT *v.* GUNGA PROSAD PUTNAYAK . . . **4 C. W. N. 103**

38. ——— Collector's order of exemption—*Act XI of 1859, ss. 18, 33.* A Collector's order under s. 18 of Act XI of 1859 for exempting an estate from sale for arrears of revenue must be an absolute exemption, and not an order having effect as an exemption or not, according to what may happen, or be done, afterwards. It must not depend on an act which may, or may not, be performed. The High Court having set aside a sale, as contrary to the provisions of Act XI of 1859, upon a ground other than that declared and specified in an appeal made to the Commissioner of Revenue against the order for the sale, the Judicial Committee, referring to s. 33 as prohibiting such a course, reversed the decision of the High Court. LALA GAURI SANKER LAL *v.* JANKI PERSHAD . . . **I. L. R. 17 Calc. 809 L. R. 17 I. A. 57**

39. ——— Exemption from sale of land under attachment by Collector—*Act XI of 1859, ss. 17, 25, 33—Beng. Act VII of 1868 —Suit to set aside sale—Bengal Cess Act (Beng. Act IX of 1880)—Omission to specify ground of objection in revenue appeal.* An estate sold for arrears of revenue had been previously brought to a judicial sale by a mortgagee, whose charge preceded that of a puisne incumbrancer, whom the present plaintiffs represented. It was not the consequence of the execution-sale that puisne incumbrancers, who were not parties to the prior mortgagee's suit, were displaced, or left with nothing but a claim against the surplus proceeds of the sale, if any ; and on the facts, the present plaintiffs had a mortgagee's interest in the estate sold by the Collector entitling them to sue to have the sale for default in payment of revenue set aside, as contrary to Act XI of 1859. A sale for arrears of revenue if for arrears which have accrued while the land has been subject to an order issued by the Collector under the Cess Act (Bengal Act IX of 1880), for the levy of road cess in arrear, is contrary to s. 17 of Act XI of 1859, such an order being an attachment within the meaning of that section. But under s. 33 of that Act, in every case where a sale for arrears of revenue is impeached, as being contrary to the provisions of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner under s. 25. The above provision in s. 33 applies where the sale has been irregularly conducted, and also where the sale has been illegal in consequence of an express provision for exemption o

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SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

the land from sale for arrears having been contravened. *Lala Gauri Sanker Lal* v. *Janki Pershad, I. L. R. 17 Calc. 809 : L. R. 17 I. A. 57*, referred to GOBIND LAL ROY *v.* RAMJANAM MISSER
I. L. R. 21 Calc. 70
L. R. 20 I. A. 165

40. ——— **Sunset law**—*Beng. Act VII of 1868, s. 11—Revenue Sale Law (Act XI of 1859), s. 6.* S. 11 of Bengal Act VII of 1868 makes the sunset law as enacted in s. 6 of Act XI of 1859 applicable to sales of tenures under the former Act. The refusal, therefore, of the Collector to accept payment of the amount due when tendered after sunset on the latest day for payment does not make the sale under Bengal Act VII of 1868 illegal. AZIMUDDIN PATWARI *v.* SECRETARY OF STATE FOR INDIA . . . **I. L. R. 21 Calc. 360**

41. ——— **Payment of arrears before sale without obtaining exemption from sale**—*Act XI of 1859, ss. 6, 13, 14, and 33—Proceedings when share of estate is not sold at auction-sale—Ground for annulling sale not declared and specified in appeal to Commissioner.* The plaintiffs and defendants were sharers in a certain estate, the plaintiffs being owners of a joint share, and the defendants the owners of other shares, in respect of which separate accounts had been opened in the Collector's register. The plaintiffs in March 1890 made default in the payment of Government revenue for their share, and it was advertised to be put up for sale on the 18th September 1890, under ss. 6 and 13 of Act XI of 1859, for recovery of the amount due, R18-6. On the 16th September the plaintiff paid into the treasury of the Collectorate the amount of arrears due, and made an application that the joint share might be exempted from sale ; receipts were given for the amount paid in, but no order was made on the application, and the share was not exempted from sale. On the 16th September the joint share was put up for sale, but there being no bids, the sale was postponed, and on the same day the Collector made an order under s. 14 of Act XI of 1859 that, unless the arrears were paid by the other sharers (the defendants) within ten days, the whole estate would be put up for sale. Notices of this order, provided for by a rule made under the Act by the Board of Revenue, were given to the serving peon on the 2nd October for service on the defendants, and the arrears were paid in by some of the defendants on the 4th and by others on the 7th October, and eventually the Collector, acting under s. 14 of the Act, granted on the 5th December 1890 a certificate] of purchase, and gave delivery of possession to the defendants. The plaintiffs appealed to the Commissioner, but their appeal was rejected on the 10th March 1891. In a suit for a declaration that the proceedings taken by the Collector under s. 14 of the Act were illegal and conveyed no title to the defendants, and for possession of the joint share with mesne profits :—

SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SATE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

Held, by PETHERAM, *C.J.*, and BEVERLEY, *J.* (AMEER ALI, *J.*, dissenting), that the Collector not having exempted the share from sale, the payment by the plaintiff of the arrears on the 16th September was no bar to the proceedings taken under s. 14 of the Act. *Held*, also, that the defendants' purchase was not made invalid by the fact of their not having paid in the arrears within ten days from the 18th September, the day fixed for the sale ; the ten days in s. 14 run from the time when notice of the Collector's order is given to the other sharers, and not from the date of the sale. *Held*, further, that it was not open to the plaintiffs to take this latter objection, as it was not declared and specified in their grounds of appeal to the Commissioner in accordance with s. 33 of the Act. *Gobind Lal Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70*, followed. *Per* AMEER ALI, *J.*, *contra*. *Per* PETHERAM, *C.J.*—S. 33 applies to sales under s. 14 as well as to sales by public auction under the Act. *Semble :* There is nothing in Act XI of 1859 which would have prevented the plaintiffs from purchasing the share themselves when it was put up for sale on the 18th September. *Per* BEVERLEY, *J.*—Under s. 6 of the Act, the sale, if it had taken place on the 18th September, would have conveyed a good title to the defendants ; and under s. 14 they are expressly declared to have " the same rights as if the share had been purchased by them at the sale." *Per* AMEER ALI, *J.*—The proceedings provided for by s. 14 do not apply in a case where there have been no bids at the sale. S. 33 is not applicable to a transfer by the Collector of the defaulting share under s. 14 ; the sale contemplated by s. 33 and referred to by the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70*, is a public sale held at a place prescribed by the proper authorities at which there are bidders and a possibility of competition. GOSSAIN CHUTTURBHOOJ DUT *v.* ISHRI MUL . . . **I. L. R. 21 Calc. 844**

42. ——— **Benami purchase for defaulting proprietors**—*Beng. Reg. XI of 1822—Void or illegal sale.* Under Regulation XI of 1822, a benami purchase for defaulting proprietors at a sale for arrears of revenue was not *ipso facto* illegal and void. KALEEDOSS MOOKERJEE *v.* MOTHOORANATH BANERJEE . . . **5 W. R. 154**

43. ——— **Fraudulent purchase by judgment-debtor**—*Act XI of 1859—Right of decree-holder.* In a suit to recover possession of a share of an estate on the ground of purchase at a sale in execution which share was alleged to have been knocked down by the Collector to another party in an execution sale under Act XI of 1859, where it was found that the plaintiff's purchase had not been *bonâ fide*, the right, title, and interest of the decree-holder having been previously purchased benami by the judgment-debtor himself :—*Held*, that the real purchaser was the judgment-debtor, and that the holder of the rent-decree could

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SALE FOR ARREARS OF REVENUE— *contd.*

8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

properly sell either the estate of the said right, title, and interest. LALLA JUGGESSUR SAHOY *v.* GOPAL LALL . . . . **15 W. R. 54**

44. ——— Failure of consideration— *Suit to set aside sale and recover purchase-money on the ground that subject of sale was alluvial land and practically non-existent.* An estate does not necessarily mean land but may denote julkur, phulkur, or bunkur rights, and even where land has been entirely washed away there still remains the right to possession of any alluvion that may subsequently reappear on the same site, which right may, in accordance with the Privy Council decision in *Lopez* v. *Muddun Mohun Thakoor, 13 Moo. I. A. 467*, be sold as an estate. A suit, therefore, by a purchaser of such an estate to have the sale set aside and recover his purchase-money, on the ground that the subject of his purchase was non-existent at the time of sale, and had since remained so, was held to be not maintainable. GOVERNMENT *v.* RADHAY SINGH . . **20 W. R. 117**

45. ——— Award of compensation to purchaser— *Sale set side under Beng. Reg. I of 1821.* A sale in 1802 of lands for arrears of Government revenue was set aside by the mofussil and sudder commissions constituted under Bengal Regulation I of 1821, although no suit was brought to annul the sale until 1821; and the decision was affirmed by the Judicial Committee. But the sale having taken place by direction of the Government, and there being no fraud on the part of the purchaser, the Judicial Committee, under cl. 2. s, 4 of Regulation I of 1821, awarded the purchaser compensation to be paid by the Government. ISHUREE PERSAD NARAIN SINGH *v.* LAL CHUTTERPUT SINGH **3 Moo. I. A. 100**

S.C. DEEP NARAIN SINGH *v.* LAL CHUTTERPUT SINGH . . . . **6 W. R. P. C. 27**

46. ——— Revenue sent by money-order—Mistake— *Estate, wrong description of —Revenue in arrear—Revenue Sale Law (Act XI of 1859), ss. 8, 20, 33—Land Revenue rules in the Land, Revenue and Cesses in Bengal, rule 29—Jurisdiction.* Where the actual amount of revenue remitted by money-order reached the Collectorate in time, but the remitter made a mistake in the towji number and the name of the registered proprietor, but was right as to the name of estates and the amount of revenue payable in respect thereof: *Held*, that it was the duty of the officers of the Collectorate to rectify the mistake under rule 29 of the Land Revenue Rules, and not to put up the property to sale which, if held, would be without jurisdiction and ought to be set aside. *Bal Krishna Das* v. *Simpson, I. L. R. 26 Calc. 883; L. R. 25 I. A. 151*, referred to. HAMID HOSSEIN *v.* MUKHDUM REZA (1905) . **I. L. R. 32 Calc. 229 9 C. W. N. 306**

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8. SETTING ASIDE SALE—*contd.*

(*b*) OTHER GROUNDS—*contd.*

47. ——— Irregularity— *Separate shares, sale of—Act XI of 1859, ss. 5, 6, 13, 25, 32—Equitable relief—Fraud—Irregularity—Notice—Description of property—Appeal to Commissioner, specification of grounds in.* No revenue sale can be set aside on the ground of fraud, when the sale would have taken place whether or not the fraud had been committed; nor can the equitable relief of reconveyance to the party affected by the fraud be enforced against the auction-purchasers, when some of them are innocent and *bonâ fide* purchasers. *Amirunessa Khatoon* v. *The Secretary of State for India, I. L. R. 10 Calc. 63*, followed. *Bhoobun Chander Sen* v. *Ram Soonder Surma Mozoomdar, I. L. R. 3 Calc. 300*, distinguished. An erroneous entry of the name of a proprietor in a notice under s. 6 of Act XI of 1859 does not vitiate a sale. *Ram Narain Koer* v. *Mahabir Pershad Singh, I. L. R. 13 Calc. 208*, followed. The non-issue of a notice under s. 5 of Act XI of 1859 is a mere irregularity, which does not make a sale a nullity nor shall the sale be annulled upon such ground under s. 33 of that Act unless such ground should have been specified in the appeal to the Commissioner. *Balkishen Das* v. *Simpson, I. L. R. 25 Calc. 833 : L. R. 25 I. A. 151*, and *Gobind Lal Roy* v. *Ramjanam Misser, I. L. R. 21 Calc. 70 : L. R. 20 I. A. 165*, followed. *Mohabeer Pershad Singh* v. *The Collector of Tirhoot, 15 W. R. 137*, dissented from. DEONANDAN SINGH *v.* MANBODH SINGH (1905) **I. L. R. 32 Calc. 111**

(*c*) PARTIES.

48. ——— Secretary of State, if a necessary party— *Act XI of 1859, s. 33—Patnidar's right to sue.* In an action to set aside the sale of an estate for arrears of revenue, the Secretary of State is not a necessary party. *Balkishen Das* v. *Simpson, I. L. R. 25 Calc. 833*, and *Bal Mokoond Lall* v. *Jirjudhun Roy, I. L. R. 9 Calc. 271*, relied upon. The wording of s. 33 of Act XI of 1859 is not restrictive so as to debar a person, who has in the property sold a substantial interest which is liable to be affected by the sale, from instituting a suit to set aside the sale. *Robert Watson* v. *Sreemunt Lal Khan, 5 Moo. I. A. 447*, and *Gobind Lal Roy* v. *Biprodas Roy, I. L. R. 17 Calc. 398*, followed. A *patnidar* is therefore entitled to institute such a suit. JAHNNOVI CHOWDHARANI *v.* SECRETARY OF STATE FOR INDIA (1902) **7 C. W. N. 377**

9. MISCELLANEOUS CASES.

1. ——— Act XI of 1859, s. 5— *Effect of notification under Act—Attachment.* A notification issued under s. 5, Act XI of 1859, is simply a public call on the debtor to pay his debt by a fixed date; it does not operate as an attachment by the

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9. MISCELLANEOUS CASES—*concld.*

Civil Court. NURKOO RAM *v.* RAMJOORAWUN SINGH . . . . . **9 W. R. 481**

2. ——— **Transfer of tenure from one Collectorate to another**—*Payment of revenue—Notice of transfer.* If a tenure is transferred from one Collectorate to another, and the holder of the tenure, after receiving notice of the transfer, continues to pay his revenue into the former Collectorate, he is not entitled to take credit for such payment. But if he pays before notice and obtains a receipt, such receipt is a quittance as against Government. THAKOOR CHURN ROY *v.* COLLECTOR OF 24-PERGUNNAHS . **13 W. R. 336**

3. ——— **Act XI of 1859, s. 31**—*Recorded proprietor, Representative of—Execution of decree—Purchaser in execution of decree—Revenue sale—Deposit—Assignee.* S. 31 of Act XI of 1859 must be read strictly. An assignee of the recorded proprietors is not their representative within the meaning of that section, and the Collector is justified in refusing to pay to such assignee, claiming on his own behalf, money held in deposit on account of the recorded proprietors. SECRETARY OF STATE FOR INDIA *v.* MARJUM HOSEIN KHAN **I. L. R. 11 Calc. 359**

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See LIMITATION ACT, 1877, SCH. II, ARTS. 178, 179 . I. L. R. 30 Mad. 209

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I. L. R. 27 Bom. 266
I. L. R. 13 Mad. 504
I. L. R. 11 Bom. 473

See MORTGAGE—SALE OF MORTGAGED PROPERTY.

See ONUS OF PROOF—SALE IN EXECUTION OF DECREE.

See PLEADER—PURCHASE BY PLEADER AT SALE IN EXECUTION OF DECREE
4 B. L. R. A. C. 181
I. L. R. 10 Mad. 111
I. L. R. 15 Mad. 389

See PRE-EMPTION—RIGHT OF PRE-EMPTION . . I. L. R. 1 All. 272, 277
6 N. W. 243, 272
7 N. W. 97, 281
I. L. R. 2 All. 850
I. L. R. 3 All. 112, 827
15 W. R. 455

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT . I. L. R. 1 All. 353, 547
I. L. R. 4 Calc. 925
22 W. R. 169
I. L. R. 2 All. 451
I. L. R. 26 Calc. 727

See RIGHT OF SUIT—
FRAUD . I. L. R. 29 Calc. 395
SALE IN EXECUTION OF DECREE.

See SHERIFF—SALE BY SHERIFF.
I. L. R. 27 Calc. 264

See TRANSFER OF PROPERTY ACT, S. 99.
I. L. R. 35 Calc. 61

See WAIVER . 11 C. W. N. 848

——— mortgaged property—

See MORTGAGE—SALE OF MORTGAGED PROPERTY.

See SALE FOR ARREARS OF RENT—SETTING ASIDE SALE—GENERAL CASES.
I. L. R. 29 Calc. 1

——— setting aside sale—

See CIVIL PROCEDURE CODE, 1882, S. 244—
QUESTIONS IN EXECUTION OF DECREE . 6 C. W. N. 279, 283
PARTIES TO SUIT . 6 C. W. N. 127

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SALE IN EXECUTION OF DECREE— *contd.*

——— setting aside sale—*concld.*

See HINDU LAW—ENDOWMENT—ALIENATION OF ENDOWED PROPERTY.
6 C. W. N. 663

See SALE FOR ARREARS OF RENT—SETTING ASIDE SALE—GENERAL CASES.
I. L. R. 29 Calc. 1

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.
6 C. W. N. 836

1. PLACE OF SALE.

1. ——— **Place of holding the sale—***Sale of moveable property in execution of decree—Practice.* Under the Code of Civil Procedure (Act XIV of 1882), it is intended that a sale of moveable property attached in execution of a decree should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons must be shown for directing otherwise. Where the only ground urged for directing a sale outside the Court's jurisdiction was that the property would probably fetch a better price, and it was found by the Court that a fair sale could be had on the spot:—*Held,* that no sufficient reason was shown for departing from the usual practice. LAKSHMIBAI *v.* SANTAPA REVAPA SHINTRE
I. L. R. 13 Bom. 22

2. PERSON SELLING PROPERTY OF WHICH HE IS NOT, BUT AFTERWARDS BECOMES, OWNER.

1. ——— **Obligation to make good the sale out of subsequently-acquired interest—***Vendor and purchaser.* The doctrine—that where a person sells property of which he is not the owner, but of which he afterwards becomes the owner, he is bound to make good the sale to the purchaser out of his subsequently-acquired interest—does not apply to a case where the sale was made through the Court at the instance of an execution-creditor, and was therefore compulsory. ALUKMONEE DABEE *v.* BANEE MADHUB CHUCKERBUTTY
I. L. R. 4 Calc. 677 : 3 C. L. R. 473

3. OBJECTION TO SALE.

1. ——— **Dispossession of third party in execution—***Resistance or obstruction by stranger on delivery to auction-purchaser—Civil Procedure Code, 1859, s. 269.* There was no provision in the Civil Procedure Code, 1877, similar to that contained in s. 269 of Act VIII of 1859, which enabled the Court executing a decree to inquire into a complaint made by a person other than the defendant, on the ground of dispossession in the delivery of possession to the purchaser of immoveable property sold in execution of a decree; and therefore the only remedy of a person so dispossessed was by regular suit. *A*, a decree-holder, purchased certain property belonging to *B*, his judgment-debtor, at a sale, in execution of his decree, and delivery of possession to him was ordered. A stranger to the suit thereupon presented a petition to the Court executing the decree, setting up a title to a moiety of the property in question, and prayed for an investigation into his right, and for recovery of possession, on the ground that he had been dispossessed by *A*. *Held,* that the application could not be maintained. HARASATOOLLAH *v.* BROJONATH GHOSE
I. L. R. 3 Calc. 729 : 1 C. L. R. 517

[This omission is now rectified, and under the Civil Procedure Code, 1882, the Court has power to make an inquiry on the application of a third party dispossessed in execution.]

2. ——— **Decree, impeachment of, by a stranger as fraudulent—***Civil Procedure Code (Act XIV of 1882), s. 287.* In the execution of a decree ordering the sale of immoveable property it is not competent for the Court to refuse to sell it because a stranger to the suit in which such decree was obtained, who is in possession of such property, impeaches the decree as having been obtained by fraud; the course open to him, if he wishes stay of execution, being to file a suit and obtain an injunction for that purpose. PURSHOTTAM VITHAL *v.* PURSHOTTAM ISWAR . **I. L. R. 8 Bom. 532**

3. ——— **Objection subsequently taken by the judgment-debtor that the property sold was not legally saleable—***Civil Procedure Code, ss. 311, 312 and 313—Execution of decree—Sale in execution—Estoppel. Held,* that a judgment-debtor who might have raised objections to a sale in execution of a decree against him, but who have refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable. *Ramchhibar Misr* v. *Bechu Bhagat, I. L. R. 7 All. 641,* and *Durga Charan Mandal* v. *Kali Prasanna Sarkar, I. L. R. 26 Calc. 227,* followed. UMED *v.* JAS RAM (1907) . . **I. L. R. 29 All. 612**

4. STAY OF SALE.

1. ——— **Stay of sale in regard to a particular property—***Other property of judgment-debtor.* To save a particular property from sale, a judgment-debtor must show the value and condition of other properties in her possession, and the Judge must consider how and by what arrangement such a disposal of different portions of such property may be made so as to avoid the sale of the property already attached. DEB KUMARI BIBEE *v.* RAM LALL MOOKERJEE
3 B. L. R. Ap. 107 : 12 W. R. 66

2. ——— **Stay of sale pending administration suit—***Mortgage decree—Right of secured creditor.* In execution of a decree on a mortgage-bond executed by the father of the judgment-

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SALE IN EXECUTION OF DECREE— *contd.*

4. STAY OF SALE—*contd.*

debtors, since deceased, which decree directed that the mortgage-lien should be enforced, first, by sale of the property specifically mortgaged; and, secondly, if the debt remained unsatisfied by the sale of the other property in the possession of the judgment-debtors, the judgment-creditor proceeded to have the property sold. After issue of the sale notification, one of the judgment-debtors applied for stay of the sale, on the ground that an administration suit was pending with respect to the property of his father, the mortgagor, and also asked that a receiver be appointed and arrangements made for paying off the mortgage-debt and saving the property from sale. *Held*, that the Court was wrong in passing such order, inasmuch as there were no reasonable grounds why a secured creditor should be debarred from enforcing his security pending the administration suit. KRISTOMOHINY DOSSEE *v.* BAMA CHURN NAG CHOWDRY
I. L. R. 7 Calc. 733 : 9 C. L. R. 344

3. ——— **Tender of debt by transferee of property**—*Civil Procedure Code, s. 291. Held*, that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under s. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money and stop the sale. BEHARI LAL *v.* GANPAT
I. L. R. 10 All. 1

4. ——— **Civil Procedure Code, ss. 276, 305.** S. 305 of the Civil Procedure Code (which enables the Court in certain cases to stay the sale of immoveable property to enable the debtor to raise the amount of the decree by mortgage, lease, or private sale of the property) contemplates a mortgage or lease of private sale only where "the amount of the decree can be thus provided for." A Court executing a decree can neither grant a certificate under this section, nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full. It is not sufficient that after grant of certificate a mortgage by the judgment-debtor is, as between him and his mortgagee, *bonâ fide*, nor can it affect the lien acquired by the judgment-creditor under s. 276. GURUSAMI *v.* VENKATSAMI **I. L. R. 14 Mad. 277**

5. ——— **Payment into Court of decretal money and costs**—*Transfer of Property Act (IV of 1882), s. 90—Execution of decree—Stay of sale.* Where the sale of mortgaged property has been directed by an order absolute under s. 8 of the Transfer of Property Act, 1882, it is open to the person holding the equity of redemption in such property to pay into Court at any time before the sale the amount of the decretal debt and costs, and thereupon the execution-proceedings will cease. It is not necessary that the person holding the

SALE IN EXECUTION OF DECREE— *contd.*

4. STAY OF SALE—*concld.*

equity of redemption should wait, until the property is actually put up for sale. *Raja Ram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205*, and *Harjas Rai* v. *Rameshar, I. L. R. 20 All. 354*, followed. *Bibijan Bibi* v. *Sachi Bewah, I. L. R. 31 Calc. 863*, referred to. MISRI LAL *v.* MITHU LAL (1905)
I. L. R. 28 All. 28

5. IMMOVEABLE PROPERTY.

1. ——— **Interest in decree against mortgaged property**—*Civil Procedure Code, 1859, s. 259—Sale of decree—Interest in immoveable property.* A decree for the sale of mortgaged property was attached and sold in execution of a decree. *Held*, that the interest in immoveable property thereunder conveyed to the purchaser was immoveable property within the meaning of s. 259 of Act VIII of 1859, and that certificate of sale ought to have been granted to the purchaser. HARI GOVIND JOSHI *v.* RAMCHANDRA PANDURANG JOSHI
9 Bom. 64

2. ——— *Decree creating charge on land—Interest in immoveable property.* The sale of a decree charging land for its satisfaction in the course of execution-proceedings against the judgment-creditor is a sale of an interest in immoveable property. *Held*, that the provisions of the Code of Civil Procedure relating to sales of immoveable property will apply to such sale. BHAWANI KUAR *v.* GHULAB RAI . . . **I. L. R. 1 All. 348**

MOBKOONISSA *v.* DEWAN ALI MISTREE
4 W. R. Mis. 22

3. ——— *Civil Procedure Code (Act XIV of 1882), ss. 235, 247, 284, 287—Execution of decree, application for sale of tenure in—Incumbrance, notification of existence of—Incumbrance—Arrears of rent due in respect of the tenure—Rules made by the High Court—Omission to state existence of arrears of rent, effect of—Costs recoverable by judgment-debtors against decree-holder; inclusion of, in application for execution, effect of—Liability of hypothecated property on release of principal by acts of landlord.* Although there is no express provision in the Code of Civil Procedure casting on the decree-holder the duty of notifying incumbrances on any property sought to be brought to sale, the rules made by the High Court under the provisions of s. 287 of the Code cast on him the duty of notifying the existence of arrears of rent due to him in respect of the property which he seeks to bring to sale. An arrear of rent due in respect of the property sought to be sold is to be regarded as one of the matters to be notified, as being material for the purchaser to know in order to judge of the nature and value of the property; and the omission of the decree-holder to notify such arrear due to him at the date of the issue of the proclamation for the sale of the property has the effect of destroying the

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SALE IN EXECUTION OF DECREE— *contd.*

5. IMMOVEABLE PROPERTY—*concld.*

lien he has upon the property. *Nursing Naran Singh* v. *Roghoobur Singh, I. L. R. 10 Calc. 609*, and *Kasturi* v. *Venkatachalapathi, I. L. R. 15 Mad. 412*, referred to and followed. Under s. 247 of the Code of Civil Procedure, all that the decree-holder is entitled to enforce execution of is the difference between the amount found recoverable by him and the amount which the judgment-debtor is entitled to recover against him. When a decree-holder loses his remedy to enforce his decree for arrears of rent by the sale of the property in default, by reason of his own negligence, laches and acts, he cannot be allowed to enforce it as against a third party into whose hands the property passes at the sale, and to make any property hypothecated for the rents liable for the whole amount due to him when, by the security bond, the hypothecated property is made liable only for so much of the arrears due as may not be realized by the sale of the property in default. GIRIBALA DEBIA *v.* MINA KUMARI (1900) . . . **5 C. W. N. 497**

4. ——— **Property to be sold, ancestral in part only**—*Execution of decree—Transfer of decree to Collector—Notification (Local Government) No. 671, dated August 31st, 1880. Held,* that where the Civil Court is satisfied that the land, which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only. AHMAD GHAUS KHAN *v.* LALTA PRASAD (1906) . . . . **L. L. R. 28 All. 631**

5 (*a*). IMPARTIBLE ESTATE.

5. ——— *Sale of "right, title and interest" of holder of impartible zamindari and member of joint family governed by Mitakshara law—Subsequent reversal of interpretation of law under which sale was held—Change in nature of interest owned by holder of impartible estate—Change of law whether retrospective—Effect of sale under new interpretation of law.* In execution of a decree against the holder (by custom of primogeniture) of an impartible zamindari, who was a member of a joint family governed by the Mitakshara law, his "right, title and interest" in the estate was sold in 1876. By the law as then interpreted such a holder had only a limited interest, and except for special justifiable causes (of which the debt on which the above decree was obtained was not one) no power of alienation beyond his lifetime. Subsequently this interpretation of the law was reversed by the Judicial Committee in the cases of *Sartaz Kuari* v. *Deoraj Kuari, L. R. 15 I. A. 51 : I. L. R. 10 All. 272*, and *Rao Venkata Surya Mahipati* v. *Court of Wards, L. R. 26 I. A. 83 : I. L. R. 22 Mad. 383*, which decided that the holder of an impartible estate had an absolute interest in it, and made it alienable, unless a custom against alienation were proved. In a suit by a purchaser at the sale against the successor by survivorship to the judgment-debtor for possession of the subject of sale, on

SALE IN EXECUTION OF DECREE— *contd.*

5 (*a*). IMPARTIBLE ESTATE—*concld.*

the ground that the plaintiff had purchased an absolute interest in it:—*Held,* that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood and that only the life-interest of the then holder passed by the sale. ABDUL AZIZ KHAN *v.* APPAYASAMI NAICKER (1904) **I. L. R. 27 Mad. 131**

6. BIDDERS.

1. ——— **Withdrawal of bid**—*Civil Procedure Code, 1882, s. 290.* It is competent to a bidder at a Court auction-sale to withdraw his bid. AGRA BANK *v.* HAMLIN . **I. L. R. 14 Mad. 235**

7. PURCHASERS, RIGHTS OF.

(*a*) GENERALLY.

See ACCRETION—RIGHT OF PURCHASERS TO ACCRETIONS.

1. ——— **What passes by sale**—*Sale under money-decree—Right, title, and interest of judgment-debtor.* Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment-debtor at the time of the sale. AKHE RAM *v.* NAND KISHORE . . . . **I. L. R. 1 All. 236**

KHUB CHAND *v.* KALIAN DAS **I. L. R. 1 All. 240**

BARTON *v.* BRIJONATH SURMAH . **3 W. R. 65**

RAM ONOOGROHO SINGH *v.* MONTORUN **W. R. 223**

SETH OODEY KURRUN *v.* CHAIT RAM **2 Agra 125**

JYKISHOON SOOKUL *v.* SHUNKUR SOOKUL **3 Agra 168**

ZALIM *v.* CHOONEE LALL . . **3 Agra 194**

BHUKAN BHAIBAVA *v.* BHAIJI PRAG **1 Bom. 19**

2. ——— *Sale under Bom. Reg. IV of 1827—Right, title, and interest of judgment-debtor.* All that passed under a Court's sale under Bombay Regulation IV of 1827 was the right, title, and interest of the judgment-debtor whose property was proclaimed for sale. KUSHABA BIN SANKROJI *v.* PITAMBARDHARI . **12 Bom. 15**

3. ——— *Property sold with specification—Rights of judgment-debtor.* Though there is a specification of the subject of sale at the time of sale, yet it is not the property specified, but only the right of the judgment-debtor therein, that is offered for sale and is conveyed, there appearing no provisions in the Procedure Code to contemplate the sale or transfer of anything more than the right and interest of the judgment-debtor;

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SALE IN EXECUTION OF DECREE—*contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*a*) GENERALLY—*contd.*

and the auction-purchaser at a sale in execution acquires by the express terms of the conveyance to him not the presumed title of the person in possession, or the apparent title in the Collector's books, but the right, title, and interest of the judgment-debtor in the property sold. MAHOMED BUKSH *v.* MAHOMED HOSSEIN
3 Agra 171 : Agra F. B. Ed. 1874, 145

See BALUK DOSS *v.* NIMAYE CHUNDER SIRCAR . . **. 17 W. R. 511**

4. ——— *Description of property in specification under s. 237 of Civil Procedure Code on application for attachment—Execution against joint family property.* The specification required by s. 237 of the Civil Procedure Code of the judgment-debtor's share or interest in immoveable property sought to be attached should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share which was sought to be attached and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property the Court would hold, unless something to the contrary appeared, that the sale was of that share and interest only. MUHAMMAD HUSAIN *v.* DIP CHAND . . . **I. L. R. 14 All. 190**

5. ——— *Sale of rights and interests in mouzah consisting of two mehals—Submersion of mehal at time of sale—Sale-certificate not specifically mentioning submerged mehal—Passing of rights in submerged mehal to purchaser.* The rights and interests of certain judgment-debtors in a mouzah consisting of two separate mehals, respectively known as the Uparwar mehal and the Kachar mehal, were brought to sale in execution of the decree. At the time of the sale the Kachar mehal was submerged by the river Ganges, and in the sale-notification the revenue assessed upon the Uparwar mehal only was mentioned, and there was no specific attachment of the Kachar or submerged land, but the property was sold as that of the judgment-debtors in the mouzah. Subsequently the river having receded, the auction-purchaser attempted to obtain possession of the Kachar land, but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale, but only their rights and interests in the Uparwar mehal. *Held*, that either the whole rights of the judgment-debtors in both mehals were sold, or, if not, their rights in the Uparwar mehal with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mehal; and the mere fact of the mention in the sale-notification of the revenue of the Uparwar mehal did not affect what passed by the sale. *Held*, also, that the attachment of the judgment-debtors' entire proprietary rights in the mouzah included their interests in both mehals and the sale-certificate clearly showed that all their rights in the village were passed to the purchaser. *Mahadeo Dubey* v. *Bholanath Dichit, I. L. R. 5 All. 86*, and *S. A. No. 818 of 1885*, referred to. *Fida Husain* v. *Kutab Husain, I. L. R. 7 All. 38*, dissented from. MUHAMMAD ABDUL KADIR *v.* KUTUB HUSAIN. KUMAL-UD-DIN AHMAD *v.* KUTUB HUSAIN
I. L. R. 9 All. 136

6. ——— *Increase of judgment-debtor's interest occurring after attachment and before sale.* Previously to a mortgage of it, a fractional interest in certain property (which interest was purchased by the plaintiff, the mortgagee, at a judicial sale) had been the subject of a settlement by a Mahomedan on his wife under the conditions that, if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held*, that the two sons had taken definite interests capable of being attached within s. 266 of the Civil Procedure Code, not being mere expectancies. *Held*, that a judicial sale of property, purporting to be of all the interest of a judgment-debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale; and that accordingly the above-mentioned settlor having died without a child by that wife, between the date of the attachment and the sale, the sons' augmented interests passed thereby. UMES CHUNDER SIRCAR *v.* ZAHUR FATIMA . **I. L. R. 18 Calc. 164**
L. R. 17 I. A. 201

7. ——— *Civil Procedure Code (Act XIV of 1882), s. 274, cl. (c)—Rights of purchaser of mortgage-bond at sale in execution of decree.* Where a person at an execution-sale purchases a mortgage-bond under which certain immoveable property is given as collateral security for an advance, the fact that he has not attached under s. 274 of the Code will not affect his right to have the collateral security enforced by the sale of the properties mortgaged. KASINATH DAS *v.* SADASIV PATNAIK . **I. L. R. 20 Calc. 805**

8. ——— *Sale of raiyat's interest—Want of zamindar's consent to alienate.* An auction-purchaser of a raiyat's right and interest in his house in a village could not acquire more title than could have been transferred by private sale, and therefore if by the village custom the raiyat cannot alienate the house with the zamindar's consent, and such consent has not been obtained, the sale in execution conveys no rights in it to the purchaser. SHIB LALL *v.* LOCHUN SINGH . **3 Agra Rev. 7**

9. ——— *Sale of specified share—Property coming to debtor before sale.* When there was a sale of a specified share belonging

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SALE IN EXECUTION OF DECREE— *contd.*

7. PURCHASERS, RIGHTS OF—*condt.*

(*a*) GENERALLY—*contd.*

to the judgment-debtor:—*Held*, that the auction-purchaser was not entitled to claim property which had before sale descended to the judgment-debtor. AZADEE *v.* AJMERE KOONWER . **1 Agra 282**

10. _____ *Interest in purchase-money—Civil Procedure Code, 1877, s. 266—Property not subject to attachment and sale.* The purchaser at a sale in execution of a decree of the right or interest which the vendor of immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, takes nothing by his purchase, such interest not being subject to attachment and sale under s. 266, Civil Procedure Code, 1877. AHMAD-UDDIN KHAN *v.* MAJLIS RAI **I. L. R. 3 All. 12**

11. _____ *Right to mesne profits—Civil Procedure Code (Act VIII of 1859), s. 259—Certificate of sale.* The possession, with mesne profits, of land comprised in a zur-i-peshgi lease of the year 1851 was decreed to the zur-i-peshgidars in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favour of their representatives. In 1869 one of the parties to that litigation obtained a decree for money against the zur-i-peshgidars; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter in the lease of 1851 was sold to a third party. *Held* (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by the sale, but remained in the representatives. GANESH LALL TEWARI *v.* SHAMNARAIN **I. L. R. 6 Calc. 213**

12. _____ *Life-interest in property of testator.* A life-interest in the residue of the real and personal property of a testator, after all the charges upon it have been satisfied and provided for, and after a full administration has taken place of the assets for the purpose of discharging these several dispositions, cannot be sold under an execution issued in the Supreme Court against the property of the testator. The sale therefore passes nothing to the purchaser. TOKAI SHEROR *v.* DAUOD MULLICK FUREEDOON BEGLAR **4 W. R. P. C. 87 : 6 Moo. I. A. 510**

13. _____ *Sale of legacy under writ against executor.* A seizure and sale by the Sheriff of the amount of a legacy under a writ against the executor, declared invalid in the absence of proof of payment extinguishing the legatee's interest. LAZAR *v.* COLLA RAGAVA CHETTY **5 W. R. P. C. 126 : 2 Moo. I. A. 83**

14. _____ *Right and interest of proprietor of resumed revenue-paying estate.* By a sale in execution of the rights and interests of a judgment-debtor as recorded proprietor of a

SALE IN EXECUTION OF DECREE— *contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*a*) GENERALLY—*contd.*

Government resumed revenue-paying estate, released rent-free lands lying in the estate do not pass to the purchaser. DOL GOBINDMONY DEBIA *v.* IMDAD ALI . . . . **5 W. R. 170**

15. _____ "*Right, title, and interest*" *of a judgment-debtor in a partly-executed decree—Possession of land attached under Beng. Reg. V of 1812, s. 26.* A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a talukh which had been since 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Regulation V of 1812. The Court which granted the decree, intending to execute it, approved the proceedings of an Ameen purporting to put the decree-holders into constructive possession of a certain number of mouzahs of the talukh. In 1850 the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, their "right, title, and interest" in the decree of 1843. *Held* (affirming the judgment of the High Court), that possession of the mouzah having been delivered, so far as it could be delivered, considering the attachment to which the talukh containing these mouzahs was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution sale was only the unexecuted portion of the decree of 1843. GRISHCHUNDER CHUCKERBUTTY *v.* JIBANESWARI DABIA. GRISHCHUNDER CHUCKERBUTTY *v.* BISESWARI DEBIA **I. L. R. 6 Calc. 243 : 7 C. L. R. 420**

16. _____ *Sale of right, title, and interest of zamindar—Impartible primogenitary zamindari—Interest taken by purchase.* In 1873 and 1876, portions of an impartible primogenitary zamindari, which were in the possession of a lessee from the zamindar, were attached and brought to sale in execution of decrees against the zamindar. The purchase-money was very inadequate as the price of the full ownership of the property (subject to the lease), but what was sold according to the sale-certificate was the right, title, and interest of the judgment-debtor without any restriction. The judgment-debtor died in 1881, and the lease having run out, the purchaser now sued in 1893 for possession. *Held*, that the plaintiff must be taken to have purchased an interest for the life only of the judgment-debtor. ABDUL AZIZ KHAN SAHIB *v.* APPAYASAMI NAICKAR . . . **I. L. R. 22 Mad. 110**

17. _____ *Sale of rights of deceased debtor whose representatives hold certificate of administration.* In cases where the right of inheritance really vests, the purchaser of the rights of a deceased judgment-debtor, whose representatives hold under a certificate under Act XXVII of 1860, does not acquire the entire estate, but acquires

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SALE IN EXECUTION OF DECREE—*contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*a*) GENERALLY—*contd.*

it subject to all legal and equitable rights of inheritance. SHAM COOMAR ROY *v.* JUTTUN BIBEE **14 W. R. 448**

RAJKRISTO SINGH *v.* BUNGSHEE MOHUN **14 W. R. 448 note**

18. ——— *Sale of zamindari rights—Building appurtenant to zamindari rights.* The "rights and interests" of a zamindar in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property *qud* zamindar: *Held*, that, in the absence of proof that such building was excluded from sale, the sale of his "rights and interest" in the village passed such building to the auction-purchaser. ABU HASAN *v.* RAMZAN ALI . **I. L. R. 4 All. 381**

19. ——— *Sale of house and lands to different purchasers—Decree-holder, purchase of land by, and sale of house to third person.* Where a decree-holder who had attached certain land and a house upon it caused the land to be sold in execution and purchased it, and then caused the house to be sold to a third party:—*Held*, that he had purchased the land on which the house stood, subject to the right of the person who bought the house to have it continued there. MOOKTA SOONDUREE CHOWDHRAIN *v.* MUTHOORANATH GHOSE . . . . . **22 W. R. 209**

20. ——— *Sale of property with incumbrances—Right, title, and interest of debtor.* The purchaser at a Court's sale buys only the right, title, and interest of the debtor, burdened with all valid liens such as a previous san mortgage. *Mathuradas Ranchoddas* v. *Kalia Khushal, 7 Bom. A C. 24*, and *Chintaman Bhaskar* v. *Shivram Hari, 9. Bom. 304*, followed. RANCHODDAS DAYALDAS *v.* RANCHODDAS NANABHAI . **I. L. R. 1 Bom. 581**

21. ——— *Interest adverse to judgment-debtor—Effect of sale—Incumbrances by debtor after attachment.* Under an execution sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all the alienations and incumbrances effected by him after the attachment of the property sold. DINENDRONATH SANNIAL *v.* RAMKUMAR GHOSE. TARAKCHANDRA BHUTTACHARJEE *v.* BAIKANTNATH SANNIAL **I. L. R. 7 Calc. 107 : 10 C. L. R. 281 L. R. 8 I. A. 65**

BHUGOBAN CHUNDER DOSS *v.* LALLA THAKOOR PERSHAD . . . . . **W. R. 1864, 359**

22. ——— *Sale free of decree-holder's interest—Reservation of rights.* When a judgment-debtor's property is sold at the instance of the judgment-creditor, the sale, whether directed by the decree or not, must be a sale free of the judgment-creditor's rights in the property, unless these are reserved. DOOLEE CHUND *v.* OOMDA BEGUM . . . . . **24 W. R. 263**

See DULLAB SIRKAR *v.* KRISHNA KUMAR BAKSH **3 B. L. R. 407 : 12 W. R. 303**

23. ——— *Prior right of former purchaser at unconfirmed sale—Laches.* The purchaser at a Court's sale buys only the then existing right, title, and interest of the judgment-debtor, and therefore ordinarily takes, subject to the prior right, contingent on confirmation, of a former purchaser, though such former purchase be confirmed subsequently to his own. *Quære*: Whether the case might not be different if the delay in the confirmation of the former purchase were accompanied by great laches on the part of first purchaser, or by other special circumstances. KONAPA BIN MAHADAPA *v.* JANARDAN SUKDEV **11 Bom. 193**

24. ——— **Effect of sale**—*Right of purchaser as compared with purchaser by private sale—Right as against charges on estate sold.* A purchaser at a judicial sale is in a position different from that of a mere representative of the old proprietor, or of one who comes in by a voluntary sale made by the latter. A judicial sale transfers to the purchaser the property of the judgment-debtor against the debtor's will, and places the purchaser in a higher position than that which the judgment-debtor, by any private alienation, could confer on him. Such a purchaser is competent to defend his possession and title by showing that the charge which it is sought to establish against the estate is fraudulent and collusive, and therefore void. OOMRAO SINGH *v.* SHIMBOO NATH . **2 N. W. 38**

25. ——— *Purchase subject to decree for sale—Incumbrance.* A decree-holder having attached certain property in the execution of a decree, *R* appeared as an objector. The decree-holder was referred to a civil suit, and obtained a decree for the sale of the property in satisfaction of the former judgment-debt. *A* then sued the judgment-debtor for the return of certain alleged consideration-money and obtained a decree, in execution of which he brought to sale and became purchaser of the same property of which the sale had been decreed as above-mentioned. *Held*, that *N* could only purchase the property subject to the decree for sale, and that the transactions subsequent to that decree had no effect to shake it off. NIRUNJUN RAI *v.* RUJJOO RAI . **5 N. W. 166**

See SOORAJ BUKSH *v.* RAMJEEAWUN . **4 N. W. 5**

26. ——— *Fraudulent alienations before decree.* An auction-purchaser can question the fraudulent acts and alienations of the old proprietor in fraud of the decree. BAICHOO *v.* HOWARD . . . . . **3 Agra 15**

DEWAN ROY *v.* RIDDELL . **9 W. R. 521**

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SALE IN EXECUTION OF DECREE— *contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*a*) GENERALLY—*concld.*

27. ——— *Fraudulent award, right of purchaser to contradict.* The *locum tenens* of a purchaser at a sale in execution of a decree is not bound by an award in fraud of the decree to which the judgment-debtors were parties. ALFATUN *v.* RAO KARAN SINGH . **7 N. W. 362**

28. ——— *Right of purchaser to set aside deeds.* There is no authority for the proposition that the purchaser at a sale in execution of a decree of the right, title, and interest of the judgment-debtor acquires by that purchase not merely the right, title, and interest of the judgment-debtor, but any right which the judgment-creditor might have to set aside or question the validity of any deed which had been previously made, even it might be by the judgment-debtor himself. LALLA RAM SURUN LALL *v.* LOKEBAS KOOER **18 W. R. 39**

29. ——— *Right to set aside patni—Mortgage—Covenant not to alienate.* *A* gave a mortgage to *B* of certain property as a security for money lent, and covenanted not to alienate the property by gift, ijara, patni, or otherwise, by which loss might be caused to the existing actual assets of the property. *A* subsequently granted a patni to *C*. *B* obtained a decree against *A* for the amount of the loan, and the property was sold in default of payment. *D* was the purchaser at the auction-sale. *Held*, that *D* could maintain his suit against *C* to set aside the patni and for possession. BRAJARAJ KISORI DASI *v.* MOHAMMED SALEM . . **1 B. L. R. A. C. 152**

S.C. BROJO KISHOREE DOSSIA *v.* MAHOMED SULEEM . . . . . **10 W. R. 151**

30. ——— *Sale—Execution—Right of purchaser—Estoppel by conduct—Mortgage.* In execution of a money-decree certain property was purchased. The said property was subject to a mortgage, but not a mortgage executed by the judgment-debtor, although the judgment-debtor would himself have been estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction. *Held*, that the purchaser was equally bound as the judgment-debtor, inasmuch as the right, title and interest of the judgment-debtor had passed to the purchaser, and his purchase was therefore subject to the mortgage. *Poresh Nath Mukerji* v. *Anath Nath Deb, I. L. R. 9 Calc. 265 ; Mahomed Muzuffer Hossein* v. *Keshori Mohan Roy, I. L. R. 22 Calc. 909 ; Ram Coomar Koondu* v. *Macqueen, L. R. I. A. Sup. vol. 40 : 11 B. L. R. 46 ; Sarat Chunder Dey* v. *Gopal Chunder Laha, I. L. R. 20 Calc. 296 : L. R. 19 I. A. 203 ; Porter* v. *Incell, 10 C. W. N. 313*, referred to. PRAYAG RAJ *v.* SIDHU PRASAD TEWARI (1903) **I. L. R. 35 Calc. 877**

SALE IN EXECUTION OF DECREE— *contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*b*) EASEMENTS.

31. ——— **Right to easements.** The rule that the right to easements goes with the property when sold by the owner himself, applies also when the property is sold by the Court in execution of a decree against him. HUREE MADHUB LAHIREE *v.* HEM CHUNDER GOSSAMEE **22 W. R. 522**

(*c*) EMBLEMENTS.

32. ——— **Right to emblements**—*Mortgage, sale under.* On the 14th of July 1876, *B* obtained a decree against *D* directing *D* to pay the amount advanced upon a mortgage of *D's* lands within six months from the date of decree, or, in default of payment, the lands to be sold with liberty to *B* to bid at the sale. Default having been made, the lands were sold on the 21st of June 1877, and *B* became the purchaser. At the time of the sale the lands were in the occupation of *D's* tenants under an agreement to give to *D* a moiety of the crops. On the 11th December 1877, *P*, another judgment-creditor of *D*, attached the crops on those lands which had been cut and stored by *D's* tenants since the date of the sale. *Held*, that by the sale to *B* all right, title, and interest of *D*, including his right to the moiety of the crops in the hands of his tenants, passed to *B*, and no residual right remained in *D* on which *P's* execution could operate, the crops not having been actually carried away and appropriated by *D*. LAND MORTGAGE BANK OF INDIA *v.* VISHNU GOVIND PATANKAR **I. L. R. 2 Bom. 670**

33. ——— *Crop standing on land sold in execution of a decree obtained by a mortgagee in possession.* A mortgagee in possession sued on his mortgage, and having obtained a decree brought the land to sale in execution : and the execution-purchaser was placed in possession. *Held*, the mortgagee was not entitled to recover from the execution-purchaser the value of the then standing crop. RAMALINGA *v.* SAMIAPPA **I. L. R. 13 Mad. 15**

(*d*) RENT.

34. ——— **Right to rents**—*Rents paid for former proprietor after sale—Notice of title of purchaser.* The purchaser of a zamindari sold in execution of a decree is entitled to all the rents accruing due from the date of his purchase ; and if the tenants or raiyats, after having had notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner. COLLECTOR OF RAJSHAHYE *v.* HURSOONDERY DEBIA **W. R. 1864, Act X, 6**

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SALE IN EXECUTION OF DECREE—*contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*d*) RENT—*concld.*

35. ——— **Apportionment of rents**—*Purchaser of share of estate.* A purchaser at a sale in execution of a decree of one of several estates let in one patni is not bound by any agreement between the patnidar and other zamindars regarding their shares of the entire patni rent. Nor can he claim from the patnidar as his own share of the patni rent a sum bearing the same proportion to the whole patni rent as the sudder jumma bears to the sudder jumma of all the estates let out in patni. In order to obtain redress in such a case, either the patnidar or one or all of the zamindars may have their fixed patni rent properly apportioned among the several zamindars by a civil suit in which all the zamindars should be parties. PORESH NATH ROY *v.* BISHROOP DUTT . . **W. R. 1884, Act X, 16**

(*e*) REVERSIONARY INTEREST.

36. ——— **Reversionary right of grantor**—*Property liable to attachment and sale—Grant to Hindu widow for maintenance for life—Act VIII of 1859, s. 205—Civil Procedure Code, s. 266 (k).* One *N*, the sole owner of a certain village, had a son *J*. *J* had two wives. By his first wife he had a son *U*. *J's* second wife was *G*, by whom he had a son whose widow was *K*, the defendant in the suit. *J* died leaving *U* his son, *G* his widow, and *K* his son's widow, and on his death *U* inherited the village. Prior to the year 1874, *U* had made a gift to *G* of 105 bighas situate in the village. In 1874 the rights and interests of *U* in the village were sold by auction and purchased by *T*, the ancestor of the plaintiffs. *G* by a deed of gift conveyed the 105 bighas to *K* and ultimately died on 26th January 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to *G* in lieu of her maintenance, which she was to hold rent-free for her life, and that she had been in possession thereof for twenty years. Further, that *U* had the right to resume the land and assess it to rent on the death of *G*, and all the rights and interests of *U* in the land were attached and sold in 1874. On second appeal it was contended that the interest of *U* in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that *U* gave to *G* the usufruct of the land for her life in lieu of her maintenance; that after the gift the interest of *U* in the land was of the same character and carried with it the same consequences as the reversion, which the lessor would have for land leased for life or years, and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have; and that *U* had a vested right in the land which was capable of being sold and that right passed to the auction-purchaser at the sale of 1874. *Koraj Koonwar* v. *Komul Koonwar, 6 W. R. 34; Ram Chunder Tantra Das* v. *Dhurmo Narain Chukarbatty, 7 B. L. R. 341: 15 W. R. F. B. 17; Tuffuzzool Husain Khan* v. *Raghunath Pershad, 7 B. L. R. 186: 14 Moo. I. A. 40*, distinguished. KACHWAIN *v.* SARUP CHAND . **I. L. R. 10 All. 462**

SALE IN EXECUTION OF DECREE—*contd.*

7. PURCHASERS, RIGHTS OF—*contd.*

(*e*) REVERSIONERY INTEREST—*concld.*

(*f*) STRIDHAN.

37. ——— **Malabar law**—*Personal decree against karnavan—Civil Procedure Code, s. 335.* *A* sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit for a private debt. In the execution-proceedings, an objection petition was put in, stating that the shops were stridhanam and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale. *Held*, that, upon the facts found, the plaintiff acquired nothing under the Court sale. ACHUTA *v.* MAMMAVU **I. L. R. 10 Mad. 357**

8. ERRORS IN DESCRIPTION OF PROPERTY SOLD.

1. ——— **Subject of purchase**—*Certificate of sale, description in—Obligation of purchaser to see that certificate is correct.* It is the business of an auction-purchaser to see that the sale-certificate conveys to him what he supposes himself to have purchased, and it is not open to him to adduce evidence afterwards to prove that he purchased anything more than the certificate shows him to have taken under the sale. PEAREE MOHUN MOOKERJEE *v.* GOSTO BEHARY DEY **26 W. R. 104**

2. ——— *Certificate of sale more extensive than decree—Right of purchaser.* Where a decree-holder obtains an order for the sale of the judgment-debtor's interest in certain property, and, becoming purchaser at the sale which follows, receives a sale-certificate going beyond the order, he cannot avail himself of anything in the certificate beyond the order. GOWREE KUMUL BHUTTACHARJEE *v.* SURUT CHUNDER DOSS BISWAS **22 W. R. 408**

3. ——— **Subject of sale**—*Discrepancy between notification of sale and sale-certificate—Right of purchaser.* Where on an execution sale there is a discrepancy between the conditions in the notification of what is to be sold and the certificate of what has been sold, the conditions in the notification are to be taken as of superior authority in dealing with the conflicting claims of innocent third parties whose rights are affected by the variation.

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SALE IN EXECUTION OF DECREE— *contd.*

8. ERRORS IN DESCRIPTION OF PROPERTY SOLD—*contd.*

In execution of a decree for arrears of rent, an application was made for a sale of the tenure for the arrears of which the decree had been obtained. A notification was issued purporting to be a sale proclamation under Act VIII of 1859, s. 249, and in pursuance of that notification the sale of the right, title, and interest of the judgment-debtor took place. *Held*, that the tenure did not pass by that sale, notwithstanding that the sale-certificate stated it was the tenure itself which had been sold. UMA CHURN SEN *v.* GOBIND CHUNDER MOZUMDAR **1 C. L. R. 460**

4. ——— *Misdescription of tenure sold—Right of purchaser.* *A*, in satisfaction of a decree against *B*, caused the sale of a tenure, styling it a jote-jumma. *C*, the superior zamindar, purchased the tenure as such for R900; but failing to pay the balance of the purchase-money, the tenure with the same description was re-sold, and purchased by *C* for one rupee. *A*, on discovering his mistake in having advertised the property as a jote-jumma, when in fact it was a shamilat talukh (a more permanent and valuable holding), caused a sale of *B's* rights and interests in the shamilat talukh, and, having purchased them himself, was put into possession. *A* then sued for rent under Act X of 1859, when *C* intervened as in enjoyment of the rent, and *A's* suit was dismissed. In a suit by *A* to establish his right to the shamilat talukh:—*Held*, that *A* was entitled to succeed, as he had acted *bonâ fide*, and that *C* could not be considered an innocent purchaser for a valuable consideration, but a purely speculative purchaser, as he must have known that no such tenure as that which he purchased under the denomination of jote-jumma had any real existence. HURO NATH ROY *v.* MOTHOORA NATH ACHARJEE **7 W. R. 4**

5. ——— *Description in notification of sale—Sale under mortgage-decree—Vendor and purchaser.* The proprietors of a talukh and mehal called B, assessed with revenue at R6,800-4-7, to which certain lands which had been gained by alluvion appertained, which lands had been formed into a separate mehal and assessed with revenue at R88, mortgaged it in these terms: "We agree mutually to mortgage the said talukh B, and accordingly after mortgaging and hypothecating the whole of the mouzahs, original and appended, yielding a jumma of R6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, etc., etc., and all and every portion of our proprietary, possessory, and demandable rights, without excepting any right or interest obtained or obtainable, etc." Subsequently, the mehal talukh B, "together with original and attached mehal and all the zamindari rights appertaining thereto," was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire talukh B, jumma R6,800-4-7," but afterwards refused to perform the contract, and was sued for its specific performance. The plaint in this suit stated that the subject-matter of the contract was the "entire talukh B, jumma R6,800-4-7," and the decree which the purchasers obtained for the specific performance of the contract referred to its subject-matter in similar terms. *Held*, in a suit by the purchasers for the possession of the alluvial mehal, that the terms of the mortgage were sufficiently comprehensive to include that mehal, and it was not intended by the entry of the jumma of mehal B, exclusive of the jumma of the alluvial mehal, to exclude the latter from the mortgage, the entry of the jumma being merely descriptive. Also that the alluvial mehal passed to the auction-purchaser at the auction-sale, under the words "attached mehal." Also that the sale to the plaintiffs passed the alluvial mehal, the words "the entire talukh B" being sufficient to include it, the entry of the jumma of mehal B in the sale contract, plaint, and decree being merely descriptive. GANPATJI *v.* SAADAT ALI . . **I. L. R. 2 All. 787**

6. ——— **Certificate of sale**—*Certificate of sale not conclusive as to the property sold at execution sale—Civil Procedure Code (Act XIV of 1882), ss. 316, 317.* A decree on a mortgage directed that the whole interest of five brothers in the mortgaged house should be sold. The proclamation of sale stated also that the whole interest in the house was to be sold. The sale took place, and the plaintiff was the purchaser. By a mistake, however, on the part of the officer in charge of the sale, the memorandum of sale, the certificate of sale and the receipt of possession passed by the plaintiff omitted to mention the names of four of the brothers, and erroneously stated that the interest only of one of them had been sold. The defendant subsequently obtained a money-decree against some of the other brothers, and, in execution sold their interest in the house, purchased it himself, and took possession of a part of the house. The plaintiff thereupon brought this suit to eject him. The lower Appellate Court dismissed the suit, holding that in ejectment the plaintiff was bound to give strict proof of his title, and that the certificate of sale was conclusive evidence of the property which had been purchased by him. On appeal:—*Held*, reversing the decree of the lower Court, that the plaintiff was entitled to a decree. The certificate of sale was not conclusive as to the property which had been purchased by the plaintiff. The property offered for sale and bid for by the plaintiff was the property ordered to be sold and proclaimed for sale. What was sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and the sale of that property became absolute by the order which confirmed the sale. BALVANT BABAJI DHONDOE *v.* HIRACHAND GULABCHAND GUJAR (1903) . **I. L. R. 27 Bom. 334**

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SALE IN EXECUTION OF DECREE—*contd.*

8. ERRORS IN DESCRIPTION OF PROPERTY SOLD—*contd.*

7. ——— **Misdescription of area**—*Sale in execution of a decree obtained outside the jurisdiction of the Original Side of the High Court—Misdescription of area of property sold—Deficiency in quantity of land—Compensation, suit for—Abatement of rent.* An auction-purchaser of a tenure, sold in execution of a decree outside the jurisdiction of the Original Side of the High Court, brought a suit against the decree-holder for a refund of part of the purchase-money, on account of a deficiency in the actual area of land purchased, as compared with the area stated in the sale proclamation, and for abatement of rent in respect of such deficiency. It was alleged that the decree-holder made false and fraudulent allegations in respect of the area of the property in the sale proclamation, but there was no finding by the lower Court as to this, nor was there any finding that the plaintiff sustained any loss, and there was no condition in the sale proceedings as to compensation for errors or misdescription. The purchase-money was not in Court, and the decree-holder offered to pay back the auction-purchaser his purchase-money and release him from his purchase, but this was refused. *Held*, that, although there was a deficiency in area, the auction-purchaser was not entitled to compensation, as he had failed to prove he had sustained loss by misdescription in the sale proclamation, but he was entitled to an abatement of rent for such deficiency. *Kissory Mohan Roy* v. *Kali Charan Ghose, 1 C. W. N. 106*, distinguished. *Held, per* MACLEAN, *C.J.*, that, in order to enable the auction-purchaser to claim compensation, it was not essential to make out a case of fraud against the decree-holder. *Abdullah Khan* v. *Abdur Rahman Beg, I. L. R. 18 All. 822*, dissented from. DOYAL KRISHNA NASKAR *v.* AMRITA LAL DAS (1901) **I. L. R. 29 Calc. 370**

8. ——— **Misdescription of property**—*Saleable interest of the judgment-debtor—Small Cause Court; jurisdiction of, in suits to set aside sale—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 21—Rights of a purchaser at an execution-sale.* A suit to set aside a sale, either in whole or in part, is not a suit of a Small Cause Court nature, but is one excluded from the jurisdiction of the Small Cause Court by Art. 21 of Sch. II to Act IX of 1887. *Prasanna Kumar Khan* v. *Uma Churn Hazra, 1 C. W. N. 140*, distinguished. When the judgment-debtor has a saleable interest, however small, the purchaser at an execution-sale purchases at his own risk, and, there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief if the property does not correspond to the description. *Sundara Gopalan* v. *Venkatavaradar Ayyangar, I. L. R. 17 Mad. 228*, followed. SONARAM DAS *v.* MOHIRAM DAS (1900) **I. L. R. 28 Calc. 235**

SALE IN EXECUTION OF DECREE—*contd.*

8. ERRORS IN DESCRIPTION OF PROPERTY SOLD—*concld.*

9. ——— **Statement of value**—*Execution sale—Sale proclamation—Enquiry as to approximate value when to be made.* It cannot be laid down generally that in no case should any enquiry be made as to the value of the judgment-debtor's property to be sold before issuing the sale-proclamation. *Kashi Pershad Singh* v. *Jamuna Pershad Sahu, I. L. R. 31 Calc. 922*, commented on. Where the decree-holder stated the value of the property to be R15,000, but the judgment-debtor objected that the value was R1,50,000 and the Court adopted the former valuation without any inquiry :—*Held*, that in the face of the discrepancy in the value as stated by the decree-holder on the one hand and the judgment-debtor on the other, an enquiry as to the approximate value of the property was obviously necessary and should be held. SURENDRA MOHAN TAGORE *v.* HURRUK CHAND (1907) . . . . **12 C. W. N. 542**

9. JOINT PROPERTY.

1. ——— **Sale of joint property as if separate**—*Effect of sale—Right taken by purchaser.* Under a sale in execution of a decree no property can be sold except that which belongs to the defendants in the suit. Accordingly, if under a decree in a suit against *A* alone, for a debt for which *B* is jointly liable, an estate be sold in which *B* is entitled to an equal share with *A*, the interest of *A* alone is acquired by the purchaser. KISHEN CHUNDER GHOSE *v.* ASHOORUN . **Marsh. 647**

SREEPERSHAD SURMAH BHUTTACHARJEE *v.* SHUROOPA DOSSIA . . . . **9 W. R. 452**

2. ——— **Sole right of member of joint Hindu family in undivided property**—*Decree in suit for damages for tort—Costs.* There may be a valid sale upon an execution in an action of damages for a tort, of the share of undivided family property to which, if a partition took place, a judgment-debtor would be individually entitled. Such damages in the costs recovered constitute a judgment-debt, in respect of which the judgment-creditor's rights are the same as those upon any other judgment for payment of money. VIRASVAMI GRAMINI *v.* AYYASVAMI GRAMINI **1 Mad. 471**

3. ——— **Partnership property**—*Sale-decree against one of several partners in mercantile firm—Right against partnership property.* A suit was brought by *C* against "*A*, as manager of a firm and also against the firm itself;" and a decree was passed accordingly. *A* was one of two partners in the firm. The other partner (*B*) was not named in the plaint. In execution of the decree, the right title, and interest of *A* in a stable, which in fact belonged to the firm, was sold to the plaintiff. In a suit brought by the plaintiff against *B*, the other partner in the firm, to recover possession of the

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SALE IN EXECUTION OF DECREE— *contd.*

9. JOINT PROPERTY—*contd.*

property :—*Held*, that the plaintiff was in no better position than a purchaser at a sale of partnership property made in execution of a decree against a single partner, and that he could not be allowed to effect a partial partition, which the judgment-debtor, to whose right he succeeded, would not have been entitled to obtain. All that the plaintiff could do was to bring a suit for an account and settlement of the whole concerns of the firm, and claim that interest in the property which upon a final settlement might be ascertained to belong to his judgment-debtor. KALYANBHAI *v.* MOTIRAM JAMNADAS . . . . **10 Bom. 378**

See KESHAV GOPAL GINDE *v.* RAYAPA **12 Bom. 165**

4. ——— **Property of co-parceners—** *Share of one of several co-parceners—Undivided Hindu family—Unascertained share, purchase of.* In the Bombay Presidency the share of one of the co-parceners in a Hindu undivided family in the ancestral estate may before partition be seized and sold in execution for the separate debt in his life-time. The purchaser of such an unascertained share cannot, before partition, insist on the possession of any particular portion of the undivided family estate, and he takes any such share subject to the prior charges or incumbrances affecting the family estate or that particular share. The attachment of a co-parcener's share in the family property under an ordinary money-decree should go against the share, right, title, and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify and against the share, right, title, and interest in all other parts of the family property. UDARAM SITARAM *v.* RANU PANDUJI . . . . **11 Bom. 76**

5. ——— *Attachment and sale of the interest of one of several co-parceners in the undivided estate—Mortgage by one co-parcener.* In 1848 two members of an undivided family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 guntas of the mortgaged land to be attached and sold on account of the right and interest of one of the mortgagors only on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 guntas then were, to recover the same from him as being the property of the mortgagor whose right and interest therein had been attached and sold :—*Held*, that the purchaser could take no more than the share of the co-parcener whose interest alone had been attached and sold, though this share might be defined as it existed at the time of the mortgage made by him in 1848. PANDURANG ANANDRAV *v.* BHASKAR SHADASHIV . . **11 Bom. 72**

6. ——— **Property of joint tenants—** *Share in joint family property—Family dwelling-house—Service rents—Right of purchaser.* Where the

SALE IN EXECUTION OF DECREE— *contd.*

9. JOINT PROPERTY—*contd.*

interest of one of several joint tenants in a family dwelling-house and in certain lands let out on service tenure is sold in execution, the purchaser is entitled to joint possession of the dwelling-house with the other shareholders, and also to a right to share in the service rents. *Kowar Bijoi Kesal Roy* v. *Samasundari, B. L. R. Sup. Vol. 172 : 2 W. R. Mis. 30*, commented on. RAJANIKANTH BISWAS *v.* RAM NATH NEOGY . **I. L. R. 10 Calc. 244**

See ESHAN CHUNDER BANERJEE *v.* NUND COOMAR BANERJEE . . . . . **8 W. R. 239**

7. ——— **Property of joint tenure-holders—** *Decree against one of several joint sharers—Effect of sale under such decree.* In execution of a decree against one of several joint holders of a tenure, when it is clear that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure had he taken proper steps to do so or although the purchaser may have obtained possession of the whole tenure under the sale. But if, however, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right, title, and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as, a sale of the tenure, the whole tenure must be considered as having passed by the sale. If the question is doubtful on the face of the proceedings, the Court must look to the substance of the matter, and not to the form or language of the proceedings. JEO LAL SINGH *v.* GUNGA PERSHAD . **I. L. R. 10 Calc. 996**

See NITAYI BEHARI SAHA PARAMANICK *v.* HARI GOVINDA SAHA . . **I. L. R. 26 Calc. 677**

and ANUNDA KUMER NASKAR *v.* HARI DASS HALDAR . . . **I. L. R. 27 Calc. 545**

8. ——— **Property of joint family—** *Suit to set aside sale—Refund of purchase-money.* The sale of joint property governed by the Mitakshara law, in execution of a decree made on a debt which was not a necessity, is not valid and cannot be upheld, even though the proceeds are used to satisfy another decree on a bond by which money was borrowed on necessity. The parties suing for annulment of such invalid execution sale are bound to pay the auction-purchasers so much of the debt as would have been a burden on the estate. BHYRO PERSHAD *v.* BASISTO NARAIN PANDEY **16 W. R. 31**

9. ——— *Personal decree against karnavan of tarwad—Right of purchaser.* If, in execution of a money-decree obtained against a person who happens to be the karnavan of a Malabar tarwad, the tarwad property is attached and sold, a purchaser at an auction-sale obtains nothing, and in such a case the question whether the purchase was made *bonâ fide* and for value is not material.

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SALE IN EXECUTION OF DECREE—*contd.*

9. JOINT PROPERTY—*contd.*

ELAYACHANIDATHIL KOMBI ACHEN *v.* KENATUMKORA LAKSHMI AMMA . **I. L. R. 5 Mad. 201**

10. ——— *Right of minor brother—Sale advertisement under decree against entire property.* A minor brother's share in a joint family estate was *held* not liable under a sale advertisement which referred solely to the rights and interests of his elder brothers who did not represent him, though the decree was against the entire property. RAM LOCHUN SAHHA *v.* UNNO POORNA DOSSEE . . . . . **7 W. R. 144**

NETYE ROY *v.* ODEET ROY . **10 W. R. 241**

11. ——— *Mortgage for legal necessity by managing brother of joint family—Sale in execution of decree obtained against mortgagor alone—Rights of purchaser and other member of joint family.* *A*, the managing member of a joint Hindu family governed by the Mitakshara law, for joint family purposes and legal necessity mortgaged the joint family property. The mortgagee subsequently sued *A* alone upon the mortgage, obtained a decree, and had the property comprised in the mortgage put up for sale. *B*, a brother of *A's*, who was no party to the mortgage or to the suit thereon, resisted the purchaser at the auction-sale in his endeavour to get possession. In a suit by the purchaser against *B* and *A*:—*Held*, that *B's* interest in the joint family property was unaffected by the decree passed in the mortgage suit, and that the purchaser was not entitled to the relief he sought as regards his share. *Subramaniyayyan* v. *Subramaniyayyan, I. L. R. 5 Mad. 125*, followed. ABILAK ROY *v.* RUBBI ROY **I. L. R. 11 Calc. 293**

12. ——— *Purchase by decree-holder of family property in execution of decree against member of joint family—Effect of sale—Right of purchaser.* The property of an undivided Hindu family consisting of brothers having been hypothecated by one brother was sold in execution of a decree obtained against him alone upon the hypothecation bond and purchased by the decree-holder. *Held*, in a suit by another brother to recover his share of the property sold, that the purchaser was only entitled to the interest of the judgment-debtor in the property sold, and could not be permitted to prove that the debt for which the property was sold was contracted for family purposes by the manager of the family. ARMUGAM *v.* SABAPATHI . . . . **I.. L. R. 5 Mad. 12**

13. ——— In an undivided Hindu family consisting of two brothers, the elder, while managing the property during the minority of the younger, executed a mortgage of family property in renewal of a former mortgage, executed by his deceased father as security for moneys lent for purposes neither immoral nor illegal. The mortgagee, having sued the elder brother upon this mortgage, brought to sale and purchased the property mortgaged. The younger having brought a suit for partition against the elder brother and the alience of the mortgagee and purchaser at the Court sale:—*Held* (TURNER, *C.J.*, and KERNAN, *J.*, dissenting), that the plaintiff was entitled to recover his share of the property without paying his share of the mortgage-debt, and that it was immaterial whether or not the mortgage was executed to discharge a prior mortgage debt of the father. SUBRAMANIYAYYAN *v.* SUBRAMANIYAYYAN **I. L. R. 5 Mad. 125**

14. ——— *Execution of decree against one brother—Rights of other brothers.* *J* purchased a 10 biswas share in a village, and *Y* purchased a village, both of which properties were, at the time they were respectively purchased, mortgaged to secure one debt. *J* died leaving four sons. After *J's* death, *Y*, whose village had been sold in execution of a decree for the sale of the mortgaged property, sued *R*, eldest son of *J*, for rateable contribution in respect of the debt secured by the mortgage, and he obtained a decree for R210 and costs, and directing the 10 biswas share to be sold in satisfaction of the decretal amount. Upon attachment of the share in execution of the decree, the three younger sons of *J* claimed 7½ biswas as belonging to them, and prayed that the same might be released from attachment. This objection was disallowed as made too late, and the sale in execution of the decree took place. The sale certificate showed that the property sold was "the rights and interests" of *R* in the 10 biswas. The three younger sons of *J* subsequently brought a suit to establish their right to 7½ biswas out of the 10 and to set aside the sale to that extent. *Held*, that the shares of the plaintiffs were unaffected by the sale, and all that passed thereunder to the purchaser was the 2½ biswas share of the judgment-debtor. The plaintiffs were not bound by the decree in a suit to which they were not parties, and by a sale to which they objected, and in the teeth of the terms of the sale-certificate put forward to defeat them. SUNDAR LAL *v.* YAKUB ALI **I. L. R. 6 All. 362**

15. ——— *Property of Hindu judgment-debtor—Right of purchaser.* *Held*, that the property in the hands of a Hindu judgment-debtor was liable to sale in the same way and to the same extent as would the other immoveable property of a Hindu having sons be liable: and that the question of the extent of the right to be sold should have been left an open question for adjudication in a suit between purchasers and other persons claiming right therein. BULDEO SINGH *v.* DWARKA DASS . . **1 Agra 169**

16. ——— *Sale of ancestral family property in execution of decree against father—Delay in impeaching sale.* A son's interest may pass on a sale of ancestral property in execution of a money-decree against his father, but whether it does or does not pass will have to be determined by the circumstances of each case.

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SALE IN EXECUTION OF DECREE— *contd.*

9. JOINT PROPERTY—*contd.*

Delay in bringing proceedings to impeach sales is a matter for consideration in determining what interests pass on the sale. BASO KOER *v.* HURRY DASS . **I. L. R. 9 Calc. 495 : 12 C. L. R. 292**

17. ——— *Son's interest in joint ancestral property—Sale of right, title, and interest of father.* The sale of the right, title, and interest of a father in ancestral property, in execution of a decree for a debt incurred by him, passes as well the right, title, and interest of the son, where the debt was not incurred for an immoral purpose, and where the purchaser has inquired whether there was a decree against the father, and that the property was properly liable to process and sale in satisfaction of the decree and has purchased the estate *bonâ fide* under the execution, and *bonâ fide* paid a valuable consideration for it. In determining whether the sale passed the right, title, and interest of the son, the nature of the debt and not the nature of the property must be considered. Unless it can be shown that the debt was incurred for an immoral purpose, the question as to the nature of the debt must be held to be determined against the son by there having been a decree against the father, and his right, title, and interest in the family property. PANDIT HAIT RAM *v.* MULU . **N. W. 110**

18. ——— *Right of father of joint Hindu Mitakshara family—Suit by sons to set aside sale.* In execution of a simple money-decree against the father of the plaintiffs who were members of a joint Mitakshara family, the right, title, and interest of the judgment-debtor in certain joint immoveable property was sold in 1873, and the purchasers took possession of the whole property. In 1878 the plaintiffs sued to recover their shares in such property, on the ground that only the share of their father had legally passed to the purchasers. *Held*, that the plaintiffs were entitled to succeed. BHAGWAT DASSA *v.* GOURI KUNWAR **7 C. L. R. 218**

19. ——— *Mortgage by father of Mitakshara family—Notification of sale—Right, title, and interest.* In consideration of an antecedent debt, the father of a family governed by Mitakshara law mortgaged a certain mouzah M, portion of the joint family property, by a bond containing the following clause : " I have pledged and mortgaged the right and interest of mouzah M." A decree directing " the estate mortgaged under the bond to be held liable " was obtained upon the mortgage, and in execution thereof, under Act X of 1877 " the right, title, and interest of the judgment-debtor " as set out in the proclamation of sale was sold. *Held*, that the mortgagor must be taken to have mortgaged the entire interest of the family, and that, looking at the decree which declared the property mortgaged to be liable, the whole interest had passed under the execution-sale to the purchaser. STUDD *v.* BRIJ NUNDUN PERSHAD SINGH **9 C. L. R. 350**

SALE IN EXECUTION OF DECREE— *contd.*

9. JOINT PROPERTY—*contd.*

20. ——— *Attachment of family property in execution of decree against Hindu father—Sale limited to interest of father on objection by sons—Right acquired by purchaser.* In execution of a personal decree obtained against the father of an undivided Hindu family and one of his sons, the creditor attached the family estate. The two remaining sons objected, by petition, to the attachment of their shares, and the Court directed that the sale should be confined to the right, title, and interest of the judgment-debtors. The creditor, having purchased at the sale, obtained possession of the whole estate. *Held*, that the right, title, and interest of the father purchased by the creditor was only a right to obtain the share of that judgment-debtor by partition. SUBAYYAN *v.* RUPPA NAGASAMI AYYAN . . . **I. L. R. 6 Mad. 155**

21. ——— *Money-decree against father—Attachment of son's shares.* In a suit brought against the father of a Hindu family and his eldest son, on a bond executed by the former, by which family property was hypothecated as security for the repayment of the debt, a decree was passed against the father only, and his share of the property was declared liable to be sold. In execution of this decree, family property was attached, but, on the intervention of the younger sons, the attachment was set aside as to their shares. In a suit brought by the decree-holder to establish his right to sell the younger sons' shares in satisfaction of the decree against their father :—*Held*, that, so far as the younger sons were concerned, the decree must be treated as a decree for money against the father, and that all that could be sold in execution of the decree against the father was the share of the father. UMAMESWARA *v.* SINGAPERUMAL **I. L. R. 8 Mad. 376**

22. ——— *Impartible zamindari—Money-decree against zamindar—Attachment and sale of estate—Suit by son to recover after father's death—Right of purchaser.* In execution of a money-decree obtained against the holder of an impartible zamindari, the creditor attached certain immoveable property—portion of the zamindari—which he described as the property of the debtor. This was sold by the Court and purchased by *L*. A suit having been brought by the son of the judgment-debtor after his father's death to recover the property from *L*:—*Held*, that all that *L* acquired was the life-interest of the judgment-debtor in the property, and therefore the plaintiff was entitled to recover. SIVAGANGA *v.* LAKSHMANA . **I. L. R. 9 Mad. 188**

23. ——— *Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.* When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of

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SALE IN EXECUTION OF DECREE—*contd.*

9. JOINT PROPERTY—*contd.*

such decree of the joint ancestral property, without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Ch. II, s. 48, and *Manu*, Ch. VIII, sloka 159, and one which it would not be their pious duty as sons to discharge. If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest,—*i.e.*, the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder. *Girdharee Lall* v. *Kantoo Lall, 14 B. L. R. 187 ; Deendyal Lall* v. *Jugdeep Narain Singh, I. L. R. 3 Calc. 198 ; Suraj Bunsi Koer* v. *Sheo Pershad Singh, I. L. R. 5 Calc. 148 ; Bissessur Lall Sahoo* v. *Luchmessur Singh, L. R. 6 I. A. 233 ; Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar, I. L. R. 6 Mad. 1 ; Hurdi Narain Sahu* v. *Rooder Perkash Misser, I. L. R. 10 Calc. 626 ; Nanomi Babuasin* v. *Modun Mohun, I. L. R. 13 Calc. 21 ; Ram Narain Lal* v. *Bhawani Prasad, I. L. R. 3 All. 443 ; Gaura* v. *Nanak Chand, Weekly Notes, All. 1883, p. 194 : Weekly Notes, All. 1884, p. 23 ; Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75 ; Phul Chand* v. *Man Singh, I. L. R. 4 All. 309 ; Chamaili Kuar* v. *Ram Prasad, I. L. R. 2 All. 267 ;* and *Rama Nand Singh* v. *Gobind Singh, I. L. R. 5 All. 384,* referred to. BASA MAL *v.* MAHARAJ SINGH . . . **I. L. R. 8 All. 205**

24. _____ *Son's liability for father's debt—Sale of ancestral property—Bonâ fide purchaser.* By the sale of ancestral property in execution of a mere money-decree against the father for his separate debt, only the right, title, and interest of the father pass to the purchaser and nothing more, and this holds good whether the purchaser is a stranger or the decree-holder himself. A purchaser at a Court sale cannot set up the title of a *bonâ fide* purchaser for value without notice. *Lakhmichand Walchand* v. *Kastur Bechar, Bom. 60,* and *Sobhagchand Golabchand* v. *Bhaichand, I. L. R. 6 Bom. 192,* followed. BHIKAJI RAMCHANDRA OKE *v.* YASHVANTARAV SHRIPAT KHOPKAR **I. L. R. 8 Bom. 489**

SALE IN EXECUTION OF DECREE—*contd.*

9. JOINT PROPERTY—*contd.*

25. _____ *Mitakshara law —Alienation, voluntary and involuntary, by the members of a family governed by the Mitakshara law.* *A*, a Hindu governed by the Mitakshara law, after the attachment of a property, part of his ancestral estate, to which he and his minor son *B* were, jointly entitled as members of a joint Hindu family conveyed by a deed of gift the whole of his interest in the ancestral property, including the property under attachment, to *B*. Five days after the execution of the deed of gift the property was sold in execution of the decree of the attaching creditor, *C*, and was purchased by *C* at such sale. Ten days after the sale, *A* instituted proceedings, under s. 256 of Act VIII of 1859, to set it aside on the ground of irregularity. These proceedings were afterwards continued in the name of *A*, but virtually on behalf of the minor *B*, under the control and direction of the Collector, who had taken charge of his estate, and appointed a manager under Act XL of 1858. These proceedings terminated in 1874 by the application to set aside the sale being dismissed, and the sale was therefore confirmed, and *C* took possession of the property. In 1877 a suit was instituted on behalf of *B*, by the manager appointed by the Collector, against *C* and *A* to recover possession of the property, on the ground (1) that when it was sold it was not the property of *A*, the judgment-debtor ; and (2) that the property of a joint Hindu family could not be sold or alienated by, or taken in execution of, a decree against a single member of that family. *Held,* (i) that the fact that the plaintiff, through his guardian, had actively intervened in the proceedings under s. 256 of Act VIII of 1859, was no bar to the institution of the present suit on his behalf ; (ii) that *C* at the sale purchased the interest, whatever it was, of *A* only, and was entitled to have it ascertained and allotted to him on partition ; and (iii) that although under the Mitakshara law a member of joint family cannot, or may not, be able to alienate his share or interest in the joint family estate, yet such share or interest can be taken in execution and sold by the holder of a decree against him. COLLECTOR OF MONGHYR *v.* HURDAI NARAIN SHAHAI **I. L. R. 5 Calc. 425 : 5 C. L. R. 112**

26. _____ *Civil Procedure Code (Act VIII of 1859), s. 264—Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamindari ; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.* On a sale of the right, title, and interest in an impartible zamindari, in execution of decrees against the zamindar, the head of an undivided family, the question was whether (*a*) only his own personal interest, (*b*) the whole title to the zamindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only ; and between the dates of proclamation and the auction-sale the zamindar died. On

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SALE IN EXECUTION OF DECREE— *contd.*

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the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that, under the circumstances, it could sell, and was bound to sell (*b*); because the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son:—*Held*, that the question of what the Court could or should have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. PETTACHI CHETTIAR *v.* SANGILI VIRA PANDIA CHINNATAMBIAR
I. L. R. 10 Mad. 241
L. R. 14 I. A. 84

27. _____ *Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather—Assignment by grandsons of the same property subsequently to such sale, effect of.* In 1858 *S* mortgaged certain ancestral property to the first defendant for a term of nine years. In 1864, *S* being then dead, the defendant sued *R*, the son of *S*, to recover the money-debt and obtained a decree against the estate of the deceased. The land in question was thereupon attached and sold on the 13th August 1873, subject to defendant's mortgage lien, and was purchased for the defendant by his cousin. The certificate of sale was drawn up in accordance with the decree, and recited that the purchaser bought the whole right, title, and interest of *S*. On the 3rd August 1882 the plaintiff purchased from *R's* sons the share of *R* in *S's* estate. The plaintiff sued the defendant to redeem the property. The Court of first instance rejected his claim. On appeal, the lower Appellate Court reversed that decree, and remanded the case for re-trial. Against this order of remand, the defendant appealed to the High Court. *Held*, restoring the decree of the Court of first instance, that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely *S's* interest. By his purchase the defendant was to be regarded as having bargained for, and purchased the entire interest in, the land. *Nanomi Babuasin* v. *Modhun Mohun*, *I. L. R. 13 Calc. 21*, followed. SAKHARAM SHET *v.* SITARAM SHET
I. L. R. 11 Bom. 42

28. _____ *Joint Hindu family—Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, sale in execution of—Sale certificate referring to rights and interest of father only in joint family property—Suit by sons for declaration of right to their shares—Form of decree.* If a person in possession of property which originally belonged to the members of a joint Hindu

SALE IN EXECUTION OF DECREE— *contd.*

9. JOINT PROPERTY—*contd.*

family, of whom the father was one, can produce as his document of title only a sale-certificate showing him to have bought, in execution of a money-decree against the father only, the right, title, and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale. The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zamindari property, covenanting to put the mortgage in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation, and obtained money-decree, in execution whereof the right, title, and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale-certificate, only that right, title, and interest was sold. The auction-purchasers, having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as karta, and that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares. *Held*, that, inasmuch as upon the terms of the sale-certificate nothing more passed to the defendants at the sale than the right, title, and interest of the father, the plaintiffs were entitled to maintain the suit and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share, might come in and claim a partition of that share out of the joint estate. *Per* MAHMOOD, *J.*, that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law. *Simbhunath Panday* v. *Golap Singh*, *L. R. 14 I. A. 77 : I. L. R. 14 Calc. 572 : Deendyal* v. *Jugdeep Narain Singh*, *L. R. 4 I. A. 247 : I. L. R. 3 Calc. 198 ;* and *Hurdey Narain Sahu* v. *Ruder Perkash Misser*, *L. R. 11 I. A. 26 : I. L. R. 10 Calc. 626*, referred to. RAM SAHAI *v.* KEWAL SINGH
I. L. R. 9 All. 672

29. _____ *Decree against father—Sale of ancestral estate in execution of money-decree—Son's rights and liabilities.* *A* purchased the half share of the judgment-debtors in certain immoveable family property, at a Court sale held in execution of money-decrees against *B* and his brother, who were members of an undivided Hindu family. *B's* undivided son sued *A*—*B* and the remaining members of his family being also joined as defendants—to recover a share in the land, alleging that his interest was not bound by the sale

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but he did not prove that the debt for which the decrees were passed was immoral, and it appeared that *A* had bargained and paid for the entire estate. The plaintiff was a minor at the time of the sale, and *B* was now the managing member of the family. *Held*, that the Court sale was binding on the plaintiff's share. *Nanomi Babuasin* v. *Modhun Mohun*, *L. R. 13 I. A. 1*: *I. L. R. 13 Calc. 21*, discussed and followed. KUNHALI BEARI *v.* KESHAVA SHANBAGA . . . **I. L. R. 11 Mad. 64**

30. ——— *Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale.* In 1862 *R* and his son *A* mortgaged the property in dispute to *B*. In 1863 *R* died, leaving a widow *S* and two sons, *viz.*, *A*, and *P*, a minor. In 1866, *A* and *S*, the latter of whom acted for herself and as guardian of her minor son *P*, settled the account with *B*, the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868 *A* died. In 1869 *B's* assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against *S* both as guardian of the minor *P* and also against her in her individual capacity. At the Court-sale held in execution of this decree, *D* purchased property in dispute in 1870. In 1881 *P* filed the present suit to recover possession of the property, alleging that *B's* purchase was invalid as against him, he having been a minor at the time of the Court-sale. *Held*, upon the merits, that the debt for which the decree was passed, being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was therefore not entitled to disturb the execution purchaser. DAJI HIMAT v. DHIRAJRAM SADARAM . . . **I. L. R. 12 Bom. 18**

31. ——— *Joint family—Money-decree—Decree against father alone—Purchaser at execution-sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution-proceedings.* In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property, or only his interests in it, passes by the sale, is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance, but only a sale in execution of a money-decree. In the case of an execution-sale, the mere fact that the decree was a mere money-decree against the father as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold, is not a complete test. The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person who had purchased it at an auction-sale held in execution of a money-decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale; and the lower Courts decided in their favour. On appeal, the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money-decree without referring to the execution-proceedings. KAGAL GANPAYA *v.* MANJAPPA **I. L. R. 12 Bom. 691**

32. ——— *Sale for debt of father—Suit by son to set aside sale—Failure to prove immoral purpose of debt.* A sale in execution of a decree against a zamindar for his debt purported to comprise the whole estate of his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose. *Held*, that the impeachment of the debt failing the suit failed; and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay. *Hardi Narain Sahu* v. *Ruder Perkash Misser*, *I. L. R. 10 Calc. 626*: *L. R. 11 I. A. 26* (where the sale was only of whatever right, title, and interest the father had in property), distinguished. MINAKSHI NAYUDU *v.* IMMUDI KANAKA RAMAYA GOUNDAN . **I. L. R. 12 Mad. 142**, **L. R. 16 I. A. 1**

33. ——— *Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act, s. 99—Sale of mortgage property in execution of decree on a money-bond for interest due on the mortgage.* The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money-bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money-bond; and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person. *Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree. *Held*, further, *per* KERNAN, *J.*, that the sale in execution was invalid under the Transfer of Property Act, s. 99. SATHUVAYYAN *v.* MUTHUSAMI **I. L. R. 12 Mad. 325**

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SALE IN EXECUTION OF DECREE— *contd*

9. JOINT PROPERTY—*contd.*

34. _____ *Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution-proceedings—Sale-certificate.* The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons, or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right. *Held*, that, as the mortgage and decree as well as a sale-certificate expressed only the father's right, the *primâ facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract, but supported. The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about or, what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances. *Upooroop Tewary* v. *Lalla Bandhjee Suhay, I. L. R. 6 Calc. 749*, distinguished. SIMBHUNATH PANDE *v.* GOLAP SINGH . . **I. L. R. 14 Calc. 572**
L. R. 14 I. A. 77

35. _____ *Hindu law—Joint family—Court-sale of right, title, and interest of the father, effect of.* One *R* and his sons were members of an undivided family. In execution of certain money decrees passed against *R*, the lands in dispute were sold to various persons, from whom they were afterwards bought by the defendant. In 1875 *R* died, and in 1887 his sons and garndson filed this suit against the defendant to recover the lands. They alleged that the lands were service vatan lands and inalienable, and that the execution-sales affected nothing except *R's* life-interest, and that, on *R's* death, they (the plaintiffs) became entitled. They also contended that, even if the Court should find the lands were not service vatan lands, they were, at all events, ancestral property, and that the plaintiffs' interests therein were not affected by execution-sales under decrees to which they were not parties. *Held*, on the evidence that, although the sale-proclamation and sale-certificate spoke only of the right, title, and interest of *R*, as being offered for sale and purchased by the auction-purchasers, the entire family interest in the property was, as a fact, the subject of the auction-sales. The words "right, title, and interest" of the judgment-debtor are ambiguous words, which may either mean the share which he would have obtained on partition, or the amount which he might have sold to satisfy his debt; and it is claimed in each case a mixed question of law and fact to determine what the Court intended to sell and what the purchaser expected to buy. APPAJI BAPUJI *v.* KESHAV SHAMRAV. KESHAV SHAMRAV *v.* APPAJI BAPUJI . . . **I. L. R. 15 Bom. 13**

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9. JOINT PROPERTY—*contd.*

36. _____ *Son's interest in ancestral property—Death of son before sale.* Where the son died between attachment and sale, the judgment-creditor was *held* to have no property in what he had attached, so as to entitle him to sell it in execution of his decree. GOOR PERSHAD *v.* SHEODEEN . . . . **4 N. W. 137**

37. _____ *Right of purchaser—Sale of reversionary interest.* *A*, a Hindu was possessed of an undivided moiety in certain property, and was also entitled to a reversionary interest in the other undivided moiety contingent on his surviving his mother. In a suit against *A*, the Sheriff, under a writ of *fi. fa.*, seized and sold to *B* the right, title, and interest of *A* in the premises. In an *ex parte* suit by *B*, asking for a declaration that he was entitled to the contingent reversionary interest of *A*, as well as to his present possessory right, MACPHERSON, *J.*, gave a decree for the present possessory right, but refused to make any decree as to the contingent reversionary interest of *A*. KISTO DHONE GANGOOLY *v.* RABUTTY DOSSEE . **1 Ind. Jur. N. S. 324**

38. _____ *Interest of co-widows in estate undivided.* The co-widows of one and the same husband take a joint interest in one undivided estate. *Semble:* The interest of one or two such widows cannot be sold in execution of decree. KATHAPERUMAL *v.* VENKABAI **I. L. R. 2 Mad. 194**

39. _____ *Right of purchaser under joint decree—Error in certificate.* Where a joint decree for contribution, which had been passed against a Hindu widow and the reversioner was executed against the latter as the sole surviving judgment-debtor, by the sale of his rights and interests in the property, the joint property was held to have been passed even though the sale-certificate omitted the word "property." CHOWDHRY ZUHOORUL HUQ *v.* GOOROO CHURN ROY . . . . . **15 W. R. 329**

40. _____ *Decree on mortgage of joint family property executed by the father alone—Sale of joint family property—Subsequent exemptions of son's interests—Suit by purchaser for refund of purchase-money—Rights of auction-purchaser as against the decree-holder and as against the sons—Civil Procedure Code, s. 315—Transfer of Property Act (IV of 1882), s. 82.* In execution of a decree for sale, upon a mortgage executed by the father of a joint Hindu family, certain joint family property was put up to sale without specification of the interests of the other members of the family. On suit by the sons, their interests, amounting to four-fifths of the entire property, were exempted. The auction-purchaser thereupon brought a suit against the de Cree-holders and the sons, to recover fourfifths

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SALE IN EXECUTION OF DECREE—*contd.*

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of the price paid by him. *Held*, (i) that the auction-purchaser's remedy by suit was not excluded by reason of s. 315 of the Code of Civil Procedure, and (ii) that the auction-purchaser could not recover anything as against the decree-holders, but (iii) that the auction-purchaser had acquired a lien on the interests of the sons to the extent of four-fifths of the purchase-money, which could be enforced by sale of their interests to that extent in the property exempted from sale in their favour. *Munna Singh* v. *Gajadhar Singh, I. L. R. 5 All. 577*; *Kishun Lal* v. *Muhammad Safdar Ali Khan, I. L. R. 13 All. 383*; *Sundara Gopalan* v. *Venkataravada Ayyangar, I. L. R. 17 Mad. 228*; *Dorab Ally Khan* v. *Abdool Azeez, L. R. 5 I. A. 116*; *Ram Narain Singh* v. *Mahtab Bibi, I. L. R. 2 All. 828*; *Derry* v. *Peek, L. R. 14 A. C. 337*; *Hariraj Singh* v. *Ahmed-ud-din Khan, I. L. R. 19 All. 545*; *Dharam Singh* v. *Angan Lal, I. L. R. 21 All. 301*; and *Muhammad Askari* v. *Radhe Ram Singh, I. L. R. 22 All. 307*, referred to. SHANTO CHANDAR MUKERJI *v.* NAIN SUKH (1901) **I. L. R. 23 All. 355**

41. ——— *Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property executed by the father—Decree and sale of mortgaged property—Suit by sons to recover their shares—Transfer of Property Act (IV of 1882), s. 85—Effect of sale.* Where property belonging to a joint Hindu family has been sold by auction, in execution of a decree obtained upon a mortgage of such property executed by the father of the joint family, it is open to the sons to sue for the recovery of their shares in the property so sold, if they were not made parties to the suit in which the decree against their father was obtained, provided that the mortgagee had at the time of suit notice of their interests in the property. But their suit must be based upon some ground which under the Hindu law would free them from liability as sons in a Hindu joint family to pay their father's debts. A sale once having taken place, the sons cannot succeed, in a suit to recover the property sold, upon the sole ground that they were not made parties to the original suit. *Kaunsilla* v. *Chandar Sen, I. L. R. 22 All. 377*, overruled. *Hargu Lal Singh* v. *Gobind Rai, I.L. R. 19 All. 541*, and *Bhawani Prasad* v. *Kallu, I. L. R. 17 All. 537*, distinguished. *Rewa Mahton* v. *Ram Kishen Singh, I. L. R. 14 Calc. 18*; *Nonomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21*; *Suraj Bunsi Koer* v. *Sheo Proshad Singh, I. L. R. 6 I. A. 88*; *Malkarjun* v. *Narhari I. L. R. 25 Bom. 337*; and *Bhagbut Pershad Singh* v. *Girja Koer, I. L. R. 15 Calc. 717*, referred to. DEBI SINGH *v.* JIARAM (F.B., 1902) **I. L. R. 25 All. 214**

10. MORTGAGED PROPERTY.

1. ——— **Mortgagor, interest of**—*Sale under money-decree—Sale under decree enforcing mortgage.* There are substantial differences between a sale in execution for a money-decree and a sale under a decree ordering a sale to enforce a mortgage. In the former case the Court proposes to sell whatever interest in the property would, under any circumstances, be available to creditors at the date of the attachment; in the latter case, whatever interest the mortgagor was, under any circumstances, competent to create, and did create at the time of the mortgage. PONNAPPA PILLAI *v.* PAPPUVAYYANGAR . . **I. L. R. 4 Mad. 1**

2. ——— **Interest taken by purchaser.** Where the rights and interests of a judgment-debtor are sold in execution, the purchaser takes the land to which they relate, subject to such mortgages and leases as may be existing. OOJAGUR ROY *v.* RAM KHELAWAN SINGH **10 W. R. 384**

3. ——— *Proclamation of sale—Mortgages noted in proclamation of sale—Civil Procedure Code, 1882, ss. 282—287.* Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an inquiry under s. 287 only, and have not been made the subject of an order under s. 287 of the Civil Procedure Code. SHANTAPPA CHEDAMBARAYA *v.* SUBRAO RAMCHANDRA YELLAPUR **I. L. R. 18 Bom. 175**

4. ——— *Purchaser of mortgaged property, rights of—Right to set aside incumbrances.* A purchaser of property sold under a decree in favour of a mortgagee cannot claim to set aside, as prejudicial to its rights, a ticca pottah granted by the mortgagee when those rights were not in existence. It cannot be maintained that the purchaser of property sold under a decree in favour of a mortgagee takes the property free from such lease or farm as the owner might have found to be expedient or convenient, provided the value of the property was not impaired and the operation of the mortgagee's lien not impeded. BANI PERSHAD *v.* REET BHUNJUN SINGH . . **10 W. R. 325**

5. ——— *Conditional sale executed before sale of execution, but after mortgagee's decree.* A purchaser under a decree for sale obtained by the mortgagee under a simple mortgage does not purchase subject to a conditional sale executed by the mortgagor after the prior mortgagee had obtained a decree of sale, but before the property was actually sold. RAJNARAIN SINGH *v.* SHEERA MEAN . . . . **7 W. R. 67**

6. ——— *Nature of mortgagee's security—Sale by mortgagee—Rights of subsequent mortgagee—Civil Procedure Code, 1859, s. 259.* The security to which a mortgagee becomes entitled under the ordinary form of mortgage in the mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the

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mortgage, and he cannot be deprived of this security by any subsequent charges on the property or prior unregistered charges which the mortgagor may create or have created. When he brings the property to sale the sale is an out-and-out sale of the estate of the debtor, and the purchaser takes the property subject only to those incumbrances which were in existence at that date, though such of the subsequent incumbrancers as may, at the time of the sale, have taken out execution may have a right to satisfy their claims from the surplus proceeds of the sale. In applying s. 259 of the Code of Cvil Procedure to cases of the above description, the words, "the right, title, and interest of the defendant in the property sold," must be understood as meaning the right, title, and interest which the decree ordered to be sold,—*i.e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage. KASANDAS LALDAS *v.* PRANJIVAN ASHARAM . **7 Bom. A. C. 146**

BROJO KISHOREE DOSSIA *v.* MAHOMED SULEEM **10 W. R. 151**

s. c. BRAJARAJ KISORI DASI *v.* MOHAMMED SALEM . . . . **1 B. L. R. A. C. 152**

7. ——— *Right to redeem.* Where a decree-holder sells a mortgagor's right and interest in property already mortgaged and declared liable to sale in liquidation of the debt for wihch it was mortgaged, the purchaser purchases merely the mortgagor's right to redeem. LALLA JOOGUL KISHORE LALL *v.* BHUKHA CHOWDHRY . . . . . **9 W. R. 244**

8. ——— *Right of purchaser —Rights of respective mortgagees.* A mortgage made by way of security for money advanced remains a mortgage until the debt is satisfied, and the mortgagee-creditor has every right to sue to obtain a decree and sell that which is held by him as security for his money, without any regard to the proceeding, of any other subsequent mortgagee or purchaser. A purchaser at a sale in execution of such a decree under a prior mortgage, as well as the original holder of a prior mortgage, has rights far superior to those of any other mortgagee or purchaser of a subsequent date. A subsequent purchaser, by payment of an earlier mortgage and obtaining a decree for the money so paid, does not acquire any rights belonging to that mortgage. His payment was a voluntary act, and his decree against his vendor was a personal one for a simple debt, not secured by any security connected with any portion of the land in dispute. DHOREE ROY *v.* BULDEB NARAIN SINGH . . . **W. R. 1864, 345**

9. ——— **Purchase by mortgagee—** *Lien of mortgagee—Liability of purchaser—Incumbrances.* Certain mouzahs were granted in zur-i-peshgi lease by *G* to plaintiff's ancestor. After *G's* death, his heir, *F*, pledged one of the mouzahs, B, with others as collateral security, in a bond in favour of plaintiff, and some years later executed

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a zur-i-peshgi pottah in favour of defendant to obtain possession by paying to plaintiff the money due under the first zur-i-peshgi lease. Plaintiff then sued *F* alone on his bond and obtained a decree, in execution of which he sold a share in B and purchased it himself. In a suit for possession and to have the superiority of his lien declared over defendant's zur-i-peshgi,—*Held*, that plaintiff was not entitled to possession until he paid off the whole of the amount advanced by the defendant to clear off the debt due under the first zur-i-peshgi lease. *Held*, also, that the holder of a subsequent incumbrance, by paying off a prior incumbrance, acquires all the rights of the latter so far as the amount actually paid by him for that purpose is concerned. BEKON SINGH *v.* DEEN DYAL LALL . . . **24 W. R. 47**

10. ——— **Right of purchaser of mortgaged property**—*First and second mortgages.* Where a mortgagee sues upon his mortgage-bond and his claim is decreed, the decree should be satisfied out of the mortgaged property, and not out of the right, title, and interest which remain in the mortgagor. The purchaser at the execution-sale acquires all the interest which passed by the mortgage to the mortgagee, and any interest which remained in the mortgagor—*i.e.*, his equity of redemption. If there was a second mortgage, all that it could pass from the mortgagor was his equity of redemption, and the decree in a suit on such mortgage could only authorize the sale of the equity of redemption, unless the first mortgagee was made a party, and his mortgage shown to be invalid and the second mortgage to have priority. DOOLAL CHUNDER DEB *v.* GOLUCK MONEE DEBIA. **22 W. R. 360**

11. ——— *Effect of sale— Parties.* The usual mode in the mofussil Civil Courts, of selling in mortgage suits "the right, title, and interest," of the mortgagor, or his heir, is not correct if deemed to be his right, title, and interest at the time of the sale. The intention of the Court is to pass to the purchaser the right, title, and interest both of the mortgagor and mortgagee. What passes to the auction-purchaser under the certificate of sale is the right, title, and interest of the mortgagor as it stood when he made the mortgage and not merely as it stood at the time of the Court-sale. One *U* mortgaged certain immoveable property to *A R* (defendant No. 1) for R400 on the 7th May 1865. On the death of *U*, the mortgagee *A R* brought a suit (No. 311 of 1871) against his widow *K* (defendant No. 2), but did not make his (*U's*) children (who were minors) parties to it. On the 28th July 1871 *A R* obtained a decree for R460, being the amount of principal and interest due on his mortgage, with further interest from the date of suit to date of payment. That decree directed satisfaction of the amount due under it out of the mortgaged property if it were not paid by the widow, *K* (defendant No. 2). *K* having failed to satisfy the decree the Court, on the application of

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A R (the decree-holder), sold the mortgaged property on the 19th September 1872 for R400 to the brother of *A R*. On the 7th August 1873 the auction-purchaser obtained a certificate of sale to the effect that he had purchased at the Court-sale "the right, title and interest of *H*" (the widow) in the mortgaged property. On the 17th August 1874 the auction-purchaser sold the property for R700 to the father of the plaintiff. In 1877 the plaintiff sued *A R* (the mortgagee and decree-holder) to recover possession of the property with mesne profits. *U's* widow, *K* and children (two sons and a daughter) were defendants in the suit, the plaintiff alleging, in addition to the facts just stated, that these defendants had colluded with the tenants of the property in dispute and collected the produce thereof. Defendant No. 1 (*A R*) denied his liability. The answer of defendants Nos. 2, 3, 4, and 5 (respectively the widow, two sons and a daughter of *U*) substantially was that the Court-sale did not affect the rights of defendants Nos. 3, 4, and 5, as they had not been parties to the mortgage suit No. 311 of 1871 and that they were entitled to hold the property. The Subordinate Judge awarded the plaintiff's claim, holding that both the sales —*viz.*, the Court-sale under the mortgaged-decree in suit No. 311 of 1871 and the subsequently private sale by the auction-purchaser—were *bonâ fide* and binding on defendants Nos. 2, 3, 4 and 5, inasmuch as the debt for which the property was sold had been contracted by *U*. This decree was reversed on appeal, on the ground that the Court-sale extended only to the right, title, and interest of *K* (defendant No. 2) in the mortgaged property, and did not affect the rights of defendants Nos. 3, 4 and 5, who were not parties to it. On appeal to the High Court:—*Held*, that the defendant in the title of the purchaser (plaintiff) arose from the circumstance that the suit of *A R* (No. 311 of 1871) for foreclosure and sale was sufficiently constituted as to parties, both the sales having been found to be unimpeachable in all other respects, and that the defendants Nos. 3, 4 and 5 were entitled to the same relief which they would have obtained if they had been made parties to that suit, *viz.*, the right of redeeming the property by paying off the mortgage. The High Court accordingly reversed the decree of the District Judge, and directed the defendants Nos. 3, 4 and 5 to pay to the plaintiffs, within six calendar months from date, the sum of R460, with interest on the principal (R460) from date of the institution of suit No. 311 of 1871 until payment. The Court further directed that, in default of payment, the mortgage should be foreclosed and defendants Nos. 3, 4 and 5 precluded from redeeming the property which should be delivered up to the plaintiff. ABDULLA SAIBA *v.* ABDULLA
I. L. R. 5 Bom. 3

See also SURINGAPURE *v.* PETHE
I. L. R. 2 Bom. 662

12. ——— *Decrees enforcing mortgages—Priority.* Certain immoveable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864 and the other a charge created in 1867. *Held*, that the purchaser of such property at the sale in the execution of the decree which enforced the earlier charge was entitled to the possession of such property in preference to the purchaser of it at the sale in the execution of the decree which enforced the later charge, notwithstanding the latter had obtained possession of the property in virtue of his purchase. *Ajoodhya Pershad* v. *Moracha Kooer, 25 W. R. 254*, distinguished. JANKI DAS *v.* BADRI NATH
I. L. R. 2 All. 698

13. ——— *Right of prior mortgagee.* On the 31st August 1873 *A* mortgaged his house to *B*, who brought a foreclosure suit, and on the 7th July 1866 obtained a decree against *A* for the sale of the house if the mortgage-debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at the Court's sale on the 15th July 1870 and purchased by *C*. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution-sale under a common money-decree against *A*:—*Held*, that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor *A* passed in 1870 to *C*, whose purchase was entitled to prefcrence to the plaintiff's purchase in 1868. RAVJI NARAYAN *v.* KRISHNAJI LAKSHMAN . 11 Bom. 139

14. ——— *Sale under mortgage for payment of Government revenue—Rights of respective purchasers.* In 1855 a decree for an account was passed in the Supreme Court of Calcutta against *A*, an executor. *A* died in 1856, and the suit, which was revived against his representatives, came on for consideration on further directions on 29th August, 1866. It was then found that *A's* estate was liable for R1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment, a writ of *fieri facius* was issued, under which the property was sold by the Sheriff of Calcutta, and conveyed by him to *B* on 1st April 1867. Previously to this, the representatives of *A* had, on 11th January 1865, mortgaged the same property, together with other lands, "for the purpose of paying the Government revenue of certain talukhs belonging to *A*, deceased;" and the mortgagee having obtained a decree on his mortgage, the property was sold to *C* under that decree on 30th March 1867. In a suit for possession by *C* against *B*:—*Held*, that, though the sale to *B* was made for the express purpose of paying the debts of *A*, *B's* title was not to be preferred to that of *C*, who claimed under the mortgage of 1865, which was made for the purpose of paying Government revenue; and, *semble*, the result would be the same even if the mortgage

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of 1865 had not been made for the purpose of paying Government revenue, as it did not appear that the mortgagee, at the date of the mortgage, knew that there were unpaid creditors of *A*, and that *A's* representatives intended to misapply the money so advanced to them. *Greender Chunder Ghose* v. *Mackintosh, I. L. R. 4 Calc. 897*, followed. KASSIMUNNISSA BIBEE *v.* NILRATNA BOSE
I. L. R. 8 Calc. 79
9 C. L. R. 173 : 10 C. L. R. 113

15. ——— *Money-decree—Decree enforcing hypothecation—Act X of 1877 (Civil Procedure Code), ss. 287, 316—Act VIII of 1859 (Civil Procedure Code), ss. 249, 259.* Certain immoveable property was put up for sale, under the provisions of Act X of 1877, in execution of a decree for money, and was purchased by *C*, with notice that *L* held a decree enforcing a lien on such property. Subsequently *L* applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree, and was purchased by *S*. *S* sued, by virtue of such purchase, to recover possession of such property from *C*. *Held*, that, inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property, and as *C* had purchased the property in suit with notice of the existing lien on it and subject to its re-sale in execution of the decree in execution of which *S* had purchased it, what actually was sold in execution of that decree to *S* was such property, and *S* was entitled to possession of such property under such sale. Sales under Act VIII of 1859 and Act X of 1877, distinguished. SHEO RATAN LAL *v.* CHOTEY LAL . . . **I. L. R. 3 All. 647**

16. ——— *Unauthorized sale of mortgaged property—Payment by vendor of mortgage-debt—Lien of vendee.* The plaintiff as purchaser at a Court's sale sued to recover land in possession of the defendant. The defendant alleged that he had bought the land from the widow of the previous owner by whom it had been mortgaged, and that he (the defendant) had paid off the mortgage. The previous owner had left a minor son. The lower Courts passed a decree for the plaintiff, on the ground that the sale by the widow to the defendant was invalid, as she had not obtained a certificate of administration to her husband under Act XX of 1864. *Held*, that the defendant had a lien upon the land for the amount of the mortgage-debt which he had paid, and that the plaintiff could not set aside the sale to the defendant without refunding the amount secured by the lien. KUVARJI *v.* MOTI HARIDAS
I. L. R. 3 Bom. 234

17. ——— *Sham mortgage.* In 1861 *J* mortgaged certain lands to the defendant, who in 1864 sued upon the mortgage, and obtained a decree for sale. The decree remained unexecuted by the defendant. In 1869 the lands were sold in execution of a money-decree against *J*, and the plaintiff became the purchaser. Thereupon the defendant attached the land in execution of the decree obtained by him in 1864. The Court found that the mortgage of 1861 was not a *bonâ fide* mortgage. In a suit for possession :—*Held*, that the plaintiff was entitled to succeed. The decree obtained in 1864, being based upon a colourable mortgage, gave the defendant no claim as against a subsequent *bonâ fide* purchaser for value. What was purchased by the plaintiff at the execution-sale in 1869 was the real interest of *J* in the lands in question, not his interest as diminished by a fictitious derogation arising out of a sham transaction. GOPI WASUDEV *v.* MARKANDE NARAYAN BHAT . . . **I. L. R. 3 Bom. 30**

18. ——— *Suit for rent after execution of mortgage-decree.* *P* got a decree on a mortgage-bond in the terms of a compromise by *C* and others to the effect that the amount due should be paid by instalments, the property mortgaged remaining hypothecated. Meantime one *M* got a decree against *C*, and in execution sold part of the property,—*viz.*, a house,—subject to the lien of *P*, bought it in herself, and sold it again by private sale to plaintiff, who realized rent for some months. When *M* was put in possession, *P* petitioned the Court, objecting, but being referred to a regular suit he executed his original decree, bringing the hypothecated property to sale, and bought it himself, without, however, getting possession from the Court till many months later. Plaintiff then sued the tenant of the house in the Small Cause Court for rent, and *P* intervened as a party to the suit, claiming the rent which had fallen due from the date of his getting possession. *Held*, that the plaintiff was not in a position to maintain the suit, his possession having been put an end to by *P*, whose lien on the property was anterior to the sale under which plaintiff purchased. POORNO CHUNDER BOSE *v.* NOBIN CHUNDER GHOSE
14 W. R. 77

19. ——— *Sale of decree-holders' right and interests—Notice of assignment.* Where the rights and interests of decree-holders in a decree are sold in execution, the party purchasing *bonâ fide* without any knowledge of a previous assignment of those rights and interests is entitled to the proceeds of the purchased decree free from any trusts or obligation in favour of the assignees. NUNHUK SAHOO *v.* JUGGESSUR OOPADHYA
20 W. R. 408

20. ——— *Notice.* *G* borrowed money from *S*. He then borrowed money from *D*, mortgaging as security the property in suit. After that he borrowed from plaintiffs, executing a bond by which he again mortgaged the same property. Subsequently plaintiffs obtained a decree by which the mortgaged property was declared liable to sale for the amount decreed, sold the property in execution, and purchased it themselves. They were disturbed from possession by defendants in

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execution of a rent-decree under which they ousted plaintiffs, and got their own names registered as proprietors. Plaintiffs now sued for declaration and enforcement of their rights as purchasers at the above sale. Defendants claimed as purchasers in execution of a money-decree obtained against *G* by the first creditor, *S*, alleging that they paid off the money due to the second creditor, *D*, and were entitled to hold possession, their purchase having been previous to that of the plaintiffs. *Held*, that, in purchasing the rights and interests of *G*, defendants purchased his right to redeem property already subject to two mortgages, and as they purchased with full notice, they could only retain possession by paying off both mortgages. *Held*, also, that plaintiffs purchased not merely the equity of redemption, but *G's* rights and interests as they were when the mortgage was created subject to the mortgage held by *D*, but free from subsequent incumbrances. NARAIN SAHOO *v.* OCHOOT SAHOO . . **14 W. R. 233**

See WAJED HOOSEIN *v.* HAFEZ AHMED REZAH **17 W. R. 480**

21. _____ *Money-decree—Mortgage-decree—Notice—Civil Procedure Code* (*Act XIV of 1882*), *s. 287.* A creditor obtained two decrees against his debtor, one being a mortgage-decree to enforce his lien on certain property, and the other a simple money-decree. In execution of the second decree, the property over which the judgment-creditor had a lien was sold and was purchased by a third person. Subsequently, in execution of the first decree at the instance of the judgment-creditor, this same property was advertised for sale, but on the auction-purchaser objecting, the judgment-creditor, brought a suit against him to enforce his lien on the property in the hands of the auction-purchaser. *Held*, that it lay on the plaintiff, in order to entitle him to recover in the suit, to show that the defendants purchased with notice of the lien. *Held*, further, that the fact that for some purpose, at some time or other, the judgment creditor informed the Court of the mortgage, is not evidence of notice on the auction-purchaser. NURSING NARAIN SINGH *v.* ROGHOOBUR SINGH **I. L. R. 10 Calc. 609**

22. _____ *Priority.* The defendant advanced to *A* four sums of money on four bonds, in each of which certain property was hypothecated. The first two bonds contained a stipulation that, until the debt was discharged, the borrower would not mortgage or sell the property hypothecated. The defendant brought a suit to recover the amounts due on all his bonds, and obtained a simple money-decree, in execution of which he brought the property mentioned above to sale, and became the purchaser. The plaintiff now sued for a re-sale of the property by virtue of a mortgage of the same, duly registered. The last two of the defendant's bonds were executed after

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the Registration Act of 1864 came into force, but were, however, unregistered. *Held*, that, if the plaintiff had come in and offered to satisfy so much of the decree obtained by the defendant as related to the first two bonds, he would have been clearly entitled to assert that nothing could pass by the sale in execution of the decree on the other bonds, but the rights of the judgment-debtor, subject to his mortgage; but that, as he did not do so, the auction-sale, having been made in satisfaction *inter alia*, of the debts due on the mortgage-bonds containing the condition against alienation, passed the full proprietary right to the defendant. RAJAH RAM *v.* BAINEE MADHO . . **5 N. W. 81**

23. _____ *Effect of sale—Estoppel.*—On 10th September 1863 *A* mortgaged a house to *B*. who registered the deed, but did not obtain possession of the premises. On 2nd July 1868 *A* mortgaged the same house to *C*, who registered the mortgage-deed and took possession of the premises. On 10th October 1868 *B* sued on his mortgage, and obtained a decree against *A's* son, who was a minor, and who was represented by his mother as his guardian. She, however, had obtained no certificate of administration under the Minors Act, XX of 1864. On 17th December 1869 the mortgaged property was sold by the Court in execution of *B's* decree. The plaintiff bought it, and obtained a certificate of sale. On the plaintiff's attempting to take possession of the property, the defendant, who was *C's* widow and heiress, resisted him, and he thereupon sued to recover it. *Held*, that the plaintiff was entitled to possession. He stood, at least, in the same position as had been occupied by *B* before the sale, and *B*, as prior mortgagee, had a superior title to that of defendant, who claimed under a subsequent deed. Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee, at whose instance the sale is made, is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale. KHEVRAJ JUSRUP *v.* LINGAYA **I. L. R. 5 Bom. 2**

24. _____ *San-mortgage—Registration of certificate of sale—Civil Procedure Code, 1877, s. 287—Notice—Warranty of title.* A buyer of property at an execution-sale who registers his certificate of sale does not thereby acquire a title free from the obligation arising from a san-mortgage of previous date. When the Court sells the right, title, and interest of a judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property, and if by concealment of a san-mortgage he sold property as free of that charge, he would commit no fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title, and interest of the judgment-debtor subject to all exist-

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ing equities against the property sold, the registration of the Court's conveyance (*viz.*, certificate of sale) cannot enlarge the scope of that conveyance and discharge the property from any unregistered incumbrance which was binding on the judgment-debtor. *Per* MELVILL, *J.*—In the case of execution-sales under s. 287 of the Civil Procedure Code (Act X of 1877), notice is given to purchasers that the sale only extends to the right, title, and interest of the judgment-debtor, and that the Court ordering the sale does not warrant the title. This being so, it seems clear that a person who buys an avowedly doubtful title, and pays for it on that understanding, cannot claim to be a purchaser without notice. SOBHAGCHAND GULABCHAND *v.* BHAICHAND . . . **I. L. R. 6 Bom. 193**

See LAKSHMANDAS SARUPCHAND *v.* DASRAT **I. L. R. 6 Bom. 168**

and RUPCHAND DAGDUSA *v.* DALVATRAM VITHALRAV . . . **I. L. R. 6 Bom. 495**

25. ——— *Mortgage-debt payable by instalments—Money-decree obtained by mortgagee for two instalments—Sale of mortgaged property in execution of money-decree for such instalments without notice by mortgagee of lien for future instalments—Property sold free of incumbrances—Civil Procedure Code (Act XIV of 1882), ss. 237, 287.* The effect of ss. 237 and 287 of the Civil Procedure Code plainly is to impose a duty on the person applying for execution to disclose to the Court his own lien (which he must know of) in his application for sale, and on the Court the duty of specifying the same in the proclamation. Where, therefore, in execution of a simple money-decree obtained for some of the instalments due on his mortgage-bond a mortgagee brought to sale the property which he held in mortgage, but in his application for execution did not mention his lien on the property for the instalments that were still to fall due:—*Held*, that the purchaser, if he supposed that he was purchasing the full proprietary title, purchased the property free of the mortgagee's lien. *Agarchand* v. *Rakhma, I. L. R. 12 Bom. 678; Kherraj* v. *Lingaya, I. L. R 5 Bom. 2; Sheshgiri* v. *Salvador Vas, I. L. R. 5 Bom. 5;* and *Dhondo* v. *Ravji, I. L. R. 20 Bom. 290*, referred to. RAMCHANDRA VITHURAM *v.* JAIRAM . **I. L. R. 22 Bom. 686**

26. ——— *Mortgagee not in possesseion—Registered lease—Effect of sale in transferring property to purchaser.* *A* mortgaged his land to *B* in 1861, which mortgage was then registered, but the mortgagee did not enter into possession. Subsequently, in 1866, *A* leased the same land to *C*. That lease was registered and *C* entered into possession. In 1867 *B* obtained a decree upon his mortgage, and in execution attached and sold the mortgaged property. *C*, who had applied to have this attachment of the land removed, and failed in his application, sued to establish his right under the lease, and recover possession. *Held*, that, under the lease of 1866, he could only take

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what the mortgagor had to give him, *viz.*, a lease subject to the registered mortgage. Where a decree is obtained upon his mortgage by a mortgagee, and the mortgaged property is sold under the decree for the purpose of paying off the mortgagee, the interest of both mortgagor and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as the interest is concerned, although the officer of the Court may only have described the sale as one of the right, title, and interest of the mortgagor. It is not the practice in the mofussil to require the mortgagee to convey to the purchaser; the transfer takes place by estoppel. SHESHGIRI SHANBHOG *v.* SALVADOR VAS **I. L. R. 5 Bom. 5**

27. ——— *Mortgage without possession—Right of mortgagee as against the purchaser—Difference between a mortgage valid as against a private purchaser for valuable consideration and one valid as against a purchaser at a Court-sale—Priority—Optional registration.* On the 19th September 1871 the land in dispute was mortgaged by *L* (defendant No. 1) to the plaintiff for R25. The deed of mortgage was not registered. By it defendant No. 1 agreed to pay interest at the rate of one pice per rupee per mensem, and it was provided that the mortgagee was to remain in possession for a period of twenty-five years in lieu of principal and interest, and that the mortgagor was not to claim the property back, unless he paid the principal and interest that might accrue due in twenty-five years from the date of the bond. On the 8th July 1872 the land was sold in execution of a decree against the father of *L* and purchased by *B* (defendant No. 2), who obtained possession under the certificate of sale. In 1874 the plaintiff (the mortgagee) sued *L* and *B* for possession of the property. It was contended for *B* (defendant No. 2) that the mortgage did not bind him, because he was a purchaser for value without notice of the mortgage, and because it was not accompanied with possession. *Held*, that, although the mortgage to the plaintiff might have been without possession, it would bind the mortgagor himself, and was therefore binding as against defendant No. 2, who purchased at a Court-sale under a decree obtained against the mortgagor. A purchaser at such a sale takes only that which the judgment-debtor could himself honestly dispose of. Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay (except Gujarat) against a private purchaser for valuable consideration, but not against a purchaser at a Court-sale. BAPUJI BALAL *v.* SATYABHAMABAI **I. L. R. 6 Bom. 490**

See SHIVRAM *v.* GENU . **I. L. R. 6 Bom. 515**

28. ——— *Unregistered sanmortgage—Sale—Subsequent unregistered mortgage of same property—Decree on latter mortgage and sale*

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in execution—Sale certificate registered—Priority—Interest passing on sale of mortgaged property in execution of a money-decree and of a decree in mortgage. One *H* and his sons *B* and *C*, executed a sanmortgage of certain ancestral property in plaintiff's favour in 1885. The mortgage was unregistered. In 1886 the same property was mortgaged by *C* alone by a deed which was also unregistered. In 1889 *C's* mortgagee obtained a decree on his mortgage for sale of the mortgaged property, and in execution put up the property to auction in 1892, when defendant purchased it. Defendant got his sale-certificate registered. In 1894 the plaintiff brought this suit to enforce his mortgage-lien by sale of the mortgaged property. The defendant contended that, as to *C's* share, his certificate of sale having been registered, his claim had priority to the plaintiff's unregistered mortgage. *Held*, that the plaintiff was entitled to a decree. His, claim was superior to the defendants. The defendant had purchased the interest which *C* had mortgaged in 1889. But that mortgage was unregistered and was therefore subject to the plaintiff's mortgage, which although unregistered, was earlier in date. The defendant, by registering his certificate of sale, could not enlarge the estate which the certificate conveyed to him. By a sale of mortgaged property in execution of a decree obtained by a mortgagee against the mortgagor upon the mortgage, the interest both of the mortgagor and mortgagee passes to the purchaser. But by a sale of mortgaged property in execution of a money-decree obtained by the mortgagee against the mortgagor, the interest of the defend ant (mortgagor) alone passes to the purchaser-MAGANLAL *v.* SHAKRA GIRDHAR

I. L. R. 22 Bom. 945

29. ——— *Mortgaged land subsequently sold by mortgagee in execution of a money-decree—Purchaser at such sale with notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Civil Procedure Code (VIII of 1859), s. 213.* Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies, even though the mortgage-deed has been registered. In 1867 *R* and *G* mortgaged certain lands to *G R* by a registered deed of that date. In 1870 *G R* obtained a mnoey-decree against *R* and *G*, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage, and in February 1872 obtained possession through the Court. In the meantime *G R* brought another suit upon his mortgage against his morgagors. He obtained a decree and in April 1872 ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against *R*, *G*, and *G R* to recover the lands. *Held*, that the plaintiff was entitled to recover. *G R* (the mortgagee), when bringing the land to sale in exe cution of his decree, was bound by s. 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he has induced the plaintiff to pay full value for the property, and he could not therefore retain his lien. By his omission he was estopped from disputing the plaintiff's title. The rule, that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment. creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale. AGARCHAND GUMARCHAND *v.* RAKHMA HANMANT . **I. L. R. 12 Bom. 678**

30. ——— *Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.* On the 21st December 1871 three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*, and in August 1872, in execution of that decree, sold the said groves, and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* was found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact, he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May 1880 *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit, which resulted in the decree under which the groves were sold, in 1877, instituted this suit for possession of the groves. *Held*, that, notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title, and interest of the mortgagors, as they existed at the date of the mortgage of the 21st December 1871, with which would go the rights and interest of the mortgagee; and although at a sale under a decree for sale by a mortgagee the right, title, and interest of the mortgagor which is sold is his right, title, and interest at the date of the mortgage, and any right, title, and interest he may have acquired between the date of mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of mortgagee's decree, and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had, but for the decree. This view is

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consistent with the principles of equity and recognized by the Transfer of Property Act. *Muhammad Samiud-din* v. *Man Singh, I. L. R. 9 All. 125*, followed. GAJADHAR *v.* MULCHAND
I. L. R. 10 All. 520

31. ——— *Purchase of mortgaged propetry by mortgagee at judicial sale on leave obtained to bid.* Where mortgagees executed their decree on the mortgage, and, having obtained leave to bid at the judicial sale, purchased the property :— *Held*, that they could not be held to have purchased as trustees for the mortgagors, the leave granted to bid having put an end to the disability of the mortgagees to purchase from themselves, putting them in the same position as any independent purchasers. MAHABIR PERSHAD SINGH *v.* MACNAGHTEN
I. L. R. 16 Calc. 682
L. R. 16 I. A. 107

DAKSHINA MOHAN ROY *v.* BASUMATI DEBI
4 C. W. N. 474

32. ——— *Equities of mortgagors.* In a suit for possession by the certificated purchaser of one-third of certain mouzahs which had been sold in execution of a decree obtained by the mortgagee against the defendant as mortgagor, it appeared that the defendant had, in a previous execution sale at the instance of a second mortgagee of the same property, bought the same subject to his own first mortgage. The High Court held that the plaintiff should be treated, not as a purchaser, but as a mortgagee in respect of his purchase-money. They then directed that only so much of the original mortgage-debt as should be apportioned against the share bought by the plaintiff should be realised in his favour. *Held*, that this ruling and direction were founded on a misapprehension that the purchaser had a right to possession of the property which he had bought, and that the defendant had no equity to prevent it. LUTF ALI KHAN *v.* FUTTEH BAHADOOR **I. L. R. 17 Calc. 23**
L. R. 16 I. A. 129

33. ——— *Rights of purchasers under mortgage-decree—Purchases in execution by decree-holders—Title of purchaser holding a decree on a mortgage which had preceded his opponent's decree.* The plaintiffs and defendants, either party holding a separate decree against the same estate, had by leave purchased in execution. Both parties claimed the proprietary right and possessin, the defendants holding the latter. The first of the decrees in date was the plaintiffs' for money against the representatives of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow. The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title, and interest. The mortgagees, having got a decree upon their mortgage against the widow, purchased at the sale in execution, and defended the possession which they obtained. *Held*, that the defendants, in

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whose favour the decree had been made upon a *bonâ fide* mortgage, without notice that the mortgagor had been only holding benami for her husband, had the better title : that the High Court had rightly disallowed an objection taken by the plaintiffs, that this defence, as distinguished from the defendant's answer that the widow was the real owner, had not been set up or decided in the Court of first instance. MAHOMED MOZUFFER HOSSEIN *v.* KISHORI MOHUN ROY
I. L. R. 22 Calc. 909
L. R. 22 I. A. 129

34. ——— *Purchase of equity of redemption by decree-holder under s. 294 of the Code of Civil Procedure—Execution of decree in respect of balance—Nature of price paid by purchaser on the purchase of the equity of redemption.* *A* mortgaged certain land to *B*, but remained in possession thereof. Subsequently *A* sold a portion of the said land to *C* in consideration of her paying off the mortgage-debt due to *B*. *C* entered into possession, but was unable to satisfy the debt. *C* died, and *A* sued *C's* daughter and legal representative for damages sustained by him from the non-payment of the purchase-money by *C*. *A* obtained a decree, and, the money not being paid as therein decreed, applied for execution, and brought to sale the equity of redemption vested in *C* by virtue of the sale. By leave of the Court, *A* bid at the Court sale and bought the right of redemption and recovered back possession of the land sold to *C*. Subsequently he again applied for execution of the decree in respect of the balance by attachment of certain moveable property, and contended that he was bound to give the defendant credit only for the price which he actually paid at the Court-sale for the equity of redemption. The defendant contended that *A* was bound to give credit for the full value of the land under mortgage. *Held*, that, having obtained leave of the Court to bid under s. 294 of the Code of Civil Procedure, *A's* position was that of an independent purchaser, and that the price, which an independent purchaser must be taken to pay when he buys property under mortgage for a cash payment made to the mortgagor on account of his equity of redemption, is the cash payment for the equity of redemption *plus* the debt, *i.e.*, the amount undertaken to be paid to the mortgagee, and that for these amounts *A* was bound to give credit. KRISHNASAMI AYYAR *v.* JANAKIAMMAL
I. L. R. 18 Mad. 153

35. ——— *Application for re-sale in execution of decree—Judgment-debtor purchasing benami—Rights of mortgagee.* Upon an application made on the 28th August 1891 for execution of a mortgage-decree, the mortgaged property was sold and the judgment-debtors purchased it benami at a low price. Thereupon the decree-holders made an application on the 12th November 1891, asking the Court to set aside the

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benami purchase and re-sell the property. The first Court found that the purchase was not benami, and confirmed the sale on the 12th April 1892, but the lower Appellate Court came to a contrary conclusion and set aside the sale on the 22nd July 1892. The High Court in second appeal accepted the finding of the Appellate Court as regards the purchase being benami, but upheld the sale with the remark that the said property and any other property of the debtors might be sold in satisfaction of the mortgage-debt. This judgment was passed on the 4th August 1893. On an application for execution made on the 3rd December 1894, objections were raised on the ground that the property was not liable to be sold again in execution of this decree. *Held*, that the previous sale under the mortgage-decree was no bar to a fresh sale under the same decree. *Ram Autar Singh* v. *Tulsi Ram, 5 C. L. R. 227 ; Otter* v. *Lord Vaux, 2 K. & J. 650, and 6 DeG. M. & G. 638 ;* and *Lutf Ali Khan* v. *Futteh Bahadoor, I. L. R. 17 Calc. 32*, referred to. RAGHUNATH SINGH SAHAY *v.* LALJI SINGH
I. L. R. 23 Calc. 397

36. ———— *Transfer of Property Act (IV of 1882), s. 88—Suit for sale on a mortgage—Purchase at auction-sale by decree-holder—Further execution sought against other property comprised in the mortgage—Amount for which decree-holder must give credit to mortgagee.* A mortgagee decree-holder in a suit for sale under s. 88 of the Transfer of Property Act, 1882, brought part of the mortgaged property to sale, and, with the leave of the Court, purchased it himself. The amount realized by the sale being insufficient to satisfy the mortgage-debt, the decree-holder applied for execution against the remainder of the property comprised in the mortgage. *Held*, that the decree-holder was not bound to give credit to the mortgagor to the amount of the market value of the mortgaged property purchased by him, but only to the amount of the actual purchase-money. *Mahabir Parshad Singh* v. *Macnaghten, I. L. R. 16 Calc. 682 ; Sheonath Doss* v. *Janki Proshad Singh, I. L. R. 16 Calc. 132 ;* and *Ganga Pershad* v. *Jawahir Singh, I. L. R. 19 Calc. 4*, referred to. MUHAMMAD HUSEN ALI KHAN *v.* DHARAM SINGH . **I. L. R. 18 All. 31**

37. ———— *Transfer of Property Act (IV of 1882), ss. 92 and 63—Decree for sale on a mortgage—Order absolute for sale—Civil Procedure Code, 1882, ss. 291 and 310A.* Ss. 291 and 310A of the Code of Civil Procedure, 1882, will apply to a sale held in virtue of an order absolute for sale passed under s. 89 of the Transfer of Property Act, 1882, although no power is given under that Act to postpone the operation of an order under s. 89. RAJARAM SINGHJI *v.* CHUNNI LAL . . . **I. L. R. 19 All. 205**

But *see* KEDARNATH RAUT *v.* KALI CHURN RAM.
I. L. R. 25 Calc. 703

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38. ———— *Sale in execution of a decree for sale on a mortgage—Stay of sale on payment into Court of decretal amount and costs—Civil Procedure Code, s. 291—Transfer of Property Act (IV of 1882), s. 89. Held*, that s. 291 of the Code of Civil Procedure must be taken to have modified s. 89 of Act IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale. *Rajaram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205*, followed. HARJAS RAI *v.* RAMESHAR
I. L. R. 20 All. 354

39. ———— **Administration suit**—*Mortgage suit—Residency legatee, mortgage by—Administration, subsequent, of testator's estate—Receiver of testator's estate pending administration—Receiver, sale by, of mortgaged property before completion of administration.* Defendant mortgaged certain properties, which he took under the will of his father, to the plaintiff. Plaintiff brought this suit on the mortgage, and obtained a decree and an order for sale by the Registrar. In the meantime a suit for administration of the testator's property had been filed, and an order had been made in that suit appointing a Receiver. Plaintiff now applied that the sale of the mortgaged properties might be held by the Receiver appointed in the administration suit, instead of by the Registrar. The administration suit was still pending, and administration of the testator's estate had not been completed. *Held*, that the sale could not, be held by the Receiver before the completion of the administration. Till such completion of administration it could not be said that the defendant was entitled to the mortgaged properties. NETAI CHAND CHUCKERBUTTY *v.* ASHUTOSH CHUCKERBUTTY (1901)
5 C. W. N. 408

40. ———— **Civil Procedure Code, 1882, ss. 310A, 311**,—Ss. 310A and 311 of the Code of Civil Procedure apply to sales of mortgaged property in execution of mortgaged decrees. *Kedar Nath Raut* v. *Kali Churn Ram, I. L. R. 25 Calc. 703*, commented on. *Tirumal Rao* v. *Syed Dastaghiri Miyah, I. L. R. 22 Mad. 286 : Raja Ram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205 :* and *Krishnaji* v. *Mahadev Vinayak, I. L. R. 25 Bom. 104*, approved. MALLIKARJUNADU SETTI *v.* LINGAMURTI PANTULU (F.B., 1902)
I. L. R. 25 Mad. 244

41. ———— **Limitation**—*Mortgage—Payment—Prior mortgagee—Subsequent mortgagee—Limitation Act (XV of 1877), Sch. II, Art. 11—Civil Procedure Code (Act XIV of 1882), s. 335, rejection of objection under.* If an objection under s. 335 of the Civil Procedure Code (Act XIV of 1882) is rejected, the objector is not precluded by Art. 11 of Sch. II the to Limitation Act

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SALE IN EXECUTION OF DECREE— *contd.*

10. MORTGAGED PROPERTY—*contd.*

(XV of 1877) from instituting a suit, to enforce his mortgage lien over the property comprised in the order rejecting the application, more than a year after the date of the order. A subsequent mortgagee, in paying off prior mortgages, has a right to keep them alive for his own benefit or to extinguish them, and it must be presumed that he acted in accordance with what is best for his own interests. *Gokaldas Gopal Das* v. *Puran Mal Premsukhdas, I. L. R. 10 Calc. 1035; Dino Bandho Shaw Chowdhry* v. *Nistarini Dasi, 3 C. W. N. 153;* and *Amar Chandra Kundu* v. *Roy Goloke Chandra Chowdhuri, 4 C. W. N. 769,* relied upon. BHIKU *v.* SHUJAT ALI (1901)

I. L. R. 29 Calc. 25

42. **Sale for arrears of revenue** —*Mortgage—Execution of decree—Sale of mortgaged property for arrears of revenue—Purchase of the same by the mortgagor—Realization of surplus sale-proceeds by mortgagees—Subsequent application to sell the same property under a decree on the mortgage.* A mortgagor, by allowing the revenue payable in respect of the mortgaged property to fall into arrears, caused such property to be sold at auction by the Revenue-authorities, and it was purchased by the mortgagor *benami* in the name of a third person. The mortgagees believing that this purchase was a genuine purchase, applied for and obtained payment out of Court of the surplus realized by the sale over and above the revenue due. Subsequently the mortgagees discovered the true nature of the purchase made by the mortgagor at the Revenue Court sale, and sought to have the same property, then in the hands of a transferee from the mortgagor's successor in title, sold in execution of a decree upon their mortgage. *Held,* that there was no legal objection to the property being sold in execution of the mortgage decree. *Otter* v. *Lord Vaux, 6 De Gex, M. and G. 638,* and *Raghunath Sahay Singh* v. *Lalji Singh, I. L. R. 23 Calc. 397,* referred to. GANGA SAHAI *v.* TULSHI RAM (1903) **I. L. R. 25 All. 371**

43. **Transfer of Property Act** (*IV of 1882*), *s. 89—Order absolute for sale —Notice to defendant of application—Practice.* Notice need not be given to a defendant before an order absolute for sale is made under s. 89 of the Transfer of Property Act. KRISHNA AYYAR v. MUTHUSAMI AYYAR (1901)

I. L. R. 25 Mad. 506

44. ——— *Act IV of 1882, ss. 67, 85, 99—Mortgage—Sale under a decree of equity of redemption—Rights of purchaser, the decree having become final.* On the 22nd of March, 1881, one Nathu Ram mortgaged certain property, with possession. On the 9th of May, 1881, the mortgagees leased the mortgaged property to Nathu Ram, who, as security for the rent due from him, further pledged his equity of redemption. The original mortgagees died. The rent due under the lease fell into arrears; and the successor in title of the mortgagees instituted a suit against the mortgagor, to recover the amount due to him for arrears of rent by sale of the equity of redemption of the property. On the 27th November, 1889, a decree for sale was passed, and on the 31st of March, 1890, an appeal against the decree for sale was rejected. The property was accordingly sold by virtue of the decree for sale, and was purchased by the successor in title of the mortgagees on the 20th of April, 1891. The sons of Nathu Ram thereupon brought a suit, claiming proprietary possession of the property on the ground that the sale of the equity of redemption was illegal and void, and conveyed nothing to the purchaser. *Held,* that the sale, having been the outcome of a suit under s. 67 of the Transfer of Property Act, 1882, did not offend against s. 99 of the Act, and that, although, according to law as laid down by the High Court, the sale of an equity of redemption was not contemplated by the Transfer of Property Act, yet, inasmuch as the sale had taken place under a decree which had become final, it could not at that time be upset. *Matadin Kasodhan* v. *Kazim Husain, I. L. R. 13 All. 432,* and *Tara Chand* v. *Imdad Husain, I. L. R. 18 All. 335,* referred to. PARMANAND v. DAULAT RAM (1902) **I. L. R. 24 All. 549**

45. ——— *Decree—Setting aside sale—Void sale—Code of Civil Procedure (Act XIV of 1882), s. 244—Mortgage—Sale of mortgaged property—Money decree—Transfer of Property Act (IV of 1882), ss. 67, 99.* A sale in contravention of the provisions of s. 99 of the Transfer of Property Act is void, although a third party is the purchaser and only a portion of the property was under mortgage the sale being of the whole undivided property. *Sheodeni Tewari* v. *Ram Saran Singh I. L. R. 26 Calc. 164,* and *Shib Dass Dass* v. *Kali Kumar Roy, 1. L. R. 30 Calc. 463,* referred to. Such a sale may be set aside under s. 244 of the Code of Civil Procedure. *Mayan Pathuti* v. *Pakuran, I. L. R. 22 Mad. 347,* followed. SONU SINGH *v.* BEHARI SINGH (1905)

I. L. R. 33 Calc. 283

46. ——— **Application to set aside sale**—*Execution of decree—Who have a right to apply—Revision.* A mortgagee sued for sale on his mortgage impleading, besides the mortgagee, two persons, who claimed a title to the mortgaged property adverse to the mortgagee. In that suit it was decided that the property the subject of the mortgage in suit belonged to the mortgagor and not to the other defendants. The plaintiff mortgagee obtained a decree for sale and caused the mortgaged property to be sold by auction. The defendants, other than the mortgagor, applied to have this sale set aside under s. 310A of the Code of Civil Procedure, but their application was rejected and they then sought in revision to get this order reversed. *Held,* by BANERJI, *J.*—That the defendants applicants were not entitled to make an application under s. 310A of the Code, they not being judgment-debtors whose property had been sold. *Per* RICHARDS,

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SALE IN EXECUTION OF DECREE— *contd.*

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J.—Whether or not applicants were entitled to make the application, which they did make (and they possibly were so entitled) the Court below did not fail to exercise a jurisdiction vested in it by law nor did it act in the exercise of that jurisdiction illegally. Its order was, therefore, not open to revision. *Rajah Amir Hasan Khan* v. *Sheo Baksh Singh, L. R. 11 I. A. 237*, referred to. RAM SINGH *v.* SALIG RAM (1905) . **I. L. R. 28 All. 84**

47. ———— *Money-decree—Sale of mortgaged property—Transfer of Property Act (IV of 1882), s. 99—Setting aside sale—Confirmation of sale—Fraud—Civil Procedure Code (Act XIV of 1882), s. 244.* A sale held in contravention of the terms of s. 99 of the Transfer of Property Act is not a nullity, but an irregular sale liable to be avoided merely on proof that the terms of that section have been contravened. The application to set aside such a sale must be made under s. 244 of the Code of Civil Procedure, and must be made before confirmation of the sale, unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale (1907). ASHUTOSH SIKDAR *v.* BEHARI LAL KIRTANIA (1908)
I. L. R. 35 Calc. 61
11 C. W. N. 1011

48. ———— **Misrepresentation by auctioneer, an officer of Court**—*Sale by Court under decree on a mortgage—Contract Act (IX of 1872), ss. 18 and 19, Exception—Bid made under misapprehension caused by such misrepresentation—Suit to set aside sale—Purchaser of worthless equity of redemption—Reference of the matter to the Court—Civil Procedure Code (Act XIV of 1882), s. 306.* A sale of mortgaged property in execution of a decree was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other his deputy, the assistant bailiff, who acted as auctioneer. The latter read a proclamation of sale in English, a language not understood by the native bidders present, which stated that only the interest of the judgment-debtor was for sale. Being asked by a native present to explain the terms of the proclamation, the auctioneer made a statement in Hindustani to the effect that "there are four mortgages ; on this account there is a sale by order of the Court, the title-deeds can be seen at the Registrar's office," from which the plaintiff who casually attended the sale, was led to believe that the property was being sold at the instance of the mortgagees and free of incumbrances and he bid for the property which was knocked down to him for a sum nearly equal to its full value. After the sale he discovered that it had been sold subject to mortgages amounting to more than its value and that he was the purchaser of the equity of redemption, which was worthless. In a suit to set aside the sale on the ground that he bid for the property under a misapprehension caused by the misrepresentation made by the auctioneer, the

SALE IN EXECUTION OF DECREE— *contd.*

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Appellate Court in India held that there was misrepresentation under s. 18 of the Contract Act (IX of 1872), but that the case fell within the exception in s. 19 as the plaintiff might with ordinary diligence have discovered the truth, and dismissed the suit. *Held*, by the Judicial Committee, that in sales under the direction of the Court it was incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Here the plaintiff had been misled by the accredited agents of the Court which could not under such circumstances enforce against him so illusory and unconscientious a bargain as the sale to the plaintiff was shown to be. *Held*, also, that the plaintiff had no means of discovering the truth, while the sale was going on, and he was perfectly justified in relying on the statement as to the property which was being sold made by the auctioneer. The exception in s. 19 of the Contract Act had no application to the case. *Held*, further, that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under s. 306 of the Civil Procedure Code. KALA MEA *v.* HARPERINK (1908)
I. L. R. 36 Calc. 323

49. ———— **Simple mortgage**—*Purchaser at such sale cannot maintain suit for possession against purchasers of the equity of redemption subsequent to mortgage, but prior to suit, who were not joined as parties.* *A*, who held lands in kanom tenure, executed a simple mortgage on them in favour of *B* and subsequently sold the properties to *C*. Subsequent to such sale *B* brought a suit on his simple mortgage against *A* without making *C* a party, and obtained a decree for sale. *D* became purchaser at the sale held in execution of a decree. In the suit by *D* against *A* and *C* for possession of the properties purchased at the Court sale : *Held*, that *D* was not entitled to sue for possession, as all that passed to him at the sale was the right of *B* as a simple mortgagee. *Hargu Lal Singh* v. *Gobind Rai, I. L. R. 19 All. 541*, followed. ENTHOLI KIZHAKKIKANDY KANARAN *v.* VALLATH KOYLIL UNNOOLI (1907) . . **I. L. R. 30 Mad. 500**

50. ———— **Application by mortgagor for restoration to possession**—*Decree—Execution of decree—Sale under decree on mortgage—Subsequent appeal from mortgage decree when Appellate Court altered decree by increasing the amount and extending time for payment by mortgagors—Effect of Appellate decree on the sale—Right to possession—Limitation—Civil Procedure Code (Act XIV of 1882), ss. 244 and 311—Former order giving possession to mortgagees.* The appellants, who were mortgagees, on 20th December, 1900, obtained in a suit on their mortgage in the Court of a Subordinate Judge an ordinary decree for sale of the mortgaged property, and, pending an appeal by the appellants on the ground that they were entitled to a larger amount than had been allowed them by the decree, the mortgaged property was

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SALE IN EXECUTION OF DECREE— *contd.*

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sold on the application of, and purchased by, the appellants, and they were put into possession under an order of the High Court, dated 18th April 1904. On the appeal from the decree of the Subordinate Judge, the High Court, on 27th January 1904, made a decree for sale conditional on the payment by the respondents, the mortgagors, of an increased amount within six months from the date of the appellate decree. The respondents, who had already unsuccessfully taken objections under ss. 311 and 244 of the Civil Procedure Code to the sale being confirmed, then made an application under s. 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of s. 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application. The High Court on appeal, holding that the application was rightly made under s. 244, and was not barred, and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad, reversed the Subordinate Judge's decree and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council. *Held*, by the Judicial Committee, that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession, against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th January 1904 would entail expense and delay; that the merits of the case were not with them, and they had not offered to redeem the property. Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge. RAM GOLAM SAHU *v.* BARSATI SINGH (1908)

I. L. R. 36 Calc. 336

51. ———— *Rights of purchasers at different Court sales of same property—Purchaser at prior sale on subsequent mortgage takes the entire interest of judgment-debtor—Fraudulent sale, proof of—Relief not claimed in plaint, granting of.* The same property was sold by Court at different times in execution of two mortgage decrees obtained against such property. The first sale was in execution of the decree on the subsequent mortgage obtained in a suit in which the prior mortgagee was not impleaded and was held while the suit on the first mortgage to which the second mortgagee was no party was pending. The purchaser at the subsequent sale on the first mortgage sued to recover possession from the prior purchaser of the property and the plaint also contained a prayer for such other relief as the plaintiff may be found entitled to:—*Held*, that all the interest of the judgment-debtor passed to the purchaser at the first sale and the purchaser at the second sale of the judgment-debtor's interest in the property took nothing, as the judgment-debtor had then no saleable interest in the property. The suit to recover possession was not therefore maintainable. *Venkatanarasammah* v. *Ramiah, I. L. R. 2 Mad. 108*, followed. *Akatti Moidin Kutty* v. *Chirayil Ambu, I. L. R. 26 Mad. 486*, followed. The rights of a prior or subsequent encumbrancer will remain unaffected by a sale held in execution of a decree to which he was no party. Any such rights of the plaintiff cannot be enforced in the suit brought by him for possession, as a claim for redemption or for sale is not of the same nature as a claim for ejectment and cannot be tacked on and decreed in a suit brought for ejectment. *Gopi Narain Khauna* v. *Bousidhar I. L. R. 27 All. 325 331*], distinguished. *Venkata ramana Iyer* v. *Gompertz, I. L. R. 31 Mad. 425*, distinguished. The mere fact that a defendant did not contest the plaintiff's claim which was in part excessive, is not sufficient to show fraudulent collusion between the plaintiff and the defendant. *Kutti Chettiar* v. *Subrahmania Chettiar* (1909)

I. L. R. 32 Mad. 485

11. DECREES AGAINST REPRESENTATIVES.

1. ———— Liability of legal representative of deceased person—*Right of bonâ fide purchaser without notice at execution sale.* A *bonâ fide* purchaser without notice for valuable consideration at an auction sale is, as a general rule, entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative. The legal representative of a deceased person, though not a party to the suit, will be bound by the execution sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or if, knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he acquired a good title. *Edalji Hormasji* v. *Mahabu Begum, Special Appeal No. 266 of 1869*, considered. NATHA HARJ *v.* JAMNI

8 Bom. A. C. 37

2. ———— Decree against widow in representative capacity—*Right and interest acquired by purchaser.* A suit was brought against *A's* widow upon a bond given by *A*. In execution of the decree obtained against the widow, *A's* property was put up and sold. The advertisement of sale in one place said that the property to be sold was the property of the widow, and in an other the rights and interests of the debtor. *Held*, that the property intended to be sold, and sold, was the rights and interests, not of the widow personally, but of the widow as *A's* representative.

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SALE IN EXECUTION OF DECREE—*contd.*

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(*Dissentiente* CAMPBELL, *J.*, who held that a public sale carried only the rights which were expressed, and not those which ought to have been expressed, in the proclamation of sale.) BUKSH ALI SOWDAGUR *v.* ESSAN CHUNDER MITTER **W. R. F. B. 119**

S.C. ISHAN CHUNDER MITTER *v.* BUKSH ALI SOWDAGUR . . . . . **Marsh. 614**

See also COURT OF WARDS *v.* COOMAR RAMAPUT SINGH . . . . . **10 B. L. R. 294**

S.C. GENERAL MANAGER, RAJ DURBUNGAH *v.* RAMPUT SINGH . . **14 Moo. I. A. 605**
17 W. R. 459

and SOTISH CHUNDER LAHIRY *v.* NILCOMUL LAHIRY . . . . . **I. L. R. 11 Calc. 45**

3. ——— **Property sold as right and interest of widow**—*Property wrongly described—Right of deceased debtor—Purchaser, Right acquired by.* Where in execution of a decree in the presence of the widows of the original debtor, the property in dispute was sold as the right and interest of the widows:—*Held*, that the auction-purchaser under the circumstances of the case, acquired by the purchase the right and interest of the original debtor in the property, though in the sale notification those of the widows were advertised to be sold. TARAKANT BHUTTACHARJEE *v.* LUKHEE DABEA. TARAKANT BHUTTACHARJEE *v.* WISE . . . . . **2 Hay 8**

4. ——— **Interest of persons as representatives**—*Property wrongly described—Civil Procedure Code, 1859, s. 203.* Where a property is described at the time of an execution sale as the property of judgment-debtors who were sued as mere representatives of a deceased judgment-debtor, *primâ facie* what is sold is the property of the deceased debtor; and even if the decree is in terms as if it were a personal decree, and does not follow the wording of Act VIII of 1859, s. 203, yet it must be construed as if it was for the debt of the deceased. LALLA SEETA RAM *v.* RAM BUNSH THAKOOR . . . . . **24 W. R. 383**

5. ——— *Contents of application for execution and of notification and proclamation of sale—Sale of interest of minor—Civil Procedure Code, 1859, ss. 212, 249.* Where an application for execution of a decree omits to give the names of all the parties as required by s. 212, Act VIII of 1859, even if it shall appear from other parts of the proceedings who those parties are, the parties named must be understood to be the parties defendants against whom the execution of the decree is sought. Parties present at a sale are not bound to refer to the decree as laid down in *Ishan Chunder Mitter* v. *Buksh Ali Sowdagur, Marsh. 614*, nor must they be considered as knowing its contents unless they are stated in notification of sale. The proclamation and notification under s. 249 are intended to inform persons what is to be

SALE IN EXECUTION OF DECREE—*contd.*

11. DECREES AGAINST REPRESENTATIVES—*contd.*

sold, and to give the names of the parties defendants whose rights and interests in it are to be sold. In the case of a sale in execution of a decree against a party as a representative of a deceased person, the proper course is to give in the description of the property to be sold the name of the defendant against whom the decree was obtained, and, in describing what was to be sold, to say the right, title, and interest of the defendant as the representative of the deceased. A guardian has no right or interest in a minor's property, and the Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of a decree. The purchaser in this case was *held* to have acquired under his purchase no title to the property of the minor, the property not having been described as the property of the minor. ABDOOL KUREEM *v.* JAUN ALI ‡. . **18 W. R. 56**

6. ——— *Guardian not properly appointed—Act XX of 1864—Parties—Mad. Reg. V of 1804—Form of decree.* *J* (defendant No. 1) brought a suit (No. 374 of 1861) against the plaintiff's father *G*. On a mortgage-bond, dated the 2nd April 1856, *G* having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made against her *ex parte*. It was, however, set aside after her death on the application of *M* (defendant No. 2), the sister of *G*, on the ground of want of due service of process upon *G* and his widow. *M* was substituted as defendant in the suit, and a new decree was made in her favour. That decree was reversed, on appeal, by the District Court, which allowed *J's* claim. In execution of the decree of the Appellate Court, the mortgaged property was sold and purchased by *J* for R250. *J* obtained certificate of sale headed thus "*J*, son of *L*, plaintiff; *G*, son of *N*, deceased, supplement of substitute) his sister *M*, defendant;" and it certified that *J* had purchased "all the right, title and interest which the said defendant had in the said property." *J* was put into possession of the property. In 1877 the plaintiff (son of the original mortgagor *G*) filed the present suit against *J* and *M*, alleging that the mortgage-bond on which *J* had obtained his decree had been forged by *J*, and contending that the decree and subsequent proceedings under it did not affect his rights, inasmuch as he had not been made a party to them. The prayer in the plaint was that the decree and sale should be set aside and the property restored to his possession. The defence of *J* substantially was that the suit and appeal were defended by persons who were proper guardians of the plaintiff, and had been in the management of his property. *M* did not appear. The Subordinate Judge rejected the plaintiff's claim, holding that *M* was his guardian and manager of his property in the previous suit and appeal, and that the mortgage-bond was genuine. On appeal, that decree was reversed by the District Judge,

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SALE IN EXECUTION OF DECREE— *contd.*

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on the ground that the plaintiff had not been represented in the previous litigation by a guardian duly appointed under Madras Regulation V of 1804, and was no party to it. He accordingly allowed the plaintiff's claim. On second appeal to the High Court:—*Held*, that on the death of *G*, the plaintiff was his sole heir; that the equity of redemption in the mortgaged property vested in him; and that the inheritance was wholly unrepresented in the previous litigation, inasmuch as *M* was not appointed guardian of the plaintiff's person or administratrix of his estate, either under Madras Regulation V of 1804, ss. 2, 19, 23, or under Act XX of 1864; nor was she appointed his guardian *ad litem* in the mortgage suit. *Ishan Chunder Mitter* v. *Buksh Ali Sowdagur*, *Marsh. 614*, distinguished. JATHA NAIK *v.* VENKATAPA **I. L. R. 5 Bom. 14**

7. _____ *Sale in execution of a decree against a deceased person represented by a minor son—How far such sale affects interest of an heir not party to decree or execution-proceedings.* *K*, a Mahomedan woman, who was a co-sharer in a certain khoti vatan, died indebted, and was sued after her death as "represented by her minor son represented by his guardian." A decree having been obtained against *K*, as so represented, her share in the khoti was put up for sale in execution, and was purchased by the plaintiff who obtained a sale-certificate reciting that the right, title, and interest of *K* in the said khoti had been purchased by him. He now sued the defendants, who were *K's* co-sharers in the khoti, to recover the profits of *K's* share, which they had received. *K*, besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution-proceedings, and the defendants contended that her share in her mother's estate had not passed to the plaintiff. *Held*, that the plaintiff was entitled to the whole of *K's* share. The debt due by *K* was one for which the daughter was equally responsible; and having regard to the form of the suit and the execution-proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of *K's* share, and would acquire a title unimpeachable by the daughter. KHURSHET BIBI *v.* KESO VINAYEK . . . **I. L. R. 12 Bom. 101**

8. _____ **Representatives of deceased Mahomedan**—*Sale subject to mortgage—Power of heirs to alienate.* The heirs of a deceased Mahomedan mortgaged some property of their ancestor. After the mortgage, a judgment-creditor, in respect of a debt due from the estate of their ancestor, attached and sold the mortgaged property in execution of his decree. *Held*, that the sale was subject to the mortgage. *Held*, also, that the question with respect to the powers of the heirs and the rights acquired by the mortgagee and the purchaser under the execution, in a suit between the latter, was to be determined not by the Mahomedan law, but by the principles of "justice, equity, and good conscience." *Semble*: That even if the Mahomedan law applied, the sale in execution would be subject to the mortgage. CAMPBELL *v.* DELANEY . . . . . **Marsh. 509**

SALE IN EXECUTION OF DECREE— *contd.*

11. DECREES AGAINST REPRESENTATIVES —*contd.*

9. _____ *Purchaser of share of estate, rights of—Purchase from some of the heirs—Absent heir, reappearance of.* *B R*, a Mahomedan, had incurred debts for repairs to a house of which he owned an 8 annas share, and after his death his daughter *S*, who was entitled to a 5 annas share of his estate and who had taken charge of his property and obtained a certificate under Act XXVII of 1860, directed further repairs to be done to the estate. The debts then incurred by *B R* and *S* not having been paid, the creditor brought a suit against *S*, as representing her father's estate, to recover them, and having obtained a decree, the house was sold in execution thereof, and purchased by *H* in May 1874. *B R* at his death left also a sister, who was entitled to a 3 annas share of his estate, but who had been for some years absent on a pilgrimage to Mecca. On her return she, in January 1874, sold her interest in the house to *M*. In a suit by *M* against *S* and *H* for possession of the share so purchased by him:—*Held*, that *S* did not represent the whole estate of *B R*, and the share purchased by the plaintiff did not pass under the execution sale to *H*; the plaintiff, therefore, was entitled to recover. HENDRY *v.* MUTTY LALL DHUR . . **I. L. R. 2 Calc. 395**

10. _____ *Purchase of interest of some of the heirs—Heir not party to suit—Right acquired by purchaser.* *A*, a Mahomedan, died possessed of immoveable property and leaving a widow, a daughter, and a sister *B*, his heiress according to Mahomedan law. *B* was entitled to a one-sixth share of an undivided moiety of a certain portion of the property which was situated in Calcutta. After *A's* death, the *L* Bank sued his daughter and her husband and two of her husband's brothers in a mofussil Court to realize certain mortgage securities executed by *A* to the Bank, and obtained a decree by consent. Neither the widow nor *B*, who was then absent from the country, were parties to the suit. The Bank, in execution of their decree, caused certain property of *A*, including the undivided moiety of the Calcutta property, to be sold by the Sheriff of Calcutta. The defendant became the purchaser at this sale, and obtained possession of the property. The certificate of sale stated that what was sold was "the right, title, and interest of *A*, deceased, the ancestor, and of the defendants (naming them), the representatives, in a moiety of a piece of land situate," etc. *B* afterwards sold and assigned her share in (among other properties) the abovementioned undivided moiety of the Calcutta property to the plaintiff who now sued the purchaser at the execution-sale to recover the subject of his purchase. *Held* by GARTH, *C. J.*, KEMP and JACKSON, *JJ.*

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SALE IN EXECUTION OF DECREE—*contd.*

11. DECREES AGAINST REPRESENTATIVES —*contd.*

(MARKBY and AINSLIE, *JJ.*, dissenting), that the decree and the execution founded upon it did not affect the share of *B* in the estate of *A*, and consequently that the property in question did not pass to the defendant under the sale made by the Sheriff. ASSAMATHEMNESSA BIBEE *v.* LUTCHMEEPUT SINGH . . . **I. L. R. 4 Calc. 142**

s. c. ASHRUF ALI *v.* LUTCHMIPUT SINGH. **2 C. L. R. 223**

11. ——— *Mahomedan law—Decree against heir of deceased Mahomedan.* Under Mahomedan law, a decree against one heir of a deceased debtor cannot bind the other heirs. A mortgage having been executed by a Mahomedan, a suit was after his death brought against two of his heirs, his sister, who was entitled to a 6 annas share in his property, not having been made a party to the suit. A decree was made by consent, and in execution of that decree the right, title, and interest of the mortgagor were sold, the assignee of the sister then sued the purchaser to recover her 6 annas share without making the original mortgagee a party. *Held*, that the mortgagee was not a necessary party to the suit, and that the share of the sister, notwithstanding that the right, title, and interest of the mortgagor had been sold, was not affected by the sale, and that the plaintiff as her assignee was entitled to recover. SITA NATH DASS *v.* LUCHMIPUT SINGH **11 C. L. R. 268**

12. ——— *Civil Procedure Code, s. 234—Sale in execution of decree against deceased Mahomedan's estate—Representation of deceased by some only of his next-of-kin—Sale held to be valid.* *V*, a Mahomedan woman, died, leaving her husband and several minor children as her representatives. In execution of a money-decree obtained against *D*, the creditor attached certain land which belonged to *V*, and made her husband and two of her children parties to the execution-proceedings. The land was sold and purchased by the decree-holder. *Held*, in a suit brought by the children of *V*, to set aside the sale on the ground (*inter alia*), that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid. KANHAMMAD *v.* KUTTI **I. L. R. 12 Mad. 90**

13. **Mortgage by one of the heirs of deceased**—*Direction in will for payment of debts—Decree against heirs for debt of ancestor—Charge on property.* A testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs. After one of the testator's creditors had obtaind a decree against the heirs in their representative capacity, which by its terms was to be satisfied out of the assets left by the testator, one of the heirs mortgaged his share in twelve properties left by the testator. Subsequent to the mortgage, one of the mortgaged properties was sold in execution of the creditor's decree. The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgagee. *Held*, that, as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage, and the mortgagee was entitled to execute his decree against the property. *Bazayet Hossein* v. *Dooli Chund, I. L. R. 4 Calc. 402*, distinguished. RAM DHUN DHUR *v.* MOHESH CHUNDER CHOWDHRY **I. L. R. 9 Calc. 406 : 11 C. L. R. 565**

SALE IN EXECUTION OF DECREE—*contd.*

11. DECREES AGAINST REPRESENTATIVES —*concld.*

12. RE-SALES.

1. ——— **Defaulting purchaser, liability of**—*Civil Procedure Code (Act X of 1877), ss. 293, 297, 306, 308.* The provisions of s. 293, Act X of 1877 (Civil Procedure Code), for making a defaulting purchaser at a sale liable for any deficiency on a re-sale, extend to all sales, whether of moveable or immoveable property, and also to re-sales held under ss. 297, 306 and 308. RAMDHANI SAHAI *v.* RAJRANI KOOER **I. L. R. 7 Calc. 337 : 9 C. L. R. 23**

2. ——— **Time allowed for payment of purchase-money**—*Civil Procedure Code, 1859, s. 251—Discretion of officer conducting sale to allow reasonable time for payment of purchase-money.* The provisions of s. 251 of the Civil Procedure Code give the officer conducting a sale of moveable property a discretion to allow the purchase-money to be paid at a reasonable time after the sale had been made. FARREED ALUM *v.* SHEO CHARUN RAM . . . . **4 N. W. 37**

3. ——— *Civil Procedure Code, 1859, s. 254, computation of period under*—In computing the fifteen days allowed for payment of the balance of the purchase-money under s. 254, Act VIII of 1859, the day of sale was excluded. AMANEE BEGUM *v.* KOORBAN ALI **3 Agra 204**

4. ——— **Failure of purchaser to pay deposit**—*Civil Procedure Code, 1859, s. 254.—Failure to deposit, re-sale on.* According to s. 254, Civil Procedure Code, 1859, the property had to be put up again for sale on the purchaser failing to make deposit; and it was the deposit only which could be forfeited, and not any right which a decree-holder might have under his decree. In the case of a re-sale the judgment-debtor is entitled to credit for the full amount bid for his property at the time of the first sale. JOOBRAJ SINGH *v.* GOUR BUKSH LALL . . . **7 W. R. 110**

5. ——— **Defaulting purchaser**—*Amount leviable from defaulting purchaser—Interest—Civil Procedure Code, 1859, s. 254.* When

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SALE IN EXECUTION OF DECREE— *contd.*

12. RE-SALES—*contd.*

the proceeds of an eventual sale were less than the price bid by a defaulting purchaser, the difference was leviable from him under s. 254, Code of Civil Procedure, but was levied without interest. SOORJ BUKSH SINGH *v.* SREEKISHAN DOSS **9 W. R. 500**

See SOORUJ BUKSH SINGH *v.* SREEKISHEN DOSS. **6 W. R. Mis. 126**

6. ——— *Failure to pay deposit—Failure to pay balance of purchase-money—Civil Procedure Code, 1859, s. 253.* The provisions of s. 253, Act VIII of 1859, were held applicable in a case where the re-sale did not forthwith take place on the day of the sale, but on a subsequent date. It was only on failure of a purchaser to pay in the balance of the purchase-money under s. 254, and not on failure of the purchaser to make the deposit required by s. 253, that the purchaser could be compelled to pay up the difference between the first and second sales. AJOODHYA PERSAD *v.* GOPAL DUTT MISSER . **17 W. R. 271**

7. ——— *Civil Procedure Code, 1877, ss. 293, 294—Failure to pay deposit—Re-sale—Redress against defaulter—Bidding without permission of Court—Benami purchase.* A purchaser of property at a Court-sale who fails to pay the deposit (25 per cent. at the purchase-money) directed to be paid by s. 306 of the Civil Procedure Code is a defaulting purchaser within the meaning of s. 293 of that Code, and liable, as such, to make good any deficiency of price which may happen on a re-sale and all expenses attending the same. JAVHERBHAI *v.* HARIBHAI **I. L. R. 5 Bom. 575**

8. ——— *Civil Procedure Code, 1859, s. 254.* A purchaser at an execution-sale having defaulted to pay in the purchase-money, the property was ordered to be re-sold. Before, however, the re-sale took place, another sale of the same property was effected at the instance of another judgment creditor, but a lower price than on the first occasion. *Held*, that there was no re-sale such as was contemplated in ss. 253 and 254, Act VIII of 1859, and that the first purchaser was not liable for the difference between his bid and the price obtained at the same sale. BISOKHA MOYEE CHOWDHRAIN *v.* SONATUN DOSS . **16 W. R. 14**

9. ——— *Act VIII of 1859, s. 254.* In execution of a decree, certain property of the judgment-debtor was attached and put up for sale, and a portion thereof was knocked down to a purchaser for a sum sufficient to satisfy the decree. The purchaser, however, having made default in payment of the purchase-money, the property was again put up for sale, and the portion previously sold was purchased by the decree-holder at a price less than the amount bid for it in the former sale. *Held*, that the decree-holder was not debarred by what took place at the former sale from proceeding to satisfy his decree by sale of other portions of the attached property than that originally sold. KHERODA MAYI DASI *v.* GOLAM ABARDARI . . **13 B. L. R. 114 : 21 W. R. 149**

SALE IN EXECUTION OF DECREE— *contd.*

12. RE-SALES—*contd.*

10. ——— *Civil Procedure Code, 1859, s. 254. Held*, by PHEAR, *J.* (AINSLIE, *J., dissentiente*), that if for any good reason the auctioneer at an execution-sale under the Code of Civil Procedure does not accept as purchaser the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will; he must simply declare that no sale has been effected and reopen the bidding. *Held*, by PHEAR, *J.* (AINSLIE, *J.* dissenting), that where the Judge countersigned the certificate of sale in the following terms, "*H P*, having made the purchase for R700, stated that he made the purchase for *D K* as purchaser in *H P's* bid; and that, when a second sale became necessary, the difference of price became recoverable from the apparent first purchaser under Act VIII of 1859, s. 254, and recourse should first have been had to *D K*, who should have been allowed to show cause against an order of payment. HUREE RAM *v.* HUR PERSHAD SINGH . . . . . **20 W. R. 80**

Held (on appeal under the Letters Patent confirming the judgment of PHEAR, *J.*), that the party purchasing at an execution-sale under the Civil Procedure Code in the character of an Agent cannot be made liable as a principal; and a proceeding upon the contract under s. 254 in such a case must be taken against the principal. HUREE RAM *v.* HUR PERSHAD SINGH . **20 W. R. 397**

11. ——— *Civil Procedure Code, 1859, s. 254.* Where property had been sold under a decree and the purchaser at the execution-sale had made default in paying the purchase money, the remedy of the judgment-creditor was not limited by s. 254 of Act VIII of 1859 to a suit against the defaulting purchaser. He was entitled to recover the balance of his debt from his judgment-debtor, who might perhaps have his remedy against the defaulting purchaser. ANANDRAV BAPUJI *v.* SHEKH BABA **I. L. R. 2 Bom. 562**

12. ——— *Civil Procedure Code, 1882, s. 293—Defaulting purchaser answering for loss by re-sale—Description of property at sale and re-sale, difference of.* The sale contemplated by s. 293 of the Civil Procedure Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293. *Semble:* That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit,

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SALE IN EXECUTION OF DECREE—*contd.*

13. PURCHASERS, TITLE OF—*contd.*

(*a*) GENERALLY—*contd.*

sequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by STRACHEY, *C.J.*, that the second purchasers having acquired their title at a time when the first sale had been set aside, their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held*, further (by STRACHEY, *C.J.*, and BANERJI, *J.*) on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale. *Dagdu* v. *Panchamsing Gangaram, I. L. R. 17 Bom. 375 ; Konapa* v. *Janardan, 11 Bom. 193 ; Adhur Chunder Banerji* v. *Aghore Nath Aroo, 2 C. W. N. 589 ;* and *Ram Chunder Sadhu Khan* v. *Samir Ghazi, I. L. R., 20 Calc. 25*, distinguished. *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan, I. L. R. 10 All. 166 : L. R. 15 I. A. 12*, referred to by STRACHEY, *C.J.* BANKE LAL *v.* JAGAT NARAIN. BANKE LAL *v.* DAMODAR DAS
I. L. R. 22 All. 168

8. ——— *Civil Procedure Code, s. 316—Sale in execution—Time from which the auction-purchaser's title accrues.* When immoveable property is sold in execution of a decree, the title of the auction-purchaser to mesne-profits or possession does not accrue until the sale has been confirmed. *Gobind Ram* v. *Tulsi Ram, All. Weekly Notes (1887), 217*, and *Prem Chand Paul* v. *Purnima Dassi, I. L. R. 15 Calc. 546*, followed. AMIR KAZIM *v.* DARBARI MAL (1902)
I. L. R. 24 All. 475

9. ——— *Sale in execution—Right of person deriving title from a purchaser at such sale—Such person's rights not affected by any error or fraud in procuring the decree—Decree passed under such circumstances only voidable not void.* A decree passed by a Court having jurisdiction over the subject-matter, is not void but only voidable when it is passed under a misapprehension or is brought about by fraudulent proceedings. The party against whom the decree is passed has only an equity to set aside the proceedings. Where property sold in execution of such a decree is purchased by the decree-holder and by him sold for value to a third party who has no notice of any defect in the decree, the equitable right to set aside such decree cannot prevail against the rights of the subsequent purchaser for value without notice. A person claiming through a Court purchaser, is entitled to rely upon the plea that he is a *bonâ*

SALE IN EXECUTION OF DECREE—*contd.*

13. PURCHASERS, TITLE OF—*contd.*

(*a*) GENERALLY—*concld.*

fide purchaser for value without notice, though he cannot claim the rights of a stranger purchasing at Court-sale. *Marimuthu Udaiyan* v. *Subbaraya Pillai, 13 Mad. L. J. 231*, followed. SHEIK ISMAL ROWTHER *v.* RAJAB ROWTHER (1906)
I. L. R. 30 Mad. 295

(*b*) CERTIFICATE OF SALE.

10. ——— **Position of purchaser with certificate**—*Certificate of purchase by Registrar—Conveyance—Suit for partition—Declaration of right to share—Rules of Court, 415, 431.* The position of a purchaser at a sale in execution of a decree of the High Court after he has obtained a certificate from the Registrar under rule 415 of the Rules of Court is that of a person clothed with a right to a conveyance in virtue of a contract ; he does not hold, save as regards the parties to the contract of sale, the position of an owner. When the sale is confirmed, the purchaser is entitled to a conveyance, and until he obtains a conveyance, the property in the estate purchased does not, having regard to rule 431, pass to him so as to give him rights as against parties not bound by the decree under which the sale took place. All that passes to him as against the defendant in that suit is an equitable estate and a right to a conveyance of the property ; and therefore as the estate in the property purchased has not passed, the purchaser is not entitled to maintain a suit for partition. In such a suit he could not on partition give a good conveyance to the parties interested in the estate, nor would he be entitled to a declaration of his share in the property. JOHUR MULL KHOORBA *v.* TARANKISTO DEB . . **I. L. R. 10 Calc. 252**

11. ——— **Title of purchaser without certificate**—*Possession—Unregistered certificate of sale—Valid title—Codes of Civil Procedure, Acts VIII of 1859 and XIV of 1882.* A purchaser of immoveable property at a Court-sale under the Civil Procedure Code, Act VIII of 1859, who has been put into possession by the Court, has thereupon a complete title against all persons bound by the decree, notwithstanding that he has no certificate of sale, or one only which has not been registered. *Rajkishen Mookerjee v, Radha Madhub Holdar, 21 W. R. 349*, followed. *Quære :* How far the above ruling will be affected by the language of s. 316 of Act XIV of 1882. SHIVRAM NARAYAN *v.* RAVJI SAKHARAM **I. L. R. 7 Bom. 254**

12. ——— *Suit to recover possession of property purchased. Semble :* If it is admitted that the plaintiff purchased immoveable property at a Court-sale, he can recover without producing the certificate of sale. SADAGOPA EDINTARA MAHADESIKA SWAMIAR *v.* JAMUNA BHAI AMMAL
I. L. R. 5 Mad. 54

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SALE IN EXECUTION OF DECREE— *contd.*

13. PURCHASERS, TITLE OF—*contd.*

(*b*) CERTIFICATE OF SALE—*contd.*

13. Evidence of title of purchaser—*Sale of immoveable property—Confirmation of sale.* The order confirming a sale of immoveable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential. *Doorga Narain Sen* v. *Baney Madhub Mazoomdar, I. L. R. 7 Calc. 199*, followed. TARA PRASAD MYTEE *v.* NUND KISHORE GIRI . **I. L. R. 9 Calc. 842 : 12 C. L. R. 448**

14. ——— Completion of title of purchaser—*Payment of purchase-money and confirmation of sale—Civil Procedure Code, s. 316.* Under s. 316 of the Civil Procedure Code (Act X of 1877) the title of a purchaser at a Court-sale becomes complete upon his payment of the purchase-money and confirmation of the sale by the Court. When the saleis admitted, production of a certificate is not necessary to entitle the purchaser to maintain a suit. *Padu Malhari* v. *Rakhmai, 10 Bom. 435 ; Lalbhai Lakhmidas* v. *Naval Mir Kamaludin Husen, 12 Bom. 247 ;* and *Harkisandas Narandas* v. *Rai Ichha, I. L. R. 4 Bom. 155*, distinguished. NAIGAR TIMAPA *v.* BHASKAR PARMAYA **I. L. R. 10 Bom. 444**

15. ——— *Sale in execution of decree of Revenue Court—Delivery of possession—Act XVIII of 1873 (N.-W. P. Rent Act), s. 76—Act XII of 1881 (N.-W. P. Rent Act), s. 172.* Property sold in execution of a decree of a Revenue Court vests in the purchaser on completion of the sale and payment of the full price. In order to perfect his title, it is not necessary that he should obtain a sale-certificate or should be put into possession by the Collector. *Held*, therefore, that a suit by a purchaser at a sale in execution of a decree of a Revenue Court for possession of the property was maintainable, although his sale-certificate might be an invalid document and the Collector had not put him into possession. MUZAFFAR HUSAIN *v.* ALI HUSAIN . **I. L. R. 5 All. 297**

16. ——— *Purchaser at execution sale—Suit for possession of property—Proof of title—Act VIII of 1859, ss. 257, 259. Held,* that it was not incumbent on a purchaser at an execution sale under Act VIII of 1859, which was confirmed in his favour under that Act, when suing for possession of the property, to produce a sale certificate, but it was competent for him to prove his purchase *aliunde*. The confirmation of the sale in his favour was *primâ facie* evidence of his title to the property, and was sufficient to pass such title to him, of which a certificate, if afterwards obtained by him, would merely be evidence that the property had so passed. *Doorga Narain Sen* v. *Baney Madhub Mozoomdar, I. L. R. 7 Calc. 199*, referred to. JAGAN NATH *v.* BALDEO **I. L. R. 5 All. 305**

SALE IN EXECUTION OF DECREE— *contd.*

13. PURCHASERS, TITLE OF—*contd.*

(*b*) CERTIFICATE OF SALE—*contd.*

KALEE DASS NEOGEE *v.* HUR NATH ROY CHOWDHURY . . . . **W. R. 1864, 279**

17. ——— *Purchasers at successive execution sales—Purchaser at second sale obtaining certificate of sale and possession of property prior to grant of certificate to purchaser at first sale—Priorities.* On the 9th December 1876 the plaintiff purchased a house at an auction-sale in execution of a decree against the owner, one *S*. The sale was confirmed on the 9th January 1877, but the certificate of sale was not issued until the 16th June 1880. On the 20th January 1880 the defendant purchased the same house at a sale in execution of a money-decree against *S*. That sale was confirmed on the 28th February 1880, and a certificate was issued on 20th March 1880. The defendant got possession from the judgment-debtor in April 1880. The plaintiff now sued for possession. It was contended for the defendant that, having completed his title, under the auction-sale and obtained possession before the plaintiff had taken out his certificate, he had acquired a better title than the plaintiff. *Held*, that the plaintiff was entitled to recover. By his prior purchase he had obtained an equitable interest in the property, although he had not obtained a sale certificate. The defendant therefore purchased subject to the plaintiff's equitable interest ; and that title having subsequently been perfected by the issue of the certificate, the plaintiffs were in a position to sue for possession. YESHWANT BABURAV *v.* GOVIND SHANKAR **I. L. R. 10 Bom. 453**

18. ——— *Certificate of sale granted to the representative of deceased purchaser—Civil Procedure Code, 1882, s. 316.* When a sale in execution has become absolute, the Court can, under s. 316 of the Civil Procedure Code (Act XIV of 1882), grant the certificate prescribed therein to the representatives of a deceased purchaser. *In re* VINAYAK NARAYAN *v. In re* DATTATRAYA KRISHNA DATAR **I. L. R. 24 Bom. 120**

19. ——— Period from which title of purchaser dates—*Date of sale—Date of confirmation of sale.* The title of a purchaser at a judicial sale which has been confirmed and been made absolute relates back to, and takes effect from, the date of the sale, and does not commence only on the date of the confirmation of the sale. LUCHMIN NATH *v.* MAHARAJA OF VIZIANAGRAM **7 N. W. 310**

20. ——— *Confirmation of sale—Liability of purchaser for Government revenue.* The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as zamindar and partly as patnidar. The sale took place in September 1872, but the defendant did not obtain possession until confirmation of the sale in May 1873. Between the date of the sale and the

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SALE IN EXECUTION OF DECREE—*contd.*

14. DISTRIBUTION OF SALE-PROCEEDS—*contd.*

VIII of 1859 (with which s. 295 of Act X of 1877 corresponds) was not to alter or limit the rights of parties arising out of a contract, but simply to determine questions between rival decree-holders standing on the same footing, and in respect of whom there is no rule for otherwise determining the mode in which proceeds of property sold in execution shall be distributed. HASOON ARRA BEGUM *v.* JAWADOONNISSA SATOODA KHANDAN **I. L. R. 4 Calc. 29**

RAJCHUNDER SHAHA *v.* HURMOHUN ROY. **22 W. R. 98**

2. _____ **(1859, s. 270)**—*Property not sold in execution of decree.* S. 270 of the Civil Procedure Code did not apply to a case in which property has not been sold in execution of a decree. BISHEN CHUNDER SURMA CHOWDHRY *v.* MUN MOHINEE DABEE . . . . . **8 W. R. 501**

BALAJI RAMCHANDRA *v.* GAJANAN BABAJI. **11 Bom. 159**

3. _____ *Civil Procedure Code (Act XIV of 1882), ss. 295, 310A—Bengal Tenancy Act (VIII of 1885), s. 174—Sale in execution of decree—Deposit by judgment-debtor—Rateable distribution.* S. 295, Civil Procedure Code, does not apply to deposit made by the judgment-debtor either under s. 174, Bengal Tenancy Act, or under s. 310A of Civil Procedure Code. BIHARI LALL PAUL *v.* GOPAL LALL SEAL . **1 C. W. N. 695**

4. _____ *Imperfect attachment of immoveable property—Private alienation after such attachment—Civil Procedure Code, ss. 274, 276, Sch. IV, No. 141.* A judgment-debtor whose property had been attached in execution of a money-decree sold the property and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting and prior to the sale, the holders of other money-decrees against the same judgment-debtor preferred applications purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bonâ fide* transaction, entered into for valuable consideration. *Held*, that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in the manner provided by s. 274 of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place. Also *per* MAHMOOD, *J.*—While s. 395 of the Code gives a special right to judgment-creditors, as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be sale in execution, and that its result should appear in assets realized by the sale; and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry* v. *Mun Mohinee Dabee, 8 W. R. 501*, referred to. GANGA DIN *v.* KUSHALI **I. L. R. 7 All. 702**

SALE IN EXECUTION OF DECREE—*contd.*

14. DISTRIBUTION OF SALE-PROCEEDS—*contd.*

5. _____ *Rights created by s. 295, how affected by insolvency and vesting order—Insolvent Act (11 & 12 Vict., c. 21), s. 49.* An order under s. 295 of the Civil Procedure Code affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under s. 295 creates rights which are not affected by the insolvency. *Soobul Chunder Law* v. *Russick Lall Mitter, I. L. R. 15 Calc. 202*, cited. HOWATSON *v.* DURRANT. **I. L. R. 27 Calc. 351**
4 C. W. N. 610

6. _____ *Rateable distribution—Assets realized "by sale or otherwise."* The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors. The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code. SEW BUX BOGLA *v.* SHIB CHUNDER SEN **I. L. R. 13 Calc. 225**

7. _____ *"Assets."* Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court, and are available, under s. 295 of the Code of Civil Procedure (Act X of 1877), for rateable distribution only amongst decree-holders who have applied for execution prior to that time. VISVANATH MAHESHVAR *v.* VIRCHAND PANACHAND . . . **I. L. R. 6 Bom. 16**

8. _____ *"Whenever assets are realized," meaning of—Deposit of 25 per cent. of purchase-money—Assets.* The words "whenever assets are realized" in s. 295 of the Code of Civil Procedure really mean "whenever assets are so realized as to be available for distribution among the decree-holders." The 25 per cent. of the purchase-money deposited at a sale in execution of a decree is not "assets" within the meaning of s. 295, but a mere deposit, and therefore not immediately available for payment to the decree-holder. *Vishvanath Maheshvar* v. *Virachand Panachand, I. L. R. 6 Bom. 16*, distinguished. *Jogendro Nath Sirkar* v. *Gobind Chunder Addi, I. L. R. 2 Calc. 252*, distinguished and com-

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mented upon. HAFEZ MAHOMED ALI KHAN *v.* DAMODAR PRAMANICK **I. L. R. 18 Calc. 242**

9. ——— *Money paid by debtor under arrest in satisfaction of decree—Assets.* Money paid by a judgment-debtor under arrest, in satisfaction of the decree against him, are not assets realized by sale or otherwise, under s. 295 of the Civil Procedure Code (Act X of 1877). S. 295 of the Civil Procedure Code (Act X of 1877) must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." PURSHOTAMDASS TRIBHOVAN DASS *v.* MAHANANT SURAJBHARTHI HARIBHARTHI **I. L. R. 6 Bom. 588**

10. ——— *Execution of decree—Attachment of property—Payment into Court of money due under decree—Assets realized by sale or otherwise.* *G* and *C* held decrees against *B*, and took out execution of them and the judgment-debtor's property was attached, but no sale took place. The judgment-debtors paid into Court the sum of R1,200 on account of *G's* decree. *Held*, that *G* was entitled to the sum of R1,200 paid into Court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor. GOPAL DAI *v.* CHUNNI LAL **I. L. R. 8 All. 67**

11. ——— *Distribution of proceeds of execution—Assets realized by sale or otherwise in execution—Moneys realized by Receiver appointed by decree-holder—Equitable execution.* Rents of property under attachment which have been realized by a Receiver appointed at the instance of one decree-holder are "assets realized by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Code of Civil Procedure. The appointment of a Receiver by the Court at the instance of a judgment-creditor is a "process of execution." FINK *v.* MAHARAJ BAHADOOR SING . . **I. L. R. 26 Calc. 772**
4 C. W. N. 27

12. ——— *Realization of proceeds of sale—Sale under agreement sanctioned by Court—Sale not of the right or interest of judgment-debtor in property.* *P*, the plaintiff in a suit No. 369 of 1886, obtained a decree for R2,14,728, in execution of which certain immoveable property was attached, including the premises 22, Strand Road, which was subject to certain trusts created by a deed, dated the 2nd February 1858, executed by the father of the judgment-debtors, who with one *M* were trustees of the deed. At the time of the attachment a suit No. 448 of 1883 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they

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were absolutely entitled to the premises 22, Strand Road, and the other properties; in that suit, on the 26th March 1888, a decree was made declaring the valid trusts and charging the premises 22, Strand Road, with the payment of certain specific sums. In 1891 the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22, Strand Road, sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and to have the balance divided between the judgment-debtors; and, by the decree in that suit, dated the 2nd September 1892, the trustees of the deed were authorized to sell the premises 22, Strand Road, and were directed out of the proceeds of sale to set aside R45,000 to provide for the trusts, next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority, the trustees, on the 25th February 1893, entered into an agreement with one *J L* for sale to him of the premises 22, Strand Road, for R1,43,000. On the 8th August 1893 a notice was issued at the instance of *P* calling on the judgment-debtors to show cause why the premises 22, Strand Road, should not be sold in execution under her attachment. On the 29th August 1893 the trustees of the deed of 2nd February 1858 gave notice to *P* of an application to be made in the suits Nos. 369 of 1886 and 441 of 1891 for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees with *J L* be carried out; that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of *P*; that the balance be paid to the credit of suit No. 369; "as subject to the said attachment," and that the premises 22, Strand Road, be thereupon released from the attachment. These applications were heard together, and on the 14th September 1893 a consent order was made, by which it was ordered that the trustees be at liberty to carry out the agreement for sale with *J L*; and the sale-proceeds be paid to W, a member of the firm of the attorneys for *P*, who out of such proceeds was to pay R45,000 to the trustees, and make other payments directed by the order, and pay the balance into Court to the credit of suits Nos. 369 of 1886 and 441 of 1891, "the said *P* retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase-money was paid to *W*, who, after making the payments directed, paid the balance into Court. Whilst in the hands to *W*, the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments. *Held*, on an application by *P* to have the money paid out to her in part satisfaction of her decree, that it could not be treated as "assets realized by

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sale or otherwise in execution of a decree'' within the meaning of s. 295 of the Code of Civil Procedure. The sale of the property under the order of the 14th September 1893 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title, or interest of the judgment-debtors or of any property belonging to them. To constitute a realization within the meaning of s. 295, there must be either a realization by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to *P* in respect of her lien, the amount of such excess might perhaps have been treated as a '' realization in execution'' within the meaning of s. 295, but the balance in *W's* hands was less than the amount due to *P*, and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate. *Purshotam Dass* v. *Mahanant Surajbharthi, I. L. R. 6 Bom. 588*, and *Sewbux Bogla v. Shib Chunder Sen, I. L. R. 13 Calc. 225*, referred to and approved. PROSONNOMOYI DASSI *v.* SREENAUTH ROY

I. L. R. 21 Calc. 809

13. ——— *Right of rival decree-holder to show decree of another is barred.* Where property has been attached in execution of decree, it is competent to a rival decree-holder to show that the attachment should not issue, as the decree under which it issued was barred by lapse of time ; and the Court, if satisfied that the decree is so barred, is competent to see that the decree-holder who took out execution does not share in the distribution of the sale-proceeds. RADHA GOBIND SHAH *v.* OOZEER . . **15 W. R. 219**

14. ——— *Court to adjudicate on conflicting claims.* The Court having jurisdiction to adjudicate the conflicting claims of attaching creditors is the Court in which the attached money is deposited. WOOMA MOYEE BURMONYA *v.* RAM BUKSH CHETLANGEE

16 W. R. 11

15. ——— *Decree of Small Cause Court—Judge sitting as Small Cause Court and as Subordinate Judge.* The Judge of a Court of Small Causes sitting in the exercise of his powers as a Subordinate Judge is not one and the same Court, but two different Courts. *Held*, therefore, that the holder of a decree made by the Judge of a Small Cause Court in the capacity of a Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to share rateably, under s. 295 of Act X of 1877, assets subsequently realized by sale in execution of a decree made by such Judge

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in the capacity of Judge of such Small Cause Court. HIMALAYA BANK *v.* HURST

I. L. R. 3 All. 710

16. ——— *Decree passed by Subordinate Judge—Decree by same Court in exercise of its Small Cause jurisdiction—Rateable distribution of assets.* Certain moveable property was at first attached in execution of a money decree passed by a Subordinate Judge in his Small Cause jurisdiction, of which a part was afterwards sold. In execution of a money-decree passed by the same Subordinate Judge in his ordinary jurisdiction, the remaining property was attached and sold. Prior to the date of this sale, the applicant applied for execution of a money-decree passed in his favour by the same Subordinate Judge in his Small Cause jurisdiction, and prayed for rateable distribution of the proceeds along with other decree holders. *Held*, that the application must be allowed. Although a Subordinate Judge invested under Act XIV of 1869, s. 28, with Small Cause powers acquired the jurisdiction of two Courts, he does not become the Judge of two Courts, but remains the Judge of a subordinate Court. MALHARI *v.* NARSO KRISHNA **I. L. R. 9 Bom. 174**

17. ——— *Rateable distribution of assets—Transfer of application for execution.* Where property attached in execution of a decree of a Munsif's Court is, or becomes, subject to an attachment issued from a Subordinate Judge's Court, the holder of the decree in the Munsif's Court, in order to share rateably in the assets under s. 295 of the Code of Civil Procedure, must apply to the District Court to transfer his application to the Subordinate Court. *Gopeenath Acharjee* v. *Achcha Bibee, I. L. R. 7 Calc. 553*, and *Jetha. Madhavji* v. *Najeralli Abhramji, I. L. R. 4 Bom. 472*, approved. MUTTALAGIRI *v.* MUTTAYYAR

I. L. R. 6 Mad. 357

18. ——— *Attachment by more than one judgment-creditor of property of judgment-debtor in Court—Priority—Civil Procedure Code (Act X of 1877), s. 272.* In execution of a decree of a Munsif's Court, the plaintiff attached certain money, the proceeds of decrees which her judgment-debtor had obtained against third parties then lying in a Small Cause Court to her credit, and subsequently obtained an order from the Munsif directing the same to be paid to her in satisfaction of her decree, which order was duly communicated to the Small Cause Court Judge. Subsequently the defendant, who held another decree against the same judgment-debtor, attached the same sale-proceeds. The Small Cause Court Judge then proceeded, under s. 272 of the Civil Procedure Code, to enquire whether the plaintiff was entitled to any priority over the second attaching creditor, and having decided that question in the negative, divided the sale-proceeds rateably between them. In a suit brought by the

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plaintiff, under the above circumstances, to recover from the defendant the portion of the sale proceeds so paid to him :—*Held*, that s. 295 of the Civil Procedure Code had no application, inasmuch as the plaintiff had not applied to the Small Cause Court Judge to execute her decree, and it had never been transferred to that Court for execution ; and that the proviso in s. 272 is merely intended to mean that any question of title or priority is to be determined by the Court in which or in whose custody the property is, and not by the Court which made the order of attachment. *Held*, also, that, previous to the order by the Munsif directing the payment to be made to the plaintiff, the Small Cause Court Judge would have had jurisdiction to deal with the question he had tried ; but as that order was made prior to the attachment by the defendant, the judgment-debtor had no interest in the money which could be so attached, the effect of that order being to vest the property in the money in the plaintiff, and to take it out of the disposal of the Small Cause Court Judge ; and consequently the order for distribution was wrong, and the plaintiff was entitled to the decree she sought. *Quære :* Whether an order made by a Court under s. 272 was intended by the Legislature to be a final order. GOPEE NATH ACHARJEE *v.* ACHCHA BIBEE
I. L. R. 7 Calc. 553 : 9 C. L. R. 395

19. ——— *Decree in Small Cause suit and decree in regular suit in Subordinate Judge's Court.* Two decrees were passed against the same defendant in the Court of a District Munsif and on the Small Cause side of a Subordinate Judge's Court in the same district respectively. The holder of the decree in the Small Cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the Subordinate Judge's Court directly, and not through the District Court. *Held*, that the order for rateable distribution was right. KELU *v.* VIKRISHA . . . **I. L. R. 15 Mad. 345**

20. ——— *Rateable distribution of assets—Civil Procedure Code, 1877, s. 266—Attachment of salary.* The salary of a karkun, who was employed in the Second Class Subordinate Judge's Court of Anklesvar, was attached, in execution of a decree of the First Class Subordinate Judge's Court of Surat, by an order issued by the Surat Court, directing the Anklesvar Court to stop and remit every mont, a moiety of the said karkun 's salary to itself (the Surat Court) until satisfaction of the decree. While the decree of the Surat Court was thus in force of execution, another judgment-creditor of the karkun, who had obtaind a decree in the Anklesvar Court, applied to it for a rateable distribution of the moiety between himself and the Surat decree-holder, under s. 295 of the Civil Procedure Code, Act X of 1877. *Held* that the application was not sustainable, inasmuch as the decree of the Surat Court was being executed by itself, and not by the Anklesvar Court, to which the order of attachment was sent as the head of the department or as "the officer whose duty it was to disburse the salary," and not as a Court executing the decree of another Court. KRISHNASHANKAR *v.* CHANDRASHANKAR
I. L. R. 5 Bom. 198

21. ——— *Attachment—Rateable distribution of assets—Proceeds of sale under decrees of Small Cause Court.* Certain moveable property was attached in execution of decrees of the Small Cause Court at Ahmedabad. After the attachment, but before the sale of the attached property, other creditors of the same judgment-debtor obtained decrees against him in the Court of the Subordinate Judge at the same place, and applied to it for the attachment of the same property in execution of their decrees. The Subordinate Judge accordingly attached it by prohibitory orders issued to the Judge of the Small Cause Court. After the sale, the holders of the decrees obtained in the Subordinate Judge's Courts claimed a rateable share in the assets realized by the Small Cause Court, under s. 295 of Act X of 1877. *Held*, that they were not entitled to any share in the assets until after satisfaction of the decrees of the Small Cause Court. JETHA MADHAVJI *v.* NAJERALLI ABHRAMJI . . . **I. L. R. 4 Bom. 472**

22. ——— *Rateable distribution of assets realized in execution. R* obtained a decree against *A* and another in the High Court under its original Civil Jurisdiction. In execution of that decree, *A's* property was attached by the Second Class Subordinate Judge of Bijapur, and an order for sale was made. *D* obtained a decree against *A* alone in the Court of the First Class Subordinate Judge of Sholapur, and obtained from that Court an order for the attachment and sale of *A's* property, which was already attached by the Second Class Subordinate Judge of Bijapur. He then applied to the Second Class Subordinate Judge of Bijapur for rateable distribution of the assets realized under s. 295 of the Civil Procedure Code (Act XIV of 1882). The Second Class Subordinate Judge of Bijapur rejected the application and he thereupon applied to the High Court. *Held*, following *Jetha* v. *Najeralli, I. L. R. 4 Bom. 472*, and *Krishnashankar* v. *Chandrashankar, I L. R. 5 Bom. 198*, that *D* was not entitled to share in the assets. DATTATRAYA *v.* RAHIMTULLA NURMAHOMED KHOJA . **I. L. R. 18 Bom. 456**

23. ——— *Property attached in execution of decrees of Small Cause Court and High Court—Execution-proceedings in Small Cause Court transferred to High Court—Rateable distribution of assets realized in execution.* The plaintiffs obtained a decree in the High Court against the defendant, and in execution attached goods in

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the defendant's shop. These goods, however, were already under attachment in execution of certain decrees obtained in the Small Causes Court against the defendant. On the 4th September 1895, by an order of the High Court made on the application of the plaintiffs, the execution-proceedings in the Small Cause Court suits were transferred to the High Court, and it was ordered that the attached property should be realized by the High Court. The records of the execution-proceedings in those suits were lodged in the Prothonotary's office. On the 26th September 1895 the decree-holder in one of the Small Cause Court suits obtained an order from the Judge in Chambers directing the Sheriff to take charge of the attached property and realized it by sale. The Sheriff accordingly sold the property and certified the sale to the Prothonotary's office. The plaintiffs subsequently (under the rules of the Sheriff's office) applied to the Prothonotary for payment to them of the amount realized or so much thereof as should satisfy their decree. The plaintiffs were directed to give notice of their application to the holders of the Small Cause Court decrees. *Held*, that the holders of the Small Cause Court decrees were entitled to share rateably with the plaintiffs in the High Court suit in the proceeds of the property sold in execution by the Sheriff. JAYNARAYAN MEGHRAJ *v.* ISMAIL KARAMALI . . **I. L. R. 20 Bom. 377**

24. ——— *Rateable distribution of assets—Preliminaries to right to share in application for execution.* An application for execution must not only have been made before the assets come into the hands of the Court, but must also be on the file and undisposed of, to entitle a decree-holder under s. 295 of the Code of Civil Procedure to share rateably in the assets realized by another decree-holder in execution of his decree against the same judgment-debtor. TIRUCHITTAMBALA CHETTI *v.* SESHAYYANGAR **I. L. R. 4 Mad. 383**

25. ——— *Rateable distribution of assets, preliminaries to right to share in—Prior application for execution requiring amendment.* The circumstance that the petition of one of several decree-holders in applying for execution requires amendment because of the list of property being incomplete, is no ground for declaring such application to be superseded by a later application made before the completion of the necessary amendment, by another co-decree-holder for execution. AHMED CHOWDHRY *v.* KHATOON **7 C. L. R. 537**

26. ——— *Rateable distribution of assets, preliminaries to right to share in.* Several decree-holders executing various judgments, for the most part of very ancient date, against the estate of one *R*, were in contest in respect of the proceeds of a Government promissory note, which had long been under attachment, but was eventually sold with accumulated interest for R69,000, in accordance with an expression of the High Court's opinion upon appeals presented by two of the decree-holders. Upon that opinion being made known, one of the decree-holders, *K K*, made, as it were, a fresh attachment of the note and applied for the sale of it; whereupon it was sold in the Court of the Subordinate Judge, who ordered payment in full to *K K* and two others (*B* and *S*), who were acting jointly in execution, and the surplus to be rateably divided among the other execution-creditors. One of these then brought a suit to establish a preferential claim. *Held*, that *K K*, who, as soon as it was ascertained that the fund might be so made use of, first applied for the sale of it, was the person who came under the Code of Civil Procedure, s. 270, and was entitled to payment in full; and that *B* and *S* had been overpaid, and were liable to repay the surplus to the other decree-holders. SRISH CHUNDER SIRCAR CHOWDHRY *v.* SHIB NARAIN PAL. SHIB NARAIN PAL *v.* KOONJO KAMINEE DEBEE . **22 W. R. 466**

27. ——— *Order as to proceeds on application of third party.* An order by a Principal Sudder Ameen made on the application of a third-party, that certain sale-proceeds which he had already directed to be rateably distributed among certain decree-holders should be withheld from one of them, was held to have been made without jurisdiction. MAHARAJAH OF BURDWAN *v.* HEERALALL SEAL . . . **11 W. R. 54**

S. C. *In the matter of the petition of* DHIRAJ MAHTAB CHAND BAHADOOR. **2 B. L. R. A. C. 217**

28. ——— *Rival decree-holders—Claimants under same decree.* S. 270, Act VIII of 1859, applied only to rival decree-holders claiming under different decrees, and not to persons claiming under the same decree. ABID ALI *v.* MUNNOO BYAS . . . . **2 Agra 183**

29. ——— *Separate sales in execution of decrees.* Application was made for execution of a decree for money against *R* and also for execution of a decree for money against *R* and another person jointly and severally. Certain immoveable property belonging to *R* was sold in execution of the first decree, the assets which were realized by such sale being sufficient to satisfy the amounts of both decrees. Such property was then sold a second time in execution of the second decree. *Held*, under these circumstances, that the second sale should be set aside, not being allowable with reference to the provisions of s. 295 of Act X of 1877. RATI RAM *v.* CHIRANJI LAL **I. L. R. 3 All. 579**

30. ——— *Rateable distribution of sale-proceeds—Same judgment-debtor—Sale in execution of decree—Execution-proceedings.* Where a judgment-creditor has obtained a decree

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against two judgment-debtors, *A* and *B*, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment-creditor holding a decree against *A* alone, who has also applied for execution, is not entitled to claim under the provisions of s. 295 of the Civil Procedure Code to share rateably in the sale-proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution-proceedings to ascertain the respective shares of joint judgment-debtors In *Shumbhoo Nath Poddar* v. *Luckynath Dey*, *I. L. R. 9 Calc. 920*, it was not intended to lay down that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons. DEBOKI NUNDUN SEN *v.* HART **I. L. R. 12 Calc. 294**

31. _____ *Decree-holders sharing rateably in sale-proceeds must be bonâ fide decree-holders.* The words "decree-holders" or "persons holding decrees for money against the same judgment-debtor" in s. 295 of the Code of Civil Procedure signify *bonâ fide* decree-holders. A Court is bound, in cases falling within this section, to satisfy itself whether the claimants are *bonâ fide* decree-holders within the meaning of the section; and where it is unable to satisfy itself as to the *bonâ fides* of the claim, the Court should exclude such claimant from the distribution of assets. *In re* SUNDER DASS **I. L. R. 11 Calc. 42**

32. _____ *Rateable distribution—Creditor with joint decree.* Where property belonging to *A* has been attached under a decree, and other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale-proceeds, and amongst them a creditor who has obtained a decree against *A* and *B*, such latter creditor is entitled under s. 295 of the Civil Procedure Code, to share in the proceeds of the sale of *A's* property. SHUMBHOO NATH PODDAR *v.* LUCKYNATH DEY **I. L. R. 9 Calc. 920**

33. _____ *Decree, execution of, by several judgment-creditors against one and the same judgment-debtor—Rateable distribution.* The plaintiff obtained a decree against two persons *P* and *S* for a sum of money and one of the defendants obtained another decree against *P*, and *R*, the latter being the father of *S*, and some other defendants also obtained decrees against all those three persons. The plaintiff now brought a suit claiming to have a share of the amount realized by the sale of the properties of *P*, the common judgment-debtor under the three decrees, by rateable distribution for the liquidation of his decree, not a farthing of which was realized, although the decrees of the defendants had been partly realized from judgment-debtor other than *P*. It appeared

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that the properties of *P* were specified in the execution-proceedings and in the sale proclamation separately and the amount realized by the sale of his properties was separately stated. *Held*, that no question of the ascertainment of the shares of the judgment-debtors or of the application of the "principle of marshalling" arose in this case, and that the plaintiff was entitled to ask for a refund of the money paid to the defendants, under s. 296 of the Code of Civil Procedure, out of the assets realized by the sale of the properties of *P*. *Deboki Nundun Sen* v. *Hart*, *I. L. R. 12 Calc. 294*, distinguished. *Shumbhoo Nath Poddar* v. *Lucky Nath Dey*, *I. L. R. 9 Calc. 920*; *Nimbaji Tulsiram* v. *Vidra Venkata*, *I. L. R. 16 Bom. 683*, referred to. That it is only the unsatisfied portion of the decree that ought to be taken into account in a question of rateable distribution, there being no reason why any amount should be set apart in favour of a decree-holder in proportion to any sum covered by his decree which has already been realized. SARAT CHANDRA KUNDU *v.* DOYAL CHAND SEAL **3 C. W. N. 368**

34. _____ *Rateable distribution of sale-proceeds—Same judgment-debtors—Separate and joint judgment-debtors—Marshalling of assets between decree-holders—Decree of Small Cause Court, transfer of.* The plaintiffs in this suit obtained a decree against all three defendants *A*, *B* and *C*. In execution of such decree, they attached two sets of securities: (i) municipal bonds, the joint property of *B* and *C*; and (ii) Government loan notes, the property of *C* alone. These were sold by the Sheriff, but, before they were so sold, the holders of decrees in two other High Court suits came in and applied to the High Court for execution of their decrees, which decrees were against *C* alone. These last-mentioned decree-holders now claimed to participate rateably with the plaintiffs in this suit in the realized proceeds of both the above-mentioned securities. The plaintiffs in this suit contended that such decree-holders, having decrees only against *C*, were not claiming against "the same judgment-debtors" as themselves within the meaning of s. 295 of the Civil Procedure Code. *Held*, that, as regards the proceeds of the Government loan notes, the sole property of *C*, the plaintiff's decree and the other two decrees were all decrees "against the same judgment-debtors," and that therefore, as regards that fund, all three sets of decree-holders were equally entitled and must share therein rateably. *Held*, further, that, as regards the other fund, the proceeds of the property of *B* and *C* only, the plaintiffs in this suit were entitled thereto, since the other decree-holders had no decrees against *B* and *C*, and therefore not "against the same judgment-debtors" as was the decree of the plaintiffs. *Held*, further that, the plaintiffs having two funds to proceed against, whilst the other decree-holders had but one of these

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two, the equitable principle of marshalling should be applied, and the plaintiffs required to satisfy themselves as far as possible out of the funds not available to the other decree-holder, before they had recourse to the other fund common to all, and as regards the latter fund the plaintiff should claim against the same only as creditors for the then unsatisfied balance of their debt rateably with such other decree-holders. *Shumbhu Nath Poddar* v. *Luckynath Dey, I. L. R. 9 Calc. 920*, and *Deboki Nundun Sen* v. *Hart, I. L. R. 12 Calc. 294*, considered and followed. Another holder of a decree—a Small Cause Court decree passed against all three debtors *A*, *B*, and *C*—had previously to the said attachments by the Sheriff in this suit himself attached the same securities through the Small Cause Court. He did not, however, at any time get his decree transferred to the High Court. He now came in in these execution-proceedings and claimed to share rateably in both funds on the same footing as the plaintiffs in this suit. *Held*, that, not having had his Small Cause Court decree transferred to the High Court before the realization of the said securities, or indeed at any time, he was not entitled to share in either fund. *Muttalgiri* v. *Muttayyar, I. L. R. 6 Mad. 357*, followed. NIMBAJI TULSIRAM *v.* VADIA VENKATI **I. L. R. 16 Bom. 683**

35. ——— and s. 285—*Attachment by Small Cause Court—Transfer of decree to superior Court.* Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution-proceedings to the superior Court, adopted and held supported by the cases of *Gopee Nath Acharjee* v. *Achcha Bibee, I. L. R. 7 Calc. 553*; *Bykant Nath Shaha* v. *Rajendro Narain Rai, I. L. R. 12 Calc. 333*; and *Bhugwan Dass Bogla* v. *Bunko Behary Bajpie, Suit 130 of 1884*, (unreported), *Muttalagiri Nayak* v. *Muttayyar, I. L. R. 6 Mad. 357*, and *Nimbaji Tulsiram* v. *Badia Venkati, I. L. R. 16 Bom. 683*, not followed. CLERK *v.* ALEXANDER . . . **I. L. R. 21 Calc. 200**

HAR BHAGAT DASS MARWARI *v.* ANANDARAM MARWARI. **2 C. W. N. 126**

36. ——— *Sale proceeds—Competing decree-holders—Purchase by permission of Court.* Where there are competing decree-holders, who have applied for execution of their decrees, s. 294 of the Civil Procedure Code (Act X of 1877) must be taken as subject to the provision of s. 295, so that the decree-holder, who has been permitted under the former section to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with such competing decree-holders, and will not be allowed to set off the purchase-money against the amount due to him on his decree. SHRINIVAS *v.* RADHABAI . . **I. L. R. 6 Bom. 570**

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37. ——— *Rateable distribution—Decree-holder for unascertained mesne profits who has applied for execution, right of—Civil Procedure Code, 1882, s. 294.* The holder of a decree for unascertained mesne profits who has applied to the Court to ascertain the amount thereof and to attach immoveable property under s. 255 of the Code of Civil Procedure comes within the purview of s. 295, and is entitled to share rateably with the attaching creditor in the assets realized. S. 294 must be read with s. 295 and to give effect to both sections the receipt to be given by the decree-holder who has obtained leave to bid from the Court and has purchased the property sold, can only be accepted for so much of the judgment-debt as the assets applicable to its discharge may suffice to satisfy. VIRARAGAVA AYYANGAR *v.* VARADA AYYANGAR . **I. L. R. 5 Mad. 123**

38. ——— *Sale in execution for creditor who has not attached.* Where the sale-proceeds of a portion of several parcels of property are sufficient to satisfy the decree of a judgment-creditor who has attached the property, another judgment-creditor, although he has not attached the property, is still entitled to have the remainder of the property sold to satisfy his decree under the provisions of s. 295 of the Civil Procedure Code. MEGH LALL POOREE *v.* SHIB PERSHAD MADI . . . . **I. L. R. 7 Calc. 34**

S. C. MEGH LALL POOREE *v.* MOHAMMED DUTT JHA . . . . **8 C. L. R. 369**

39. ——— *Rateable distribution—Civil Procedure Code, 1882, s. 266.* One *C* obtained a decree against *L* and *M* for rent due from them, and, in execution thereof, applied for the attachment and sale of two houses, with their compounds and the ground underneath them (in respect of which property the said rent had fallen due), belonging, respectively, one to each of his judgment-debtors. The properties were accordingly sold on the 23rd July 1879, and the sale-proceeds handed over to *C*. In the meantime, on the 28th February 1879, *D*, a judgment-creditor of *M* under a money-decree, applied for the attachment and sale of the same immoveable property (excepting the houses) of his judgment-debtor which had been previously attached under *C's* decree for rent. On the realization of the sale-proceeds, *D* applied, under s. 295 of Act X of 1877, for a rateable proportion of the assets realized by the sale of *M's* property in execution of *C's* decree. *Held*, that *D* was not entitled to such rateable proportion of the assets. MANIKLALL *v.* LAKHA MANSING . . . . **I. L. R. 4 Bom. 429**

40. ——— *Pauper suit—Civil Procedure Code, 1859, s. 309—Prerogative of the Crown.* With a view to recover the amount of Court-fees which *J* would have had to pay had he not been permitted to bring a suit, as a pauper,

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the Government caused certain property belonging to *B*, the defendant in such suit, who had been ordered by the decree in such suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against *B*, which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held*, that the Government was entitled to be paid first out of the proceeds of such sale the amount of Court-fees *J* would have had to pay had he not been allowed to sue as a pauper, the principle that Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in *Ganpat Putaya* v. *Collector of Kanara*, *I. L. R. 1 Bom. 7*, applied in this case. COLLECTOR OF MORADABAD *v.* MUHAMMAD DAIM KHAN **I. L. R. 2 All. 196**

41. **(1859, s. 271)**—*Property sold subject to mortgage.* The proviso of s. 271 of Act VIII of 1859 was intended to apply to a case where the property is actually sold subject to a mortgage, and where the transaction is such that the purchaser is buying only the equity of redemption ; it did not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser. FAKEER BUX *v.* CHUTTURDHAREE CHOWDHRY **12 B. L. R. 513 note : 14 W. R. 209**

FUTEH ALI *alias* NANNA MEAH *v.* GREGORY **6 W. R. Mis. 13**

JOY CHUNDER GHOSE *v.* RAM NARAIN PODDAR **21 W. R. 43**

See PURMESSUREE DOSSEE *v.* NOBIN CHUNDER TARUN . . . . . **24 W. R. 305**

42. ——— *Right of mortgagee who has obtained money-decree to share in surplus proceeds.* Where a mortgagee suing upon his bond obtains a money-decree without any declaration of lien, he is in the same position as if he had not taken any mortgage at all ; and in taking out execution his claim to a rateable distribution of surplus sale-proceeds of attached property is founded upon s. 271 of the Civil Procedure Code, 1859. RADHA KANT ROY *v.* SADAFUT MAHOMED KHAN **21 W. R. 86**

43. ——— *Right of mortgagee to take residue of sale-proceeds and retain his lien as mortgagee.* Plaintiff in a suit on an instalment-bond on which he had obtained a money-decree, having asked for and obtained the residue of the sale-proceeds after all the judgment-creditors had been fully satisfied, was *held* not to have abandoned his right as mortgagee. BOLAKEE LALL *v.* CHOWDHRY BUNGSHEE SINGH **7 W. R. 309**

44. ——— *Execution of decree—Attachment by mortgagee—Surplus proceeds.* Pending a suit against *A* and *N* upon a bill of exchange, *A* deposited with the plaintiff as security for the amount due upon the bill, the title-deeds of property belonging jointly to *N* and himself. The plaintiff subsequently got a decree for the amount due upon the bill. Thereafter one *S*, in execution of a decree, against *A* and *N*, attached certain property of theirs, including the mortgaged property, and caused it to be sold ; and the surplus sale-proceeds, after satisfaction of *S's* decree, were paid into Court to the credit of his suit. Intermediately between this attachment and sale, the plaintiff also attached under his decree on the bill of exchange the mortgaged and other property of *A* and *N*, and after the plaintiff's attachment *N* ratified the equitable mortgage made by *A*. The sale under *S's* attachment having taken place, the plaintiff sued *A* and *N* and the purchasers at such sale of the mortgaged property for foreclosure or sale thereof, and obtained a decree declaring that he had a good equitable mortgage of *A's* share in the joint property, and for an account and sale in default of payment ; and the plaintiff subsequently, on 26th May 1873, got an order under his decree upon the bill of exchange for payment to him of the surplus sale-proceeds lodged in Court to the credit of *S's* suit, and for sale of certain of the properties, other than the mortgaged property, which he had attached. Under this order the money was paid out to the plaintiff, and the properties were advertised for sale. MACPHERSON, *J.*, having, on an application by *A*, set aside this order and directed that the plaintiff should refund into Court the money paid out to him, and that the sale should be stayed, the Court on appeal refused to set aside the order of the 26th May but made the plaintiff undertake to pay into Court the mortgage-money with interest if the same should be received by him from the defendants in the mortgage-suit. BANK OF BENGAL *v.* NUNDOLALL DOSS . **14 B. L. R. 509**

45. ——— *Satisfaction of mortgage-lien out of surplus proceeds.* Where seven different properties belonging to the same mortgagor had been hypothecated to three different persons, and all of them sued upon their bonds and obtained decrees which were followed by simultaneous sales in execution :—*Held*, that, as all the properties were sold at the instance of all ths mortgagees for the satisfaction of their decrees, and therefore of their respective mortgage-liens and the decrees of the mortgagees should be satisfied out of the entire sale-proceeds in the order in which the liens on the properties had been created. GOPEE SING *v.* KISHA LALL . **25 W. R. 187**

46. ——— *Provisoes—Lis pendens—Sale subject to mortgage.* Where two mortgagees, in execution of their several decrees, attached the same property, of which a moiety without further specification was respectively mortgaged to each of them, and subsequent to the attachments the property was sold in execution

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of one of the decrees :—*Held*, that, notwithstanding the whole interest of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee, and that omission or neglect on the part of the Court executing the decree to give specific direction as provided by cl. (*b*) of s. 295 of the Civil Procedure Code did not prejudice the rights of the unsatisfied mortgagee or discharge his incumbrance. JANOKY BULLUBH SEN *v.* JOHIRUDDIN MAHOMED ABU ALI SOHER CHOWDHRY **I. L. R. 10 Calc. 567**

47. ——— *Mortgage—Allowance of set-off of purchase-money against amount of decree—Suit for share of sale-proceeds—Principle of distribution.* In execution of a decree against *M*, the plaintiff attached and advertised for sale certain property in mouzah A. At that time there were pending proceedings in execution of two other decrees obtained against *M* by the first and second defendants respectively. These two decrees were obtained on a bond executed by *M*, by which an 8 annas share of mouzah A was hypothecated as collateral security ; and in execution of these decrees the defendants brought to sale, and themselves purchased, not an 8 annas share only, but the whole of mouzah A, and were allowed by the Court to set off the purchase-money against the amounts due to them under their decrees. At the same time, the plaintiff's execution case was struck off on 3rd July 1880. In a suit brought by the plaintiff under s. 295 of the Civil Procedure Code for his share of the sale-proceeds of mouzah A, in which the defendants contended that, a set-off having been allowed to the defendants, the plaintiff was not entitled to any rateable distribution, and that, if any rateable distribution were allowed, they were entitled to have an allowance made in respect of a mortgage which the plaintiff held in a 2 annas share of mouzah A, which they had paid off subsequently to the transactions now in question :—*Held*, that the fact of the set-off being allowed in exercise of the power given in s. 294 of the Code, instead of actual payment into Court, did not alter the substantial nature of the transaction, so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors. *Held*, further, that the defendants were not entitled to deduct the sum paid by them to clear off the plaintiff's mortgage from the amount of the purchase-money before the Court could determine the amount rateably distributable among the parties concerned. *Quære :* Whether they were even entitled to reckon the amount so paid as one of the claims in respect of which, with others, a rateable distribution should be made. TAPONIDI HORDANUND BHARATI *v.* MATHURA LALL BHAGAT **I. L. R. 12 Calc. 499**

48. ——— *Decree for money—Causes of action—Mortgage-decree—Mortagee purchasing under his own decree, Execution of decree by.* The cause of action given by the last paragraph but one of s. 295 of the Civil Procedure Code does not arise until the money has been actually paid over to the person who is alleged not to be entitled to receive the same, and a suit brought by a person claiming to be entitled to be paid a share of sale-proceeds under that section, and to recover the same from another to whom such sale-proceeds have been ordered to be paid, if brought before they have been actually paid to such other person, is premature and should be dismissed. Every decree, by virtue of which money is payable is to that extent a "decree for money" within the meaning of that term as used in s. 295, even though other relief may be granted by the decree ; and the holder of such decree is entitled to claim rateable distribution of sale-proceeds with holders of decrees for money only under that section. There is nothing in s. 295 which takes away the right from a mortgagee who has obtained a decree upon his mortgage to proceed against the property of his mortgagor other than that subject to his mortgage. Thus the holder of a mortgage-decree which directs that the amount be realized from the mortgaged property and from the mortgagor personally is entitled to claim rateable distribution under that section, and is not in the first instance bound to proceed against his mortgage security and exhaust that. A mortgagee who has obtained a decree on his mortgage is not restricted to proceedings in the first instance against his mortgage security before proceeding against other property of his mortgagor, but when he sells any portion of the property, the subject of his mortgage, and purchases it himself, he is bound, before he can proceed further against the mortgagor or claim rateable distribution under s. 295, to prove that there is still a balance due to him, and that the property sold and purchased by him realized a fair amount, —the mere fact of the property having been sold at auction not being alone sufficient to prove its value,—and this ought to be inquired into most carefully by the Court to which an application is made to further execute the decree or to share rateably under s. 295. HART *v.* TARA PRASANNA MUKHERJI . . . **I. L. R. 11 Calc. 718**

49. ——— *Mortgage—First and second mortgagees—Sale of mortgaged property in execution of decree of second mortgagee—Suit by first mortgagee for re-sale of property in execution of his decree.* On the 22nd March 1878 the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March 1878 the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court. On the 20th June 1878 the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. *Held*, that this was the only course open to him, and he could not

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have enforced satisfaction of his decree in accordance with the provisions of s. 295 of the Civil Procedure Code, inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money-decree whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate to subsequent and not prior incumbrances. JAGAT NARAIN RAI *v.* DHUNDHEY RAI . . . **I. L. R. 5 All. 566**

See GUR SAHAI *v.* RAM DIAL . **7 N. W. 91**

50. _____ *Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale.* Certain land was mortgaged to *A* with possession to secure the repayment of a loan of R2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits and the balance paid to the mortgagors. By an agreement subsequently made it was arranged that the mortgagors should remain in possession and pay rent to *A*. *A* obtained a decree for R2,000 and arrears of rent and costs, and for the sale of the land in satisfaction of the amount decreed. The land was sold for R2,855 in March 1881. In May 1881 *B*, a puisne mortgagee, applied to the Court for payment to him of R500 of this sum, alleging that *A* was entitled only to R2,000 and R280 costs, but not to arrears of rent, in preference to his claim as second mortgagee. The claim of *B* was rejected on the 27th May 1881 and the whole amount paid out to *A*. In February 1882 *B* (who had filed a suit on the 23rd March 1881) obtained a decree upon his mortgage. On the 23rd May 1884 *B* sued to recover R510 paid to *A* on account of rent on the 27th May 1881. The lower Court dismissed the suit on the grounds (i) that *A* was entitled to treat the arrears of rent as interest, and (ii) that the suit was barred by limitation. *Held*, on second appeal, that *B* was entitled to recover the sum claimed. SIVARAMA *v.* SUBRAMANYA **I. L. R. 9 Mad. 57**

51. _____ The meaning of s. 295 of the Civil Procedure Code is that, when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority. SHAHI RAM *v.* SHIB LAL . **I. L. R. 7 All. 378**

52. _____ *Execution of decree—Payment out of proceeds before confirmation of sale—Interest on purchase-money from date of sale to date of confirmation—Civil Procedure Code, 1882, ss. 284, 315.* Although there is no express provision in the Code laying down that a decree-holder may take out of Court the proceeds of an execution-sale before the date on which the sale is confirmed, yet s. 315 of the Code implies that this may be done. The Court, however, under special circumstances may refuse to pay over to the decree-holder the purchase-money until the sale is confirmed, but in such case it should provide for due payment of interest on the money detained. *Held*, that, under the special circumstances of this case, the decree holder was not entitled to receive interest from his judgment-debtor from the date of the sale to the date on which the sale was confirmed. JOGENDRO NATH SIRCAR *v.* GOBIND CHUNDER ADDI . **I. L. R. 12 Calc. 252**

53. _____ *Execution-proceedings—Rateable distribution—Application for further execution—Notice—Civil Procedure Code, 1882, s. 622.* *A*, and subsequently *B*, obtained decrees against *X*, in execution of which the same land was attached, and *B* obtained an order for rateable distribution. Neither decree was satisfied. *A* then applied for attachment of other property, and the sale was fixed for 28th September. On 25th September *B* filed a petition for further attachment under ss. 250, 274, and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 295, because no application for execution was pending. *Held*, on appeal, that the petition for execution was wrongly rejected, but that the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution. The proper remedy was by a suit. VENKATARAMAN *v.* MAHALINGAYYAN **I. L. R. 9 Mad. 508**

54. _____ **and s. 276**—*Claim to rateable distribution under s. 295—Sale pending attachment.* A claim under s. 295 of the Civil Procedure Code is not enforceable as an attachment against which an assignment is tendered void by the provisions of s. 276. *Ganga Din* v. *Khushali, I. L. R. 7 All. 702*, followed. DURGA CHURN RAI CHOWDHRY *v.* MONMOHINI DASI . **I. L. R. 15 Calc. 771**

55. _____ **and s. 294**—*Suit for refund of rateable amount.* *M* and *C* each obtained a decree against the same judgment-debtor and applied for execution. *C*, in execution of his decree, attached certain immoveable property, and, with the permission of the Court, purchased the same under s. 294 of the Code of Civil Procedure and set-off his purchase-money against the decree. *M* claimed that the proceeds of the sale to *C* should be rateably distributed under s. 295 of the Code, and that *C* should either elect to have the property resold or pay into Court the rateable proportion due to *M*. *C* objected to a re-sale or to pay. *Held*, that *C* might be compelled to refund the rateable amount due to *M* by summary process in execution. MADDEN *v* CHAPPANI **I. L. R. 11 Mad. 356**

56. _____ **and ss. 235, 490**—*Application for execution, necessity of, in order to share in distribution under s. 295—Attachment before*

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judgment, effect of—Decree-holder with an attachment before judgment, omission by, to apply for execution under s. 235, effect of, on right to share in distribution. A decree-holder who has attached before judgment is not entitled to rank under s. 295 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution, and as such to obtain in execution a rateable share of the property which he has attached, unless, subsequently, to his decree, he has applied for execution under s. 235 *et seq.* of the Civil Procedure Code. S. 490 of the Civil Procedure Code does not by implication confer upon a decree-holder who has attached before judgment the right to come in under s. 295 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment enures and becomes an attachment in execution. PALLONJI SHAPURJI *v.* JORDAN . **I. L. R. 12 Bom. 400**

57. ——— *"Decree for money"—"Same judgment-debtor"—Decree for enforcement of lien and against judgment-debtor personally—Decree-holder entitled to proceed against property or person as he may think fit.* *U* held a money-decree against *B*, *P*, and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B*. *D* held a decree against *B*, *P*, *R* and *S*, which, so far as *P*, *B*, and *S* were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U's* execution was rejected. *Held*, that there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code, because it directed a sale of the property of the other judgment-debtors; and that the fact that there were four judgment-debtors in *D's* decree and only three in *U's* would not deprive *D* of the right to share rateably. *Shumbhoo Nath Poddar* v. *Lucky Nath Dey*, *I. L. R. 9 Calc. 920*, referred to. *Deboki Nundun Sen* v. *Hart*, *I. L. R. 12 Calc. 294*; *Jagut Narain Pal* v. *Dhundhey Rai*, *I. L. R. 5 All. 566*; and *Hart* v. *Tara Prasanna Mukerji*, *I. L. R. 11 Calc. 718*, distinguished. DELHI AND LONDON BANK *v.* UNCOVENANTED SERVICE BANK, BAREILLY **I. L. R. 10 All. 35**

58. ——— *Rateable distribution—Decree for money—Mortgage-decree.* The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant having brought to sale the property attached, the plaintiff applied, under the Civil Procedure Code, s. 295, for rateable distribution which was refused. The plaintiff then brought to sale the mortgage premises, which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under s. 295. *Held*, that the plaintiff's decree was a "decree for money" within the meaning of s. 295, and that he was entitled to recover the sum claimed. *Per curiam.* The property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt. KOMMACHI KATHER *v.* PAKKAR . **I. L. R. 20 Mad. 107**

59. ——— *Rateable distribution—Assets realized in execution.* *A*, *B*, and *C* held money-decrees against the same judgment-debtor. *A* attached by a prohibitory order dated in December funds of the judgment-debtor in the hands of *D*. In January *B* attached in execution the same funds. In February they were paid into Court, and subsequently on the same day *C* attached them as money due in the custody of the Court. *Held*, that the funds should be rateably distributed between *A* and *B*, and that *C* was not entitled to participate therein. SRINIVASA AYYANGAR *v.* SEETHARAMAYYAR . . **I. L. R. 19 Mad. 72**

60. ——— *Decree-holder, purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale-proceeds.* A mortgagee who has obtained a mortgage-decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart* v. *Tara Prasanna Mukerji*, *I. L. R. 11 Calc. 718*, distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court. SHEONATH DOSS *v.* JANKI PROSAD SINGH . **I. L. R. 16 Calc. 132**

61. ——— *Execution—Decree—Rateable distribution of proceeds of decree—Power of Court to enquire into bonâ fides of the decree-holders while distributing such proceeds—Practice.* In distributing the proceeds of execution under s. 195 of the Civil Procedure Code (Act XIV of 1882), the Court has power to enquire into the *bonâ fides* of the several decree-holders that apply for rateable distribution if the same has been called

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in question, and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment-debtor in execution to refund. *In re Sunderdass, I. L. R. 11 Calc. 42*, followed. CHHAGANLAL *v.* FAZARALI **I. L. R. 13 Bom. 154**

62. ——— *Purchaser of decree against estate of a deceased person by the legal representative of such deceased person—Right of such purchaser to participate in proceeds realized in execution of decree.* *H K* was the holder of a decree in suit No. 657 of 1869 for R69,467 against the firm of *H B & Co.* and in execution thereof he attached a certain house belonging to the estate of one *H D*, deceased, who had been a partner in that firm. *A* (the respondent) was the legal representative of *H D*. On the 9th November 1886 *V* purchased the decree from *H K* for R18,000, which sum she obtained for the purpose as a loan from *C P. & Co.* As a security for this loan, she gave *C P. & Co.* a letter, dated the 9th November 1886, whereby she agreed to repay the loan out of the proceeds of the sale of the house which had been attached in execution of the decree which she had purchased. In the meantime another decree, *viz.*, in suit No. 8 of 1870, had been obtained against the firm of *H B & Co.*, and had been, prior to the 9th November 1886, purchased by the appellant *M*, who had also, prior to the 9th November 1886, applied for execution. On the 6th April 1887 the attached house was sold by the Sheriff, and realized R45,000. On the 5th September 1887 an order was made in Chambers that the Sheriff should divide rateably the moneys in his hands in suit No. 657 of 1869 between *M* and *V*. *M* appealed, and contended that by the transaction between *V* and *H K* the decree in suit No. 657 of 1869 had been extinguished as against the estate of *H D.*, and that the said transaction amounted, in law and fact, to a purchase, on behalf of the estate of *H D*, of the property attached in the said suits or the proceeds thereof. *Held*, confirming the order appealed from, that *V* was entitled to a rateable proportion of the moneys in question. She was only liable under the decree held by the appellant *M* as the representative of *H D*. So far as she might have had property of her own, not derived from *H D's* estate available for the purchase of *A K's* decree, she stood in the same position as a third party who might have purchased *H K's* share of the proceeds before they were realized. The purchase of *H K's* share with her own money could not perjudice *M* any more than if an entire stranger had purchased. The fact that she borrowed the money and gave the share as a security to the lender did not affect the question. If the money did not come from *H D's* estate, it could not matter whether it came directly from *V's* pocket or from another person at her request. If the money was derived from a source having no connexion, directly or indirectly, with the estate indebted, there is no distinction, in principle, between the representative of the indebted estate and a stranger. MUNMOHANDAS JAIKISONDAS *v.* VIZBAL **I. L. R. 13 Bom. 171**

63. ——— *Effect of vesting order in insolvency.* A debtor against whom several decrees have been passed filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent, and had obtained an order for sale in a District Court, and another decree-holder now applied to the same Court in execution of his decrees, for the attachment of other property and for rateable distribution of the proceeds of sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both these applications. *Held*, that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under s. 622 of the Civil Procedure Code. VIRARAGHAVA *v.* PARASURAMA . . **I. L. R. 15 Mad. 372.**

64. ——— **and s. 276**—*Attachment before judgment of fund in hands of third party—Decree afterwards obtained—Assignment by judgment-debtor of fund subsequently to the attachment—Creditors attaching the fund subsequent to the assignment—Fund by consent paid over to Sheriff by third party—Relative claims of assignee of fund and subsequently attaching creditors—Assets realized by sale or otherwise in execution—Misdescription, in order of attachment, of property attached.* On the 8th July 1890 the plaintiff brought a suit 382 of 1890 against *G* for R2,237, and on 18th July obtained an attachment before judgment of certain money belonging to *G* in the hands of the B., B. and C. I. Railway Company. On the 5th August 1900 *W* got a decree in the suit for R2,008, with interest and costs, and on the 13th August 1890 applied for execution. On the 24th September 1890 *G* made an assignment in favour of his attorneys, Messrs. Wadia and Ghandy, of the fund belonging to him (expressed to be R7,818) in the hands of the Railway Company, subject to the attachment levied on the same by *W*. This assignment was intended to secure costs incurred by Messrs. Wadia and Ghandy as attorneys for the defendant. Notice of this assignment was at once given to the Railway Company. In February 1891 the Bank of Bengal attached the sum of R7,818 in the hands of the Railway Company, in execution of a decree obtained by the Bank against *G* in suit 190 of 1890, and subsequently other creditors of *G* who had obtained judgment against him, applied for execution and obtained attachments on the sum in question. On the 26th May 1891, under a consent order in suit 382 of 1890, the Railway Company paid over to the

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Sheriff of Bombay the sum of R8,084-1-0, which was the amount admitted by the Company to be due to *G*, after making all just deductions. It was contended by Messrs. Wadia and Ghandy that, under the above assignment, they were entitled to the fund assigned to them, subject only to the claim of the plaintiff, who had, at the date of assignment, already attached the same fund, and that subsequent attaching creditors had no claim to the said fund. *Held*, that the fund in question must be regarded as "assets realized by sale, or otherwise, in execution of a decree" within the meaning of s. 295 of the Civil Procedure Code. *Held*, also, that, under the provision of s. 295, the claims of the subsequent execution-creditors were "claims enforceable under the attachment of the plaintiff within the meaning of s. 276 of the Civil Procedure Code," and that the assignment to Messrs. Wadia and Ghandy was void, as well against the claims of the creditors of *G*, who applied for execution before the 26th May 1891, as against those of the plaintiff to the fund in the hands of the Sheriff of Bombay. *Held*, further, that the attachment was not limited merely to such portion of the fund as covered the amount of the decree, but was a valid attachment in the form in which it was made, namely, on the whole fund in the hands of the Railway Company. It was argued that the attachment was actually made only on R6,000, and that it did not therefore include the whole fund which was of larger amount. *Held*, that the misdescription in the order of attachment was a mere *falsa demonstratio* and that the entire sum in the hands of the Railway Company was attached. The description of the property must be reasonably accurate, under the circumstances, and such as with reasonable certainty identifies the property. If it is such, it ought to be held sufficient. SORABJI EDULJI WARDEN *v.* GOVIND RAMJI
I. L. R. 16 Bom. 91

65. ——— *Same judgment-debtor—Sale of lands under attachment—Disposal of amount realized—Rateable distribution.* A father and son having mortgaged certain villages, the mortgagee obtained against both mortgagors a decree for the amount due, which was transmitted for execution to a District Court. The villages were subsequently, by order of the District Court, attached, and plaintiff, as receiver representing the mortgagee, then obtained an order that the villages under attachment should be sold free from the mortgage, and that plaintiff should have the same rights against the proceeds of sale as he, as such receiver, had against the property to be sold. Some of the villages were sold accordingly and the amount realized paid into the District Court. The defendant, who had obtained a separate decree against the son alone (the father having meanwhile died) in the same District Court, applied for, and was granted, a rateable distribution of the moneys realized by the sale of the villages attached and

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sold as aforesaid, towards satisfaction of his decree. On plaintiff bringing a suit for the recovery of the amount so obtained by defendant from the District Court:—*Held* (i) that the judgment-debtor against whom plaintiff and defendant held decrees was the same within the meaning of s. 295 of the Code of Civil Procedure, it being immaterial that in plaintiff's suit there had been a co-defendant against whom the decree might have been separately executed; and (ii) that the order for sale of the villages under attachment was illegal and invalid in so far as it gave plaintiff the same rights against the proceeds of sale as he had by virtue of the mortgage against the property to be sold. GRANT *v.* SUBRAMANIAM . . . **I. L. R. 22 Mad. 241**

66. ——— *Proceeds of sale how applicable—Priority of holder of unregistered mortgage to holder of money-decree—Transfer of Property Act (IV of 1882), s. 97.* The plaintiff held a mortgage of certain land belonging to the first defendant. The mortgage was not registered. The second defendant *M* was a mortgagee of the same land under a mortgage which was subsequent in date, but was duly registered. *M* obtained a decree upon this latter mortgage, and applied in execution for sale, of the land. The plaintiff intervened, but his claim was rejected on the ground that *M's* mortgage was registered and had priority to his mortgage, which was not registered. The land was sold by auction to *R* (defendant No. 4) and the proceeds of the sale were partly applied in satisfaction of *M's* claim, and a further sum of R164 was paid to one *S* (defendant No. 3) who had obtained a money-decree against the mortgagor (defendant No. 1). A balance of R103-8-11 was paid into Court, and subsequently returned to defendant No. 1 (the mortgagor). The plaintiff now sued for payment of his mortgage-debt out of the proceeds of sale or from the defendants. The lower Court held that *S* could not be called upon to refund the money which had been paid to him out of the proceeds, and that the plaintiff had a cause of action only against the mortgagor (defendant No. 1) not merely for the balance of R103-8-11, but for the whole of his claim. On appeal to the High Court:—*Held*, that the claim of the plaintiff in virtue of his mortgage, although unregistered was prior to that of *S* under his money-decree. The plaintiff's earlier mortgage was postponed to that of *M*, because it was not registered, but the plaintiff had the right of a second mortgagee over the balance in virtue of his mortgage. The proceeds of the sale, after satisfying the first incumbrancer (*M*), became payable first to the other incumbrancers, if any, and then to the mortgagor (defendant No. 1). *S* could only take any balance that remained subject to the equitable right of the plaintiff. PADMANABH BOMBSHENVI *v.* KHEMU KOMAR NAIK . . **I. L. R. 18 Bom. 684**

67. ——— *Civil Procedure Code, s. 295—Execution of decree—Rateable distri-*

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bution of assets—Hindu law—Joint Hindu family—Effect of attachment of joint family property in keeping alive the remedy of the decree-holder. A decree-holder who held a decree against one member of a joint Hindu family consisting of two brothers, in execution of his decree attached his judgment-debtor's interest in a portion of the joint family property. Subsequently to the attachment, but before sale, the judgment-debtor died. Upon the rights and interests of the judgment-debtor in attached property being brought to sale, certain persons who held decrees against the same judgment-debtor or his representatives, but had not attached any of the joint family property in his life time, applied under s. 295 of the Code of Civil Procedure to be allowed to share rateably in the assets realized by the sale. Their applications were granted, but on appeal, in a suit by the decree-holder who had attached in the lifetime of the judgment-debtor it was *held* that the attachment enured only for the benefit of the decree-holder who had made it, and that the non-attaching decree-holders were not entitled by virtue of s. 295 of the Code to share in the assets realized by sale under such attachment. *Suraj Bansi Koer* v. *Sheo Proshad Singh, L. R. 6 I. A. 88; Deendyal Lal* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247; Maniklal Venilal* v. *Lakha, I. L. R. 4 Bom. 429; Gangadin* v. *Kushali, I. L. R. 7 All. 702;* and *Gurlingapa* v. *Nandaph, I. L. R. 21 Bom. 797,* referred to. *Sorabji Edulji Warden* v. *Govind Ramji, I. L. R. 16 Bom. 91,* distinguished. BITHAL DAS *v.* NAND KISHORE (1900) . . **I. L. R. 23 All. 106**

68. _____ *Mortgage—Priority, relinquishment of—Civil Procedure Code (Act X of 1877), s. 295—Suit for refund of money so distributed—Order in a suit—Limitation Act (XV of 1877), Sch. II, Art. 13.* An order for distribution under s. 295, Civil Procedure Code, is an order in a suit, and as such is excluded from the operation of Art. 13 of Sch. II to the Limitation Act. The scheme of s. 295, Civil Procedure Code, is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the rights of the parties, and does not import a conclusive adjudication on those rights, which may be re-adjusted subsequently by a suit. A suit for refund of money paid to the defendant under an order of Court made under s. 295, Civil Procedure Code, on the ground that the plaintiff was entitled to it in preference to the defendant, is not a suit to set aside the order of distribution, and does not come within the Limitation Act, Sch. II, Art. 15. *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate, I. L. R. 15 Bom. 438,* approved. On 4th May 1883, certain villages were mortgaged to *S* for R15,000. On 30th June 1883, the same were mortgaged to *P* for R7,000. On 3rd November 1883, a fresh bond was executed in favour of *S* for R20,000, which, by its terms, kept alive the bond of 4th May 1883. *S* sued one the bond of November 1883, only, and not on the bond of May 1883, and obtained a decree on the bond of November. *P* also brought a suit on his bond of June 1883, and obtained a decree. *Held,* that the mere suing on the bond of November did not amount to relinquishment by *S* of his rights under the bond of 4th May 1883. There was no necessity for *S* to sue on the bond of May in order to obtain a sale for the whole of their debt. SHANKAR SARUP *v.* LALA PHUL CHAND (1901)

I. L. R. 23 All. 313
s.c. L. R. 28 I. A. 203
5 C. W. N. 649

69. _____ *Civil Procedure Code (XIV of 1882), s. 295—Rateable distribution under several decrees—Decrees must be against same judgment-debtor—Decree against judgment-debtor—Subsequent decrees against his legal representative and his estate.* Mohoniraj obtained a money-decree against one Bhau Babaji, who died shortly afterwards. His son Kashinath, as his legal representative, was then placed on the record, and the property of the deceased judgment-debtor Bhau Babaji was then attached and sold in execution. Meantime the applicant, Gobind Abaji, had obtained a decree against "Bhau Babaji, deceased, by his son Kashinath, and against the estate of Bhau Babaji, deceased;" and he applied under s. 295 of the Civil Procedure Code (XIV of 1882) to share rateably in the proceeds of the sale held in execution of the other decree. *Held,* that the application should be refused. Under s. 295 the money-decrees in respect of which rateable distribution is given must be against the same judgment-debtor. In this case one decree was against Bhau Babaji and the other against his son Kashinath. The fact that the latter decree was expressed to be made against "Bhau Babaji, deceased, by his son Kashinath" made no difference. One decree was against Bhau Babaji himself; the other was against his legal representative. The fact that the second decree was also "against the deceased estate" did not make Bhau Babaji a judgment-debtor under the decree in a suit commenced after his death. The practice hitherto prevailing in the mofussil of making a dead man "by his heir" a party to a suit is erroneous, and should be discontinued. GOVIND ABAJI JAKHADI *v.* MOHONIRAJ VINAYAK JAKHADI (1901)

I. L. R. 25 Bom. 494

70. _____ *Civil Procedure Code (Act XIV of 1882), ss. 285, 295—Execution of decree—Rateable division of proceeds of execution-sale—Property attached in execution of decrees of several Courts—Attachment before judgment—Court of superior grade—Appeal—Revisional jurisdiction.* When property has been sold in execution of decrees in a Munsiff's Court, and, prior to the realisation of assets by sale, a decree-holder in the Subordinate Judge's Court, who attached the same property before judgment, applies to the

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Subordinate Judge for the execution of his decree, the only Court which has jurisdiction to decide questions relating to the rateable distribution of the sale-proceeds under s. 295 of the Civil Procedure Code is the Court of the Subordinate Judge, and not that of the Munsiff. *Semble:* When the Munsiff has ordered a rateable distribution of the sale-proceeds amongst the decree-holders in his Court, the Subordinate Judge has jurisdiction to set aside that order and to direct that the decree-holders in the Munsiff's Court should refund the sums drawn by them in excess of what was legitimately due to them. BHUGWAN CHUNDER KRITIRATNA *v.* CHUNDRA MALA GUPTA (1902) **I. L. R. 29 Calc. 773**

71. ——— *Civil Procedure Code (Act XIV of 1882), s. 295—Rateable distribution of proceeds of execution-sale "Prior to the realisation"—"Same judgment-debtor."* The properties of a judgment-debtor were brought to sale, at the instance of one judgment-creditor, in two parcels. After the proceeds of sale of the first parcel had been paid into Court, and before the proceeds of sale of the second parcel had been so paid in, the petitioner (also an execution-creditor) applied under s. 295 of the Code of Civil Procedure for a rateable distribution. *Held*, that he was entitled to participate in a rateable distribution in the proceeds of sale of both parcels, the assets having been realised, within the meaning of the section, when the whole of the proceeds of the property sold in execution of the decree were paid into Court, and his application having been filed prior to such realisation. *Tiruchittambala Chetti* v. *Seshayyangar, I. L. R. 4 Mad. 384*, referred to. The decree of one of the judgment-creditors above referred to was against a father, whilst the decree of the other judgment-creditor was against the father and his son, but the properties from which the assets had been realised by sale were the ancestral properties of the family of which the father and son were undivided members. *Held*, that the decrees were "against the same judgment-debtor," for the purposes of s. 295. RAMANATHAN CHETTIAR *v.* SUBRAMANIA SASTRIAL (1902) **I. L. R. 26 Mad. 179**

72. ——— *Chambers—Civil Procedure Code (Act XIV of 1882), ss. 295, 310A—Sale in execution—Judgment-debtor, deposit by—Rateable distribution.* S. 295 of the Civil Procedure Code does not apply to a deposit made by a judgment-debtor under s. 310A of the Code. The words "for payment to the decree-holder" in s. 310A mean that the decree-holder is the person solely entitled to the money paid into Court. *Hari Sundari Dasya* v. *Shashi Bala Dasya, 1 C. W. N. 195*, and *Bihari Lall Paul* v. *Gopal Lal Seal, 1 C. W. N. 695*, followed. ROSHUN LALL *v.* RAM LALL MULLICK (1903) **I. L. R. 30 Calc. 262**
s.c. 7 C. W. N. 341

73. ——— *Rateable distribution—Civil Procedure Code (Act XIV of 1882), s. 295—Proportionate distribution of sale-proceeds—Decrees against the same judgment-debtor—Suit for refund of assets distributed.* *B* obtained a decree against three judgment-debtors, *X*, *Y* and *Z*. *A* obtained a decree against *X* and *Y* only. *Held*, that *A* is entitled, under the provisions of s. 295 of the Code of Civil Procedure, to a proportionate distribution of the assets realized by the sale of property of *X*, *Y* and *Z*, so far as they represent the share of his own judgment-debtors *X* and *Y* in that property. *Deboki Nundun Sen* v. *Hart, I. L. R. 12 Calc. 294*, over ruled. GONESH DAS BAGRIA *v.* SHIVA LAKSHMAN BHAKAT (F.B. 1903) **I. L. R. 30 Calc. 583**

S.C. RAM DAYAL BAGRIA *v.* SHIVA LAKSHMAN BHAKAT . . . . **7 C. W. N. 414**

74. ——— *Civil Procedure Code, ss. 276, 295—Application for rateable share in proceeds of sale, not equivalent to an attachment.* *Held*, that an application, under s. 295 of the Code of Civil Procedure, for a rateable share in the proceeds of the sale of property attached by a creditor other than the applicant, is not equivalent to an attachment, and will be no bar to the judgment-debtor privately selling the property attached for the benefit of the attaching creditor. *Ganga Din* v. *Khushali, I. L. R. 7 All. 702*, and *Durga Churn Rai Chowdhry* v. *Monmohini Dasi, I. L. R. 15 Calc. 771*, followed. *Sorabji Edulji Warden* v. *Gobind Ramji, I. L. R. 16 Bom. 91*, dissented from. MANOHAR DAS *v.* RAM AUTER PANDE (1903) **I. L. R. 25 All. 431**

75. ——— *Civil Procedure Code, ss. 232 and 295—Sale of decree, and transfer for execution to another Court—Application by transferees for rateable distribution of assets—Court to which such application should be made.* A decree was transferred for execution from Mirzapur to Gorakhpur; the decree-holder also sold his interest in the decree. The transferees thereupon made an application for execution in the Gorakhpur Court, and prayed for a rateable share of the assets which might be realized in execution of a decree held by one Bindesri against the same judgment-debtor. Upon this application the following order was passed:—"The judgment-debtors and the transferers both received notice, but none of them put in an appearance, and no objections were filed. As the prayer in this case is to be allowed a rateable share of the assets in Bindesri Prasad's case, let this case be put with that case." *Held*, (i) that the Court to which the decree was transferred for execution had no power to entertain the transferees' application for a rateable share in the assets; such application could only be entertained by the Court which passed the decree; (ii) that the order passed by the Gorakhpur Court could not operate as *res judicata* so as to prevent the judgment-debtors from questioning the right of the transferees to make an application for execution to that Court; and (iii) that the order passed by the executing

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Court was appealable as an order under s. 244 of the Code of Civil Procedure. *Badri Narain* v. *Jai Kishen Das, I. L. R. 16 All. 483*, and *Amar Chandra Banerjee* v. *Guru Prosunno Mukerjee, I. L. R. 27 Calc. 488*, referred to. TAMEESHAR PRASAD *v.* THAKUR PRASAD (1903) **I. L. R. 25 All. 443**

76. ——— *Decree attached by two persons—Sale by one attaching creditor—Deposit to set aside sale—Title to deposit.* Defendant No. 1 obtained two decrees against defendant No. 2; plaintiffs also obtained a decree against defendant No. 2, who had obtained a decree against a third person. Defendant No. 1 attached that decree and was substituted for defendant No. 2 on the 16th July 1904; plaintiffs also attached that decree and were substituted in place of defendant No. 2 on the 18th November 1904. Then at the instance of defendant No. 1 (in execution of the attached decree) properties were sold and the sale was set aside by a deposit under s. 310A of the Civil Procedure Code. *Held*, that upon the terms of s. 310A of the Civil Procedure Code, both plaintiffs and defendant No. 1 were entitled to the money deposited. UPENDRA NATH SAHU *v.* HARI DAS MUKHERJEE (1908) **12 C. W. N. 800**

15. WRONGFUL SALES.

1. ——— **Wrongful attachment in execution**—*Attachment under warrant issued by Court.* A party is not liable to damages in respect of an attachment made under a warrant issued by a Court. RAJ BULLUB GOPE *v.* ISSAN CHUNDER HAJRAH . . . . . **7 W. R. 355**

2. ——— **Wrongful attachment**—*Liability of decree-holder and purchaser to refund to owner loss caused by sale of property wrongly seized and sold.* In execution of a decree against a judgment-debtor, his right, title, and interest in an elephant was sold. In a suit by a third party against the decree-holder and the purchaser for recovery of the elephant or its value, on the ground that the elephant was his property, and not the property of the judgment-debtor:—*Held*, that the decree-holder, as well as the purchaser, was liable to make good the loss caused by such sale. KANAI PRASAD BOSE *v.* HIRACHAND MANU **5 B. L. R. Ap. 71: 14 W. R. 120**

See SUBJAN BIBEE *v.* SARIUTULLA. **3 B. L. R. A. C. 413: 12 W. R. 329**

RAYNOR *v.* SUNGHEER SINGH. **5 N. W. 211**

3. ——— **Goods wrongly sold in execution.**—*Suit by owner.* A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them of their value without reference to anything which has taken place in the execution-proceedings. SHIBOO NARAIN SINGH *v.* MUDDEN ALLY. NATABAR NANDI *v.* KALI DASS PALI. **I. L. R. 7 Calc. 608: 9 C. L. R. 8**

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4. ——— **Property of co-sharers wrongly seized and sold**—*Suit to recover shares.* Where, under colour of buying *A's* rights and interests sold in execution, the purchaser usurps the shares of *A's* partners, they need not sue to reverse the sale, but merely to recover their shares, nor are they bound to sue to establish their right as part owners of the land within the time allowed for actions to set aside sales in execution. ATHUROONISSA *v.* RUGHOONATH BANERJEE **W. R. 1864, 322**

GUNGA NARAIN BEHUTTA *v.* COLLECTOR OF MIDNAPORE . . . . **6 W. R. 47**

5. ——— *Co-sharer, suit by—Suit for damages for sale against decree-holder.* The defendant, in execution of a decree against *A*, seized certain moveable property, which was claimed under s. 246, Act VIII of 1859, by *B*. *B* was, on investigation, found to be part owner of the property. *B's* claim was rejected and the sale took place, the property, being made over to the purchaser, and the proceeds handed to the defendant in satisfaction of his decree. The sale proclamation declared that the sale extended only to the right, title, and interest of the debtor *A*, but made no mention of *B's* claim. In a suit by *B* for damages against the defendant occasioned by the loss of the property of which he was a joint owner: —*Held*, that the defendant was not liable. TAMIZUDDIN MULLA *v.* NYANUTOLLA SIRKAR **5 B. L. R. Ap. 73 note: 11 W. R. 528**

6. ——— **Sale of property of person not party to execution-proceedings**—*Joint decree executed against separate property—Decree against karnavan on tarwad debt before partition—Execution against one of the sharers after partition.* The karnavan of a Malabar tarwad borrowed money for purposes which rendered the debt binding on the tarwad. The creditor obtained a decree against the karnavan in 1879. In 1882 a partition of the tarwad property took place. In 1891 property which had fallen on partition to the present plaintiff's share was attached and brought to sale in execution of the decree of 1879. He was not joined as a party in the execution-proceedings. *Held*, in a suit to set aside the sale in execution of the decree as invalid, that the sale did not bind the plaintiff. *Sankara* v. *Kelu, I. L. R. 14 Mad. 29*, referred to. KUNHAPPA NAMBIAR *v.* SHRIDEBI KETTILAMMA . . **I. L. R. 18 Mad. 451**

7. ——— **Decree against karnavan of tarwad on tarwad debt before partition**—*Execution against one of the sharers after partition—Joint decree executed against separate property.* In a suit for declaration that certain

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land was not liable to be attached in execution of a decree obtained in 1880, it appeared that the decree was passed against the judgment-debtor as karnavan of a Malabar tarwad, and that it was for a debt incurred for purposes binding on the tarwad. In 1882 a partition deed had been come to between the members of the tarwad under which the property in suit had been allotted to the plaintiff. *Held*, that the state of things when the debt was contracted must be looked to, and at that time the karnavan was competent to bind all the members of the tarwad. Any subsequent arrangement in the family could not affect their obligation to the creditor who was not a party to it. The plaintiff's property therefore was liable notwithstanding the partition. KISHNAN NAMBIAR *v.* KRISHNAN NAIR **I. L. R. 18 Mad. 452 note**

16. INVALID SALES.

(*a*) DEATH OF DECREE-HOLDER BEFORE SALE.

1. ——— **Effect of decree-holder's death on validity of sale**—*Civil Procedure Code, 1877, ss. 365, 366—Order confirming sale.* A judgment-debtor applied that an execution-sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and the purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for setting it aside, and disallowed such application and made an order confirming such sale. *Held per* PEARSON, *J.*, that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside. *Per* SPANKIE, *J.*, that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of ss. 365 and 366 of Act X of 1877, as the Court executing the decree should have proceeded under those sections. *Per* OLDFIELD, *J.* and STRAIGHT, *J.*, that the death of the decree-holder prior to such sale did not render it void. The provisions of ss. 365 and 366 of Act X of 1877 could not be adapted to execution-proceedings. As such sale had been published and conducted according to law, it had properly been confirmed. DULARY *v.* MOHAN SINGH **I. L. R. 3 All. 759**

(*b*) DEATH OF JUDGMENT-DEBTOR BEFORE SALE.

2. ——— **Effect of judgment-debtor's death on validity of sale**—*Sale to mortgagee—Civil Procedure Code, 1882, ss. 234, 368.* The first mortgagee of certain immoveable property obtained a decree for the sale of the property, caused

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*b*) DEATH OF JUDGMENT-DEBTOR BEFORE SALE—*contd.*

the property to be attached, and then ceased to prosecute the execution-proceedings. The second mortgagee then obtained a decree for sale of the property, caused it to be attached, and put up for sale and purchased it himself. The first mortgagee then applied for sale and the property was put up for sale and purchased by him. After the order for this sale was made, and before it took place, the judgment-debtor died, and the sale took place without his legal representatives being made parties to the execution-proceedings. *Per* OLDFIELD, *J.*, that the sale to the first mortgagee was not void because the judgment-debtor had died before it took place, and it took place without his legal representatives being made parties to the execution-proceedings, inasmuch as the provisions of s. 368 of Civil Procedure Code were not applicable to the case of the death of a judgment-debtor, and there was nothing in s. 234, even if that section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of his property has been ordered, to imply that the sale is absolutely void if no legal representative has been brought on the record. *Dulari* v. *Mohan Singh, I. L. R. 3 All. 759*, and *Gulabdas* v. *Lakshman Narhar, I. L. R. 3 Bom. 221*, referred to. *Per* STRAIGHT, *J.*, that there was no legal obligation on the first mortgagee to resort to the procedure of s. 234 of the Civil Procedure Code, since the sale to the second mortgagee had passed to him the rights and interests of the judgment-debtor, and the legal representatives of the judgment-debtor had none of his property in their hands; and there is no provision in the Code of Civil Procedure which required the first mortgagee to make the second mortgagee a party to the proceedings in execution of the former's decree and the latter could not have successfully objected to the sale in execution of that decree, and therefore that sale was not voided by the death of the judgment-debtor antecedent to its taking place. STOWELL *v.* AJUDHIA NATH . . **I. L. R. 6 All. 255**

3. ——— **Death of judgment-debtor after attachment, but before sale in execution**—*Subsequent sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code, ss. 234, 311.* S. 234 of the Civil Procedure Code applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment, at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment, but before sale. An attachment would abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force an attachment of property made in the judgment-debtor's.

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SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*b*) DEATH OF JUDGMENT-DEBTOR BEFORE SALE—*contd.*

(previously attached) owing by *H* and *W* to the judgment-debtor was made in execution in two decrees, and on 4th May 1895 a sale proclamation for 20th idem was issued. On the 11th May the judgment-debtor died leaving a will, of which *W* was one of the executors. *W* brought these circumstances to the notice of the Court stating that the executors would proceed to apply for probate and asking for an adjournment of the sale. The adjournment was refused and the sale proceeded, and the decree-holders, who had previously agreed with *H* and *W* to sell the debt to them for the amount of the purchase-money, purchased the debt for R30,000, the estate of the judgment-debtor being unrepresented. The Administrator-General, to whom the administration of the estate of the judgment-debtor was afterwards transferred, applied to be brought on to the record and to have the sale set aside. *Held*, that the sale was vitiated by the omission to bring the legal representative of the judgment-debtor on to the record, and should be set aside on the application of the Administrator-General, no separate suit being necessary for the purpose. *Sheo Prasad* v. *Hira Lal, I. L. R. 21 All. 440*, dissented from. GROVES *v.* ADMINISTRATOR-GENERAL OF MADRAS

I. L. R. 22 Mad. 119

7. ——— **Death of judgment-debtor after decree, but before execution**—*Legal representatives not made parties to proceedings—Sale in execution without notice to legal representatives under s. 248 of Civil Procedure Code—Notice given to wrong persons—Title of purchaser—Right of redemption—Limitation—Civil Procedure Code (1877), ss. 234, 248, and 311.* On the 28th March 1877 *N* mortgaged certain property to the defendant. On the 27th June 1877 one *H* obtained a money-decree against *N*, but before it could be executed, *N* died leaving all his property to his daughters, the plaintiffs. On the 22nd November 1878 *H* applied for execution against *N*, deceased, by his heir and nephew *R*. *R* appeared and stated that he was not the heir, but that the heirs of *N* were his daughters, the plaintiffs. The plaintiffs, however, were not made parties to the execution-proceedings, nor were notices served on them under s. 248 of the Civil Procedure Code (Act X of 1877). The execution-proceedings were continued, and the mortgaged property was sold on the 9th June 1880, and was bought by the defendant (the mortgagee) subject to his mortgage. The sale was confirmed, and a certificate of sale was duly issued to the defendant, who got formal possession on the 11th October 1880, he being already in possession as mortgagee. In 1889 the plaintiffs sued the defendant to redeem the mortgage. It was contended that the defendant, having purchased at a Court-sale, was entitled to the property free from the claim of the plaintiffs. The case first came before

SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*b*) DEATH OF JUDGMENT-DEBTOR BEFORE SALE—*concld.*

FARRAN, *C.J.*, and PARSONS, *J.*, who differed in opinions, FARRAN, *C.J.*, holding that the sale-proceedings were not absolutely null and void by reason of the want of notice of execution to the representatives, but they were valid until set aside by a suit brought for that purpose, which suit had never been brought, and that the plaintiffs had therefore lost their right to redeem, and PARSONS, *J.*, being of opinion that the sale was null and void, and therefore that the plaintiffs were entitled to succeed. The case was then referred to three other Judges of the Court. *Held*, by CANDY and JARDINE, *JJ.*, that even assuming that the execution-proceedings and sale had conveyed an absolute title to the purchaser, the present suit, which was brought within twelve years of the sale, did in effect challenge the sale, and that the plaintiffs were therefore entitled to redeem. *Held*, by RANADE, *J.*, that in respect of the plaintiffs who were not parties, the sale-proceedings were invalid and null, and without jurisdiction; that the auction-purchaser acquired no rights under his certificate of sale as against these legal representatives, and that as against them he could only claim title by adverse possession not falling short of twelve years. As the present suit was admittedly brought within that period, it was maintainable. ERAVA *v.* SIDRAMAPPA PASARE . **I. L. R. 21 Bom. 424**

Held, by the Privy Council on appeal (reversing the decision of the High Court).—An execution-sale cannot be treated as nullity if the Court which sells has jurisdiction to do so; and it cannot be set aside as irregular without an issue raised for that purpose and investigation made with the judgment-creditor as a party thereto, nor under s. 311 of the Code of Civil Procedure and art. 12 (*a*) of the Limitation Act, 1877, after one year from the date thereof. An executive Court does not lose jurisdiction to sell because it serves notice on a person who does not represent the deceased judgment-debtor, and afterwards erroneously decides that who does. Such decision is valid unless set aside in due course of law. MALKARJUN BIN SHIDRAMAPPA PASARE *v.* NARHARI BIN SHIDAPPA

L. R. 27 I. A. 216

(*c*) FRAUD.

8. ——— **Application of ss. 256, 257, Civil Procedure Code, 1859 (1882, ss. 311, 312)**—*Application to set aside sale.* Ss. 256 and 257, Act VIII of 1859, did not apply to a suit in which fraud is imputed vitiating the sale *in toto*. UMBIKA CHURN CHUCKERBUTTY *v.* DWARKA NATH GHOSE . . . **8 W. R. 506**

VIRSINGAPPA BIN BASLINGAPPA *v.* SADASHIVAPPA APPA GOLKHANDI . . **7 Bom. A. C. 74**

9. ——— **Application to set aside sale**—*Irregularity—Failure to prove fraud—Civi*

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALE —*contd.*

(*c*) FRAUD—*contd.*

Procedure Code, 1859, s. 256. Where the facts connected with an execution-sale fell far short of establishing fraud, and merely amounted to irregularity resulting in detriment to the judgment-debtor, his remedy was *held* to lie in an application under s. 256 of Act VIII of 1859 to set aside the sale. GOBIND SINGH *v.* MUNNO RAM DOSS **19 W. R. 414**

10. ——— *Civil Procedure Code, 1859, ss. 256, 257—Suit to set aside sale after failure of application.* A plaintiff was not debarred by reason of the failure of an application under ss. 256 and 257, Act VIII of 1859, from suing to set aside a sale on the allegation of fraud in connection with the irregularities first complained of, such fraud forming a distinct cause of action. NUND LALL DOSS *v.* DELAWUR ALI **11 W. R. 244**

(*Contra*) GOBIND SINGH *v.* MUNNO RAM DOSS. **19 W. R. 414**

11. Suit to set aside sale—*Sufficiency of proof—Irregularity, proof of want of.* In a suit to set aside an execution-sale on the ground of fraud, it is not sufficient for a Court to find that the mode of making the attachment and proclamation was according to law, but it is necessary to consider the surrounding circumstances. CHOONEE SAHOO *v.* MUNNOO LALL **14 W. R. 325**

12. ——— *Civil Procedure Code, 1882, s. 311—Ground for setting aside sale or otherwise—Effect of fraud to which auction-purchaser is no party.* A judgment-debtor cannot have a Court-sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud, and that the fraud, came to the judgment-debtor's knowledge subsequent to the confirmation of the sale. ABBUBAKER SAHEB *v.* MOHIDIN SAHEB . . **I. L. R. 20 Mad. 10**

13. ——— *Rights of bonâ fide auction-purchasers.* When no fraud has been alleged, a sale in execution cannot be set aside as regards the auction-purchaser, whether the order of Court under which it took place was legal or not. Even if the decree in execution of which the sale took place were a collusive one, the rights of the auction-purchaser would not be affected if he was no party to the fraud, and there would be no ground for setting aside the sale. MAHOMED KUZULBASH KHAN *v.* MAHOMED SHAH **12 W. R. 48**

14. ——— *Suit for money secured by the mortgage of immoveable property situate partly in the family domains of the Maharajah of Benares—Fraudulent representation by decree-holder—Sale of decree enforcing hypothecation of immoveable property.* A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the district of Benares, and of immoveable property situate within the limits of the family domains of the Maharajah of Benares. The Subordinate Judge had not jurisdiction to proceed with this suit in so far as it related to the latter property, and he was authorized to proceed with it, under the provisions s. 13 of Act VIII of 1859, by the High Court in concurrence with the Board of Revenue. He accordingly proceeded with the suit, and on the 18th November 1874 gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the family domains of the Maharajah of Benares to sale, this decree was sent for execution to the Subordinate Judge at Kondh, within whose jurisdiction such property was situate; and such property was sold in the execution of this decree on the 29th August and the 4th September 1877. Subsequently the defendants in the present suit, who held decrees for money against *H*, one of the plaintiffs in the suit abovementioned, applied to the Subordinate Judge of Benares for the attachment and sale of *H's* interest in the decree abovementioned, falsely representing that the sales in execution of that decree of the 29th August and 4th September 1877 had been set aside. Such interest was accordingly put up for sale on the 29th May 1878 at Benares by the Subordinate Judge of Benares, and was purchased by the plaintiffs in the present suit, who were induced to purchase by such false representation. The plaintiffs in the present suit claimed the avoidance of the sale of the 29th May 1878 and the refund of the purchase-money, on the ground that they were induced to purchase by such false representation, and on the ground that the sale of the interest of *H* in the decree of the 18th November 1874, being of the nature of immoveable property situate within the limits of the family domains of the Maharajah of Benares, could not legally be sold at Benares by the Benares Court. *Held*, that such false representation must be held to constitute in law such fraud as vitiated the sale of the 29th May 1878. Also that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situate within the family domains of the Maharajah of Benares. RAGHU NATH DOSS *v.* KAKKAN MAL . . **I. L. R. 3 All. 568**

15. ——— *Communication made to judgment-debtor by intending mortgagee and purchaser to prevent him attending sale.* Where, in an application to set aside the sale, it was alleged that the auction-purchaser who held a mortgage upon some of the property sold told the judgment-debtor that it was not necessary for him to go to the place where the sale was held because he, the auction-purchaser, would release the property from

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SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*c*) FRAUD—*contd.*

the mortgage-lien :—*Held*, that the facts, even if proved, would not constitute fraud entitling the judgment-debtor to have the sale set aside. ROJONI KANT BAGCHI *v.* HOSSEIN UDDIN AHMED **4 C. W. N. 538**

16. ——— *Gift in fraud of creditors—Subsequent sale by creditors in execution of subject-matter of gift—Purchase at execution-sale for inadequate price by means of fraud—Suit by donee to set aside sale for fraud—Rescission when granted.* In June 1875, *A* being in pecuniary difficulties executed a deed of gift of all his property in favour of his wife and minor sons, the plaintiffs. *B*, one of his then existing creditors, subsequently obtained a decree against him, and in execution sold part of the said property. At the sale the first defendant by means of false representation became the purchaser at an inadequate price. In July 1879 *A* applied to have the sale set aside on the ground of the fraud of the first defendant, but his application was rejected. In 1884, the plaintiffs by their next friend sued to set aside the sale, contending that at the date of *B's* decree the property was theirs by virtue of the deed of gift of June 1875, and further that the sale was void by reason of the defendant's fraud. *Held*, rejecting the plaintiffs' claim, that the plaintiffs could not be allowed to set up their deed of gift as against the proceedings in execution under which the defendant acquired his title as purchaser. That gift was made to them by *A* when he was in pecuniary difficulties, and included all *A's* property. It was therefore void as against his then existing creditors, of whom *B* was one. *B* was therefore entitled to sell the property in execution of his decree. *Held*, also, that the plaintiffs were not entitled to set aside the sale on the ground of fraud, and that the only remedy, if any, open to them was a suit for damages. The gift by *A* in 1875 was made to his wife as well as to the plaintiffs (his sons), and it gave them the property as tenants-in-common. The plaintiffs were therefore only owners of their respective shares, and were not entitled to have the sale set aside *in toto*. This, however, was what they sued for in their plaint. *A's* wife could not now join in rescinding the sale, as she must have known in 1879 of the fraud, her husband having immediately after the sale endeavoured to set aside the sale on that ground. A transaction cannot generally be rescinded unless the party seeking it is able to rescind it *in toto*, except where the transaction is severable. HORMUSJI *v.* COWASJI **I. L. R. 13 Bom. 297**

17. ——— *Code of Civil Procedure (Act XIV of 1882), ss. 244, 311, 312, 588—Allegation of fraud in application for setting aside sale.* No second appeal lies from an order setting aside a sale under s. 312 of the Code of Civil Procedure, although an allegation of fraud is made in the application for setting aside the sale, when no attempt is made to substantiate the allegation. *Rojoni Kant Bagchi* v. *Hossain Uddin Ahmed, 4 C. W. N. 538*, discussed and explained. *Nava Kumar Roy* v. *Golam Chunder Dey, I. L. R. 18 Calc. 422 ; Abhoya Dossi* v. *Pudmo Luchun Mondol, I. L. R. 22 Calc. 802*, and *Daivanayagam Pillai* v. *Rangasami Aiyar, I. L. R. 19 Mad. 29*, followed. UMAKANTA ROY *v.* DINO NATH SANYAL (1900) **I. L. R. 28 Calc. 4 ; s.c. 5 C. W. N. 124**

SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*c*) FRAUD—*concld.*

18. ——— *Execution-sale, application to set aside—Fraud—Irregularity—Code of Civil Procedure (Act XIV of 1882), ss. 244, 294 and 311—Purchase by the decree-holder benami at a price less than that at which the decree-holder was permitted to bid—Limitation Act (XV of 1877), Sch. II, Art. 178.* The purchase of property at an execution sale by the decree-holder, in the name of another person, at a price less than that at which the decree-holder obtained permission to bid for the said property, constitutes fraud which would vitiate the sale. *Mahomed Gazee Choudhry* v. *Ram Lall Sen, I. L. R. 10 Calc. 757*, referred to. Art. 178, Sch. II, of the Limitation Act, would govern such a case. SRIMATI SARAT KUMARI DEBI *v.* NIMAI CHURN DEY SIRCAR 1900 . **5 C. W. N. 265**

19. ——— *Application to set aside sale on the ground of fraud—Previous suit with similar object dismissed—Procedure—Estoppel.* S. 144 (*c*) of the Civil Procedure Code governs a case in which a person seeks to set aside an auction-sale on the ground of fraud and on the ground that the decree-holder himself held a mortgage on the property brought to sale. This plea had been urged successfully by the appellant in a regular suit brought by the present respondent, but the former now pleaded that the remedy should be by suit and not by execution-proceedings. *Per* AIKMAN, *J.*—The appellant cannot be allowed to go behind the issue decided in the course of the previous litigation. GAYA PRASAD MISR *v.* RANDHIR SINGH (1906) . **I. L. R. 28 All. 681**

20. ——— *Application to set aside sale—Limitation —Fraud—Onus of proof—What to prove exactly—Limitation Act (XV of 1877), s. 18.* When a suit or application is, on the face of it, barred by limitation, it is for the plaintiff or applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect. In the case of an application for setting aside a sale in execution, where the petitioner relied upon the provisions of s. 18 of the Limitation Act, 1877 :—*Held*, that it was incumbent upon him to show that not only had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the persons specified in that section. PURNA CHANDRA MANDAL *v.* ANUKUL BISWAS (1909) **I. L. R. 36 Calc. 654**

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*d*) EXECUTION-PROCEEDINGS STRUCK OFF.

21. ——— Effect on validity of sale *Beng. Reg. XX of 1795—Title of purchaser.* Regulation XX of 1795 directed that, when any Court of civil judicature should have occasion to sell lands in execution of a decree, it should transmit a copy thereof to the Board of Revenue, which was with all practicable despatch to cause the lands to be disposed of at the presidency, or in the district in which the lands were situated, as they might deem most advantageous to the proprietor. In 1843 a copy of a decree was transmitted for execution to the Board of Revenue in compliance with the regulation, but no sale was then effected. Afterwards two other futile attempts to sell the lands under the decree were made, and then the decree-holder sold the lands to a third party upon whose application the decree was executed by the sale of the lands of the judgment-debtor under it by order of the Court, and without any further recourse to the Revenue Board. Previous to such sale, the proceedings had been taken off the file, and the number of villages, owing to some inaccuracy, was differently stated in the later order, and the total sum was increased by adding the interest which had accrued due between the two orders. *Held*, that the purchaser at the sale acquired a good title; for it would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that when for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose were to be considered as taken in a new suit. Nor was it true in any material sense that either the properties to be sold or the sums to be recovered were different; and the principal object of the regulation being the security of public revenues, that object had been fully answered by the communication to the Commissioner in 1843, and the proceedings which were taken by him upon it. MOHESH NARAIN SINGH *v.* KISHNANUND MISSER
Marsh. 592: 2 Ind. Jur. O. S. 1
9 Moo. I. A. 324
5 W. R. P. C. 7

(*e*) DECREES AFTERWARDS REVERSED.

22. ——— *Title of purchaser.* If a sale takes place in execution of a decree in force and valid at the time of sale, the property in the thing sold passes to the purchaser. *Per* NORMAN, *J.*—If the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser. CHUNDER KANT SURMAH *v.* BISSESUR SURMAH CHUCKERBUTTY . . **7 W. R. 312**

FYAZOODDEEN BHOOYA *v.* SHUMSUNNISSA BEEBEE . **12 W. R. 508**

BEHAREE LALL *v.* RAJAH RAM **6 N. W. 291**

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*e*) DECREES AFTERWARDS REVERSED—*contd.*

23. ——— *Reversal of portion of decree relating to costs—Sale in execution for costs.* A sale in execution of a decree for cost is not cancelled when that part of the decree which made the plaintiff answerable for the costs is set aside. PEAREE MONEE DOSSEE *v.* COLLECTOR OF BEERBHOOM . . . . **8 W. R. 300**

24. ——— *Sale made after order for postponement. Held*, that an auction-sale which was made *bonâ fide* under the authority of an order which at the time of the sale was not in force, but had been superseded by a subsequent order postponing the sale, was made without jurisdiction and was null and void. FOUJDAR KHAN *v.* BAINEE DOOBEY . . **3 Agra 398**

25. ——— *Sale pending appeal—Decree reversed on appeal—Right of judgment-debtor. S*, having obtained a decree against *M* and another, brought to sale and purchased his property pending appeal. The decree having been reversed:—*Held* that *M* was entitled to the restoration of his property, and not merely to the proceeds of the sale. SADASIVAYYAR *v.* MUTTU SABAPATHI CHETTI . . **I. L. R. 5 Mad. 106**

See LATI KOOER *v.* SOBADRA KOOER
I. L. R. 3 Calc. 720: 2 C. L. R. 75

NAGINDAS DEVCHAND *v.* NATHA PITAMBAR,
10 Bom. 297

26. ——— *Reversal of decree on appeal before confirmation of sale—Purchaser, right of.* Plaintiff's title to certain land in dispute was derived from the purchaser at a Court's sale, under a decree which was reversed on appeal subsequently to the sale before it had been confirmed. *Held*, that the Court which had made the decree ceased, from the moment of the reversal, to have jurisdiction to take any further steps to execute the decree. Though the Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it, yet the act of the Court in completing the sale was none the less without jurisdiction, and, being without jurisdiction, could confer no title. If a decree be reversed after a sale under it has become absolute, and a certificate has been granted to the purchaser, the title of the purchaser is not affected by the reversal of the decree. A purchaser is bound to satisfy himself as to the jurisdiction of a Court to order a sale, and this obligation continues until the sale is completed. Before he applies to the Court to confirm the sale and grant him a certificate, the purchaser ought to ascertain that the decree under which the sale was ordered is still in existence. BASAPPA *v.* DUNDAYA
I. L. R. 2 Bom. 540

27. ——— *Sale in execution pending appeal from decree—Application for*

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SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*e*) DECREES AFTERWARDS REVERSED—*contd.*

confirmation of sale after reversal of decree—Court not competent to grant confirmation—Civil Procedure Code, s. 312. Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. *Basappa bin Malappa Aki* v. *Dundaya bin Shivlingaya, I. L. R. 2 Bom. 540,* referred to. MUL CHAND *v.* MUKTA PRASAD . . . . **I. L. R. 10 All. 83**

28. ——— *Remedy of parties aggrieved—Suit for reversal of sale.* When a property is sold in execution of a decree which had been in force at the time of sale, but which was eventually set aside on appeal, the remedy of the party aggrieved is by a suit for the reversal of the sale, and not by a suit for the recovery of damages for the loss sustained. ANNUNDO CHUNDER BANERJEE *v.* SHUBHUL CHUNDRA DEBEA **2 Hay 624**

29. ——— *Right to recover land.* A sale in execution of a decree, made while that decree is under review, cannot stand if the decree is subsequently reversed. The party dispossessed under the decree is entitled to recover the land with mesne profits. BHOOLLOO *v.* RAMNARAIN MOOKERJEE . . **W. R. 1864, 129**

30. ——— *Suit to recover possession—Return of purchase-money.* *A* had sued *R* and others for possession of two mouzahs with mesne profits and obtained a joint decree against them in the absence of *R.* In execution *A* was about to put up the rights and interest of *R* in mouzah G when *R* applied for a re-trial under Act VIII of 1859, s. 119. The petition was rejected and the property sold, the decree-holders becoming purchasers. *R* appealed, and the High Court remanded the case to the Judge, who, after investigation, set aside the *ex parte* decree and revived the suit, holding, after re-trial, that *R* had no interest in the mouzahs in suit, and was not liable to the claim of *A.* The latter appealed and the High Court decided that *R* had been in possession of mouzah J, and was liable for the mesne profits. *R* then brought a suit for possession of a share of the mouzah which had been sold in execution. *Held,* that the plaintiff could not in justice seek to recover this property from the defendants without offering to pay them the debt which he owed them, and which formed part of the consideration-money. GOWREE BOYJO NATH PERSHAD *v.* JODHA SINGH **19 W. R. 416**

31. ——— *Suit for possession against auction-purchaser by setting aside sale—Civil Procedure Code (Act X of 1877), s. 244.* In execution of a decree certain property was sold in pursuance of an order under s. 244 of the Civil Procedure Code, and purchased by a person not a party to the suits who subsequently obtained possession

SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*e*) DECREES AFTERWARDS REVERSED—*contd.*

of the property. That order was subsequently set aside. In a suit by the judgment-debtor to recover possession of the property from the auction-purchaser by setting aside the sale :—*Held,* that the order directing the sale had the force of a decree, and that the plaintiff was not entitled to the relief claimed. *Jan Ali* v. *Jan Ali Chowdhry, 1 B. L. R. A. C. 56 : 10 W. R. 154,* followed. MURARI SINGH *v.* PRYAG SINGH . . **I. L. R 11 Calc. 362**

32. ——— *Ex parte decree the validity of which is impeached—Notice to purchasers.* In a suit by *S* in his own right as well as on behalf of his minor brother, to cancel an execution-sale held in execution of an *ex parte* decree, to cancel the said decree and two bonds entered into by members of their family during the plaintiffs' minority, and to recover possession of a share in the ancestral property which had been sold, it was found that the advances of money for which the bonds were executed were made without proper inquiries as to the necessity for the loan, and that the minors were not properly represented in the suit in which the *ex parte* decree was obtained. *Held,* that the mortgage-bonds under such circumstances were invalid against the plaintiffs, and that it would be carrying presumption too far to say that a decree so obtained must be taken to be valid as against the minors. *Held,* that the auction-purchasers could not protect themselves by relying on the decree and execution-sale after having received distinct notice that the mother of the plaintiffs challenged the validity of the whole proceedings. JUNGEE LALL *v.* SHAM LALL MISSER **20 W. R. 120**

Where no such notice has been given, the sale would continue valid. RAM JEWUN LALL *v.* SHAM LALL MISSER . . . . **20 W. R. 123**

33. ——— *Effect of reversal of decree upon sale in execution—Sale to bonâ fide purchaser, not a party to the decree, distinguished from sale to decree-holder.* A sale having duly taken place in execution of a decree in force at the time cannot afterwards be set aside as against a *bonâ fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an Appellate Court. A suit was brought by a judgment-debtor to set aside sale of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bonâ fide* purchasers at other sales, under the same decree, who were no parties to it. *Held,* that, as against the latter purchasers, whose position was different from that of the decree-holding

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*e*) DECREES AFTERWARDS REVERSED—*concld.*

purchasers, the suit must be dismissed. ZAIN-UL-ABDIN KHAN *v.* MUHAMMAD ASGHAR ALI KHAN **I. L. R. 10 All. 166 L. R. 15 I. A. 12**

34. ——— *Civil Procedure Code, 1882, ss. 108, 244, and 314—Sale in execution of an ex parte decree and purchase by the decree-holder—Confirmation of the sale—Subsequent setting aside of the ex parte decree—Application by a subsequent purchaser in execution of another decree to set aside the sale on the ground that the ex parte decree had been set aside.* Certain immoveable properties were sold in execution of an *ex parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 108 of the Civil Procedure Code at the instance of some of the defendants in the original suit. On an application under s. 244 of the Civil Procedure Code having been made by a prior purchaser of the said properties in execution of another decree, to set aside the sale held in execution of the *ex parte* decree, the defence was that the application could not come under s. 244 of the Civil Procedure Code, and that the sale could not be set aside, as it had been confirmed. *Held*, that the case was one under s. 244 of the Civil Procedure Code; and that the *ex parte* decree having been set aside, the sale could not stand, inasmuch as the decree-holder himself was the purchaser. *Doyamoyi Dasi* v. *Sarat Chunder Mozoomdar, I. L. R. 25 Calc. 175; Beni Persad Koeri* v. *Lakhi Rai, 3 C. W. N. 6; Durga Charan Mandal* v. *Kali Prasanno Sarkar, I. L. R. 26 Calc. 727; Nawab Zainul-abdin Khan* v. *Mahammed Asghar Ali, L. R. 15 I. A. 12 : I. L. R. 10 All. 166;* and *Mina Kumari Bibee* v. *Jagat Sattani Bibee, I. L. R. 10 Calc. 220*, referred to. SET UMEDMAL *v.* SRINATH ROY . . . **I. L. R. 27 Calc. 810 4 C. W. N. 692**

35. ——— *Purchase by decree-holder—Effect of reversal of decree upon sale in execution—Civil Procedure Code (Act XIV of 1882), s. 244.* *A* obtained a decree against *B* for rent. *B* appealed and questioned only the rate of rent. Pending the appeal, *A* took out execution, sold *B's* property and purchased it himself. Subsequently *B's* appeal was allowed and the decree was modified, and he applied to set aside the sale under s. 244 of the Civil Procedure Code. *Held*, that, inasmuch as the Appellate Court set aside the decree and made a new decree in lieu of the decree passed by the first Court, the sale having taken place in execution of the decree, which was set aside by the Appellate Court, could not stand. *Zainul-abdin Khan* v. *Muhammad Asghar Ali Khan, I. L. R. 10 All. 166 : L. R. 15 I. A. 12*, and *Set Umedmal* v. *Srinath Roy, I. L. R. 27 Calc. 810*, referred to. CHANDAN SINGH *v.* RAMDENI SINGH (1904) . . . **I. L. R. 31 Calc. 499**

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*f*) DECREE FOUND TO HAVE BEEN SATISFIED.

36. ——— *Purchase by one of several judgment-debtors—Full Bench ruling.* Where a decree was purchased by one of the judgment-debtors and afterwards executed and property of the other judgment-debtor sold in execution of the decree, and it was eventually held by a Full Bench in the case that the purchase of the decree by one of the debtors was a satisfaction of the decree :—*Held*, in a suit against the execution-purchaser to have the sale declared invalid, that the sale must be set aside. DIGAMBUREE DEBIA *v.* ESHAN CHUNDER SEIN . . **15 W. R. 372.**

37. ——— *Order for sale and sale in execution under a decree previously satisfied.* An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made. CHUNNI *v.* LALA RAM **I. L. R. 16 All. 5**

38. ——— *Sale in execution of decree already satisfied—Bonâ fide purchaser at such sale—Right of such purchaser.* Where a person, a stranger to the proceedings, purchases property *bonâ fide* at an auction-sale held in execution of a decree, the sale to him cannot be set aside on the ground that the decree had already been satisfied out of the Court at the time the sale was held. *Rewa Mahton* v. *Ram Kishen, I. L. R. 14 Calc. 18 : L. R. 13 I. A. 106*, and *Mothura Mohun Ghose* v. *Akhoy Kumar Mitter, I. L. R. 15 Calc. 557*, followed. YELLAPPA *v.* RAMCHANDRA **I. L. R. 21 Bom. 463**

39. ——— *Mortgage decree, sale in execution of—Purchase by a third party while the decree and the order for sale are valid—Effect on sale of reversal of ex parte decree—Right of redemption of mortgagor.* A mortgagor is not entitled to redeem the property which was purchased by a third party at a sale held in execution of an *ex parte* mortgage-decree and confirmed whilst the *ex parte* decree was still in force, though the said decree was set aside and subsequently re-affirmed after trial. MUKHODA DASSI *v.* GOPAL CHUNDER DUTTA **I. L. R. 26 Calc. 734**

MUKHODA DASI *v.* HEM CHUNDER BHATTACHARJEE . . . . **3 C. W. N. 766.**

See ZAINULABDIN KHAN *v.* MUHAMMAD ASHGAR ALI KHAN.

I. L. R. 10 All. 166 : L. R. 15 I. A. 12

40. ——— *Civil Procedure Code, 1877, s. 246—Execution of cross-decrees—Power of Court executing decree—Bonâ fide purchaser—Presumption of validity of order for sale.* If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the

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SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*f*) DECREE FOUND TO HAVE BEEN SATISFIED—*contd.*

Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bonâ fide* and for fair value:—*Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. REWA MAHTON *v.* RAM KISHEN SINGH
I. L. R. 14 Calc. 18
L. R. 13 I. A. 106

41. ——— *Title of auction-purchaser—Purchaser whether bound to enquire into the validity of the order under which the sale takes place.* Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan* v. *Kazim Husain*, *I. L. R. 13 All. 432*, distinguished. *Rewa Mahton* v. *Ram Kishen Singh*, *I. L. R. 14 Calc. 18*, and *Mukhoda Dassi* v. *Gopal Chunder Dutta*, *I. L. R. 26 Calc. 734*, referred to. KAUNSILLA *v.* CHANDAR SEN
I. L. R. 22 All. 377

42. ——— *Suit to set aside sale—Fraud—Auction-purchaser acting bonâ fide—Fraudulent execution of a decree after adjustment—Execution of decree adjusted, but of which satisfaction has not been entered, effect of, on rights of innocent purchaser—Adjustment of decree without certifying.* In 1881 *R* obtained a decree against *M* for possession of certain property with costs. Subsequently a compromise of the questions at issue in the suit was come to between *R* and *M*, one of the terms of which was that *R* gave up his claim to costs. Satisfaction of the decree was not entered up in Court. In 1884 *K*, purporting to be acting on behalf of *R*, but without his knowledge or sanction, applied for execution of the decree for costs and in the execution-proceedings which followed a share of *M* in a tank was sold and purchased by *A*. *M* thereupon brought a suit against *A*, *R*, *K*, and others to set aside the sale, alleging that the whole of the execution-proceedings had been taken without notice to him, and had been fraudulently taken by the defendants in collusion with one another in order to deprive him of his share in the tank. It was found that *A's* purchase was an innocent one and untainted with fraud. *Held*, upon the authority

SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*concld.*

(*f*) DECREE FOUND TO HAVE BEEN SATISFIED—*contd.*

of *Rewa Mahton* v. *Ram Kishen Singh*, *L. R. 13 I. A. 106 : I. L. R. 14 Calc. 18*, that the sale could not be set aside. Such a sale could only be set aside if it were shown that the Court had no jurisdiction to execute the decree; but as the decree remained an unsatisfied decree so far as the Court was concerned, and capable of being executed, the compromise not having been certified to the Court, the Court had jurisdiction to execute it. *Pat Dasi* v. *Sharup Chand Mala*, *I. L. R. 14 Calc. 376*, commented on. *Held*, further, that the execution-proceedings could not be held to be void, as, although instituted by a person who had no authority to institute them, they were instituted in the name of the decree-holder, and neither the Court nor the auction-purchaser was bound to see that the application was made *bonâ fide* on his behalf. MOTHURA MOHAN GHOSE MONDUL *v.* AKHOY KUMAR MITTER . **I. L. R. 15 Calc. 557**

(*g*) DECREES AGAINST WRONG PERSONS.

43. ——— *Right to have sale set aside where decree was against wrong person as representatives—Subsequent claim by proper representative—Estoppel—Quiescence.* One *S* died indebted to the second defendant, *M*. On his death his widow, *T*, became his heir, as he left neither son nor brother surviving. In 1878 *M* brought a suit to enforce payment of the debt due by the deceased *S*, and he made *B*, the mother of *S*, defendant in the suit, omitting *T* altogether. On 30th August 1878 *M* obtained an *ex parte* decree, and on the 26th July 1880 the house of *S*, then in the possession of *B*, was sold in execution, and the first defendant, *R*, purchased it. On 6th September 1880 the sale was confirmed, and on 26th November 1880 *R* was put into possession. On the 10th of December 1880 one *S* presented a petition on behalf, as he alleged, of the plaintiff *T*, the widow of *S*, to set aside the sale. He did not produce any authority from her, and his application was rejected on the 14th June 1881. On the 31st October 1878 *T* adopted the plaintiff *B* under an authority, as she alleged, of her deceased husband *S*. In 1881 *T* filed the present suit on behalf of her adopted son, *B*, to set aside the sale and to recover the house. *Held*, that the plaintiff was entitled to have the sale set aside and to recover possession of the house. The estate was vested in *T* as legal representative of her deceased husband. Had *T* wilfully put forward *B* as the representative of *S* so as to deceive and mislead *M*, then, no doubt, she might be held bound by the decree obtained by the latter against *B*. Her mere quiescence, while *M* wilfully sued the wrong person, could not affect her legal rights, or deprive her adopted son, the plaintiff *B*, of his rights. He could not be bound by a suit and sale to which he was not a party either in person or by representation. BASWANTAPA SHIDAPA *v.* RANU **I. L. R. 9 Bom. 86**

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*h*) DECREE WITHOUT POWER OF SALE.

44. ——— *Sale under decree giving no power of sale—Partition of tarwad—Tarwad debt—Construction of decree—Decree explained by judgment.* In 1870 the managers of the plaintiff's tarwad demised certain land now in suit on kanom. In 1885 they sued to redeem the kanom, and a decree was passed that the plaintiff do pay a certain sum to the kanomdar, and that he do surrender the land ; but in the judgment it was said that the kanom amount should be charged on the land. In 1886 the tarwad was divided, and the land above referred to was allotted to the present plaintiff's branch. In 1887 the kanomdar in execution of the above decree, brought the land to sale, and it was purchased by defendant 1. *Held*, that the sale was not binding on the plaintiff. SANKARA *v.* KELU
I. L. R. 14 Mad. 29

(*i*) DECREE AMENDED AFTER EXECUTION.

45. ——— *Civil Procedure Code (Act XIV of 1882), s. 206—Amendment of decree after execution.* In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiff as prayed," but the decree ordered payment by one anandravan only. Land belonging to the tarwad was attached and sold in execution, an objection by the other members of the tarwad having been overruled. After the sale, the decree was amended and brought into conformity with the judgment. In a suit brought by other members of the tarwad against the karnavan, the decree-holder and the execution-purchaser, it was found that the judgment-debt had been contracted for proper tarwad purposes, and that the land had been sold for its proper value. *Held*, that the sale was binding on the plaintiffs. PYDEL *v.* CHATHAPPAN
I. L. R. 14 Mad. 150

See CHATHAPPAN *v.* PYDEL.
I. L. R. 15 Mad. 403

(*j*) WANT OF SALEABLE INTEREST.

46. ——— **Civil Procedure Code, 1877, s. 313**—*Purchaser knowing judgment-debtor has no interest.* A person who purchases immoveable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable interest therein, is not entitled to the benefit of provisions of s. 313 of Act X of 1877, which were designed for the protection of persons who innocently and ignorantly purchased valueless property. MAHABIR PRASAD *v.* DHUMAN DAS
I. L. R. 3 All. 527

47. ——— **Civil Procedure Code, 1882, s. 313**—*Setting aside sale—"Saleable interest."* The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained, which fact is not disclosed prior to the proclamation of sale, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had "no saleable interest" in the property within the meaning of s. 313 of the Civil Procedure Code. *Naharmul Marwari* v. *Sadut Ali, 8 C. L. R. 468*, distinguished. PROTAP CHUNDER CHUCKERBUTTY *v.* PANIOTY
I. L. R. 9 Calc. 506 : 12 C. L. R. 488

48. ——— *Application to set aside sale—"Saleable interest."* A misrepresentation or concealment in the sale notification which induces a purchaser to buy a property for much more than it is really worth, although that misrepresentation or concealment may be fraudulent, is no ground for setting aside a sale under s. 313 of the Civil Procedure Code. The meaning of s. 313 is, that when a purchaser under an execution sale buys a property which turns out to have no existence at all, or to be of no saleable value whatever, the Court may then set aside the sale under s. 313. DURGA SUNDARI DEVI *v.* GOVINDA CHUNDRA ADDY **I. L. R. 10 Calc. 368**

49. ——— *Decree against insolvent—Official Assignee—Purchaser at execution-sale—Setting aside sale.* Where in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sales set aside under s. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds. DINOBUNDHOO PAL *v.* SHOSHEE MOHUN PAL . **I. L. R. 9 Calc. 217**

S.C. DENOBUNDHOO PAL *v.* SHUSHI MOHUN PAL CHOWDHRY . . . . **12 C. L. R. 60**

S.C. RAM SOONDUR DEY *v.* SHOSHI MOHUN PAL CHOWDHRY . . . . **11 C. L. R. 389**

50. ——— *Property covered by mortgage—Saleable interest.* In execution of a rent-decree, dated 22nd May 1879, certain immoveable property was sold in execution and purchased by the appellant on the 21st February 1880, no mention having been made of any incumbrances. On the 9th May 1879 a decree was obtained upon a mortgage executed by the original judgment-debtor, and in execution of that decree the property which had already been sold was attached, and on the 11th March again sold in execution of the second decree, it being alleged that the property was covered by the mortgage which was prior in date to the former decree. The appellant thereupon applied that the sale of the 21st March should be set aside under s. 313 of the Civil Procedure Code, and his purchase-money directed to be returned to him. *Held*, that if, as a fact, the property sold was covered by the mortgage, there was, under the

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SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*j*) WANT OF SALEABLE INTEREST—*contd.*

circumstances, no such saleable interest in the judgment-debtor at the time of the sale on the 21st February 1880 as would prevent the operation of s. 313 of the Civil Procedure Code, inasmuch as under that sale the purchaser would be unable to get the particular property purchased by him, and that the sale must be set aside. NAHARMUL MARWARI *v.* SADUT ALI . . **8 C. L. R. 468**

51. ——— *Sale under attachment during subsistence of prior attachment—Saleable interest.* In execution of a decree obtained on the 15th August 1876 the property of the judgment-debtor was attached on the 17th August 1877. The sale of the attached property was postponed, pending a suit instituted under the direction of the Court by a claimant to the attached property. This suit having been dismissed on the 13th September 1878, the decree-holder on the 25th September applied for a sale of the property, and the 16th December was fixed for the sale. Meanwhile, on the 13th December 1877, a decree had been obtained by another party against the judgment-debtor, and in execution of this decree the same property was attached on the 13th September 1878, and under this attachment a sale took place on the 15th November following. On the 16th December, as fixed, the property was again sold under the first attachment. The auction-purchasers at that sale, on the 6th January 1879, applied, under s. 313 of the Civil Procedure Code, to set aside the sale, on the ground that the judgment-debtor had no saleable interest. *Held* (reversing the decision of the lower Court), on the authority of the following cases,—*Gogaram* v. *Kartick Chunder Singh, B. L. R. Sup. Vol. 1022 : 9 W. R. 514 ; Lalla Joogul Lall* v. *Bhukha Chowdhry, 9 W. R. 244 ;* and *Kartick Chunder Singh* v. *Gogaram, 2 W. R. Mis. 48,* which the Court felt bound to follow while it doubted their correctness,—that the sale must be set aside. CHUKTA PANDA *v.* GOBURDHONE DASS . . . **6 C. L. R. 85**

52. ——— *Debtor having no saleable interest in portion of property.* S. 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property. *In the matter of the petition of* RAM COOMAR DEY. RAM COOMAR DEY *v.* SHUSHEE BHOOSHUN GHOSE **I. L. R. 9 Calc. 626**

53. ——— *Judgment-debtor—Representative—Sale of immoveable property—Setting aside sale.* In the event of the death of the judgment-debtor, notice must issue to his representative before the sale of immoveable property can be set aside under s. 313 of the Code of Civil Procedure, albeit, that the section makes no express

SALE IN EXECUTION OF DECREE—*contd.*

16. INVALID SALES—*contd.*

(*j*) WANT OF SALEABLE INTEREST—*concld.*

provision for the appearance of the representative. BALA KADAR *v.* GULAM MOHIDIN **I. L. R. 7 Bom. 424**

54. ——— *Civil Procedure Code, ss. 213, 220—Transfer of execution of decree to Collector—Jurisdiction of Civil Courts to entertain application under s. 313—Rules prescribed by Local Government under s. 320—Notification No. 671 of 1880, dated the 30th August. Held,* that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree which had been transferred for execution to the Collector in accordance with the rules prescribed by the Local Government was entertainable by the Civil Courts, and the Collector had no jurisdiction under the Code or under Notification No. 671 of 1880 to entertain it. *Madhu Prasad* v. *Hansa Kuar, I. L. R. 5 All. 314,* referred to. NATHU MAL *v.* LACHMI NARAIN . **I. L. R. 9 All. 43**

See KESHABDEO *v.* RADHE PRASAD. **I. L. R. 11 All. 94**

55. ——— *Civil Procedure Code, s. 313—Setting aside sale in execution of decree—Incumbrance.* The fact that property sold in execution of a decree is incumbered, even when the incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold had no saleable interest therein. S. 313 of the Civil Procedure Code contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell, and the fact that the property may fetch little or nothing if sold does not affect the question. *Naharmul* v. *Sadut Ali, 8 C. L. R. 468,* distinguished. *Protap Chunder Chuckerbutty* v. *Panioty, I. L. R. 9 Calc. 506,* referred to. SANT LAL *v.* RAMJI DAS . . **I. L. R. 9 All. 167**

(*k*) SALE CONTRARY TO LAW.

56. ——— *Sale in contravention of the provision of the Transfer of Property Act (IV of 1882), s. 99—Sale by mortgagee in execution of decree.*—Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of s. 99 of the Transfer of Property Act. *Held,* that, although the sale was contrary to the provisions of s. 99 of the Transfer of Property Act, that section being for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property, such a sale was not void, but voidable. MAYAN PATHUTI *v.* PAKURAN **I. L. R. 22 Mad. 347**

See MARTAND BALKRISHNA BHAT *v.* DHONDO DAMODAR KULKARNI **I. L. R. 22 Bom. 624**

and ERUSAPPA MUDALIAR *v.* COMMERCIAL AND LAND MORTGAGE BANK **I. L. R. 23 Mad. 377**

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*k*) SALE CONTRARY TO LAW—*concld.*

57. _____ *Sale contrary to provisions of Transfer of Property Act (IV of 1882), s. 99—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Rights of Hindu debtor's son after attachment and sale.* In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878 plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought in 1889 in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity:—*Held*, that, inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at the instance of the mortgagee in execution of a money-decree, and so within the prohibition of s. 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree, the sale is prohibited; that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained; that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of s. 99; that the suit was not barred by s. 244 of the Code of Civil Procedure; and that plaintiff was entitled to a decree for the redemption of his share. MUTHURAMAN CHETTI *v.* ETTAPPASAMI . . **I. L. R. 22 Mad. 372**

(*l*) WANT OF JURISDICTION.

58. _____ **Effect on validity of sale—** *Property attached in execution of decrees of Munsif and District Judge—Sale of property under order of Munsif—Civil Procedure Code, 1882, s. 285.* Where certain immoveable property, which had been attached in execution of two decrees, one made by a Munsif and the other by the District Court to which such Munsif was subordinate, was sold under the order of the Munsif:—*Held*, following *Badri Prasad* v. *Saran Lal, I. L. R. 4 All. 359*, that the sale was bad, by reason of the Munsif's want of jurisdiction to order it. AGHORE NATH *v.* SHAMA SUNDARI . . **I. L. R. 5 All. 615**

59. _____ *Civil Procedure Code, 1877, s. 285—Attachment of property in execution of decree of two Courts—Postponement of sale by Court of higher grade—Sale of property under of Court of lower grade.* When several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the Court of the highest grade where such Courts are of different grades, or the Court which first effectuated the attachment where such Courts are of the same grade, is, under s. 285 of the Civil Procedure Code, the Court which has the power of deciding objections to the attachment of determining claims made to the property, of ordering the sale thereof and receiving the sale-proceeds, and of providing for their distribution under s. 295. *Held*, therefore, where the immoveable property of a judgment-debtor was attached in execution of several decrees, one a Munsif's decree and the rest a Subordinate Judge's decrees, and the Subordinate Judge postponed the sale of such property, but the Munsif refused to do so, and such property was sold in execution of the Munsif's decree, that the sale was void as having been made in pursuance of the order of a Court which had no jurisdiction to direct it. *In the matter of the petition of* BADRI PRASAD. BADRI PRASAD *v.* SARAN LAL . . **I. L. R. 4 All. 359**

60. _____ *Civil Procedure Code, 1882, s. 285—Attachment of the same property by two Courts of different grades.* The operation of s. 285 of the Code of Civil Procedure is not affected by the fact that prior to the attachment made by the Court of higher grade, proceedings subsequent to attachment may have taken place in the Court of lower grade in execution of the decree of that Court. *Badri Prasad* v *Saran Lal, I. L. R. 4 All. 359, Aghore Nath* v. *Shama Sundari, I. L. R. 5 All. 615*, and *Muttakaruppan Chetti* v. *Mathuramalinga Chetti, I. L. R. 7 Mad. 47*, referred to. BALKISHEE *v.* NARAIN DAS . . **I. L. R. 18 All. 348**

61 _____ *Civil Procedure Code (Act XIV of 1882), ss. 285 and 295—Decree, transfer of—Rateable distribution.* S. 295 of the Civil Procedure Code does not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under s. 285. HAR BHAGAT DAS MARWARI *v.* ANANDARAM MARWARI **2 C. W. N. 126**

62. _____ *Civil Procedure Code, 1877 (1882, s. 285)—Attachment and sale in execution of decrees of several Courts.* Certain immoveable property was attached in execution of a decree made by a Subordinate Judge and also in execution of a decree made by a Munsif. These

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

decrees were held by the same person, and the judgment-debtor was the same person. Such property was sold in execution of both decrees. On the application of the judgment-debtor, who brought into Court the amount due on the decree made by the Subordinate Judge, and with the consent of the decree-holder and the auction-purchaser, the Subordinate Judge made an illegal order setting aside such sale. Subsequently on the application of the decree-holder and the auction-purchaser, the Munsif made an order confirming such sale. *Per* SPANKIE, *J.*—That the Subordinate Judge had not any jurisdiction under s. 285 of the Civil Procedure Code to deal with such sale as regards the decree made by the Munsif, and the Munsif was not precluded by that section from confirming such sale as regards the decree made by him, by reason that the Subordinate Judge, a Court of a higher grade, had made an order setting it aside. *Per* OLDFIELD, *J.*—That having regard to the provisions of that section, it was doubtful whether the Munsif was competent to confirm such sale; but, inasmuch as the Subordinate Judge only intended to set it aside as regards the decree made by him, and his order was illegal, and the Munsif's order had done substantial justice, there was no reason to interfere. CHUNNI LAL *v.* DEBI PRASAD

I. L. R. 3 All. 356

63. _____ *Civil Procedure Code, 1882, s. 285—Immoveable property—Attachment by superior Court—Sale by inferior Court—Title of purchaser.* The provisions of s. 285 of the Code of Civil Procedure, 1882, apply to immoveable property. Where a house, while under an attachment issued by a Subordinate Judge's Court in execution of a decree was sold in execution of another decree against the same judgment-debtor by the District Munsif's Court, and was then sold by the Subordinate Judge's Court:—*Held*, that the sale by the District Munsif's Court was invalid by reason of the provisions of s. 285 of the Code of Civil Procedure, 1882. MUTTUKARUPPAN CHETTI *v.* MUTTURAMALINGA CHETTI . **I. L. R. 7 Mad. 47**

64. _____ *Jurisdiction of Munsif—Bengal Civil Courts Act (VI of 1871), s. 18—Attachment—Civil Procedure Code (Act X of 1877), s. 285.* *A*, who had obtained a decree in the Court of the Second Munsif of B, in September 1877 attached certain property within the jurisdiction which had been assigned to the Munsif by the District Judge under s. 18 of Act VI of 1871. In the previous month, *C*, who had obtained a decree in the Court of the Additional Munsif of B (to whom jurisdiction had similarly been assigned), had attached the same property. The sale in execution of *A's* decree took place first, and *A* became the purchaser. *A* then objected in the Court of the Additional Munsif that the property could not again be sold; but his objection was overruled, and two days subsequently the property was again put up for sale in execution of *C's* decree, and he became the purchaser. *A* brought various suits against the tenants for arrears of rent in which *C* intervened. *Held*, that the jurisdictions of the Munsifs were confined to the particular limits assigned to them, and that, as the property was situate within the limits assigned to the Second Munsif, the Additional Munsif had no jurisdiction to attach or sell it, and that the attachment by *C* was made improperly and without jurisdiction. *Quære:* Whether s. 285 of the Civil Procedure Code applies to immoveable property. OBHOY CHURN COONDOO *v.* GOLAM ALI *alias* NOCOURY MEAH

I. L. R. 7 Calc. 410: 9 C. L. R. 361

65. _____ *Civil Procedure Code, 1882, ss. 285, 295—Jurisdiction—Sale by inferior Court pending an unknown attachment by a superior Court.* At an execution-sale held by an inferior Court, at the instance of the decree-holder (the Court itself, the decree-holder, and the auction-purchaser being unaware of any objection to the exercise of a jurisdiction which the Court would ordinarily be competent to exercise), *A* purchased certain property, and this sale was confirmed. It appeared subsequently that this same property had two years previously to the sale been attached by a superior Court. On a sale of this property being advertised by the superior Court, *A* objected on the ground that he had already purchased it; this objection was overruled, and sale was held by the superior Court, at which *A* again became the purchaser. *A* then brought a suit against the decree-holder and the judgment-debtor in the inferior Court to recover as damages the sum paid by him at the sale. The suit was dismissed. *Held*, that, although the superior Court had been wrong in insisting on the second sale and in not requiring the amount received by the inferior Court to be deposited in the superior Court, and then rateably distributed amongst the creditors of the judgment-debtors, yet the sale by the inferior Court was a good and valid sale; and *A's* suit was therefore rightly dismissed. *Obhoy Churn Coondoo* v. *Golam Ali, I. L. R. 7 Calc. 410*, adopted. BYKANT NATH SHAHA *v.* RAJENDRO NARAIN RAI

I. L. R. 12 Calc. 333

66. _____ *Sale under two different decrees of different Courts of different grades—Civil Procedure Code, 1882, s. 285.* The first mortgagee of certain immoveable property obtained a decree for the sale of the property, caused the property to be attached, and then ceased to prosecute the execution-proceedings. The second mortgagee then obtained a decree for the sale of the property, caused it to be attached and put up for sale, and purchased it himself. The first mortgagee then applied for the sale of the property, and the property was put up for sale and was purchased by him. After the order for this sale was made, and before it took place, the judgment-debtor died, and

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

the sale took place without his legal representatives being made parties to the execution-proceedings. The Courts which executed these decrees were of two different grades, the Court which executed the first mortgagee's decree being of the lower grade. In a suit by the first mortgagee against the second mortgagee for possession of the property :—*Held*, that the sale to the first mortgagee was not invalid, with reference to the provisions of s. 285 of the Civil Procedure Code, because it had not been ordered and held by the Court of the higher grade, inasmuch as, when such sale was ordered by the Court of the lower grade, the property was not under attachment in execution of the decree of the Court of the higher grade, that decree having been executed by the sale of the property, and therefore the provisions of that section were not applicable. *Badri Prasad* v. *Saran Lal, I. L. R. 4 All. 359*, distinguished. *Per* OLDFIELD, *J.*, that there was nothing in the provisions of s. 285 or 295 of the Civil Procedure Code to support the contention that the first mortgagee, after allowing the property to be sold, was debarred from enforcing execution of his decree against it, and was only entitled to look to the assets realized at the sale for the satisfaction of his decree. STOWELL *v.* AJUDHIA NATH . **I. L. R. 6 All. 255**

67. ——— *Sale under decree by two Courts, first a Revenue Court, and then a Civil Court—N.-W. P. Rent Act (XII of 1881), ss. 170, 171, 172—Civil Procedure Code, 1882, s. 285—Effect of section in conflict between Civil and Revenue Courts. Held*, that the procedure prescribed by s. 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court. Hence where the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, it was *held* that the purchaser at the sale held in execution of the decree of the Court of Revenue took a good title as against the purchaser at the sale held in execution of the decree of the Civil Court. *Onkar Singh* v. *Bhup Singh, I. L. R. 16 All. 496, Aulia Bibi* v. *Abu Jafar, I. L. R. 21 All. 405* and *Madho Prakash Singh* v. *Murli Manohar I. L. R. 5 All. 406* referred, to. RAGHUBAR DAYAL *v.* BANKE LAL **I. L. R. 22 All. 182**

68. ——— *Attachment of immoveable property in execution of decrees of two Courts of same grade—Sale by one Court pending prior attachment by other Court—Validity of sale—Title of purchaser—Civil Procedure Code (Act XIV of 1882), s. 285.* *X*, on the 3rd November 1884, obtained a decree in the Court of the Second Munsif of Bagirhat against *A*, and on the 6th August 1887 sold such decree to the plaintiff, who on the 8th August 1887 applied in that Court for execution,

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

and on the 5th September 1887 attached the share of *A* in a certain jumma. The share was subsequently sold in execution of the plaintiff's decree on the 20th October 1887 and purchased by the plaintiff himself. *Y*, having obtained another decree against *A* in the Court of the First Munsif of Bagirhat on the 6th May 1875, sold his decree in the month of January or February 1887 to the defendant, who on the 10th February 1887 commenced execution-proceedings in the First Munsif's Court against *A*, and on the 16th July applied for attachment of *A's* share in the jumma. *A* filed an objection which was disallowed, and the share was attached at the defendant's instance on the 28th July 1887, and the attachment was confirmed on appeal on the 26th November 1887. The plaintiff, on the strength of his purchase of the 20th October 1887, put in a claim in the month of April 1888 in the defendant's execution-proceedings in the Court of the First Munsif, which was, however, disallowed. He then filed a suit to set aside the order disallowing his claim, and for a declaration that the right, title, and interest of *A* passed to him under the sale of the 20th October 1887. *Held*, that, though the property had been first attached in the Court of the First Munsif, that Court was not a Court of a higher grade than that of the Second Munsif within the meaning of s. 285 of the Code of Civil Procedure, and that the sale to the plaintiff was valid, and that he was entitled to the decree he prayed for. *Bykant Nath Shaha* v, *Rajendra Narain Rai, I. L. R. 12 All. 339*, followed ; *Badri Prasad* v. *Saran Lal, I. L. R. 4 All. 359, Aghore Nath* v. *Shama Sundary, I. L. R. 5. All. 615*, dissented from ; and *Muttukaruppan Chetti* v. *Mutturamalinga Chetti, I. L. R. 7 Mad. 47*, referred to. DWARKA NATH DASS *v.* BANKU BEHARI BOSE **I. L. R. 19 Calc. 651**

69. ——— *Civil Procedure Code, 1882, ss. 285 and 295—Concurrent decrees —Distribution of assets among several decree-holders —Sale in execution by inferior Court of property while under an attachment issued by superior Court.* On the 9th October 1891 *A* obtained a decree against *B* in the Court of the First Class Subordinate Judge of Surat. On the 13th October 1891 *C* also obtained a decree against *B* in the Court of the Second Class Subordinate Judge at Surat and immediately, *viz.*, on the 16th October 1891, applied for execution. *B's* property was consequently attached on the 18th October 1891. On the 7th July 1892 an order for sale was made and the proclamation of sale was issued on the 19th July 1892. The 17th August was fixed as the date of the auction-sale. On the 23rd July 1892, *A* applied to the First Class Subordinate Judge for execution of his decree of the 9th October 1891, and *B's* property (with respect to which the proclamation of sale had been already issued by the Second Class Subordinate Judge) was attached on the 14th August 1892. Three days later, however, *viz.*, on the 17th August

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SALE IN EXECUTION OF DECREE— *contd.*

16.—INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

1892, the property was sold under the decree of the Second Class Subordinate Judge. *A* then applied to the Second Class Subordinate Judge to set aside the sale on the ground that it was invalid under s. 285 of the Civil Procedure Code (Act XIV of 1882), having been made while the attachment levied by the First Class Subordinate Judge was pending, and on the Second Class Subordinate Judge's refusal to do so, *A* applied to the High Court under its extraordinary jurisdiction. *Held*, that the sale was good. NARANJI MORARJI *v.* HARIDAS NAVALRAM. . **I. L. R. 18 Bom. 458**

70. ——— *Civil Procedure Code, 1882, s. 285—Money attached in execution in two Courts—"Court of highest grade"—Munsif's Court—Small Cause Court.* In the North-Western Provinces the Court of a Munsif must, for the purposes of s. 285 of the Code of Civil Procedure, be regarded as of a higher grade than a Court of Small Causes. So *held* by EDGE, *C.J.*, TYRRELL, BURKITT and AIKMAN, *JJ.* (KNOX, *J.*, *dissentiente*). *Per* KNOX, *J.*—The respective functions of a Munsif's Court and of a Court of Small Causes in the North-Western Provinces are such that the Courts do not admit of the comparison implied by the term "grade" being instituted between them for the purposes of s. 285 of the Code of Civil Procedure. BALLU RAM *v.* RAGHUBAR DIAL **I. L. R. 16 All. 11**

71. ——— *Attachment and proclamation of sale in execution of decree of Small Cause Court—Subsequent application for execution of decree of first class Surbordinate Judge—Civil Procedure Code, 1882, s. 285—Sale by inferior Court of property while under attachment issued by superior Court.* *G* obtained a decree against *M* in the Small Cause Court of Surat, and in execution he attached a debt due to *M* and a proclamation of sale was duly issued. Before the sale took place, however, one *K* applied to the First Class Subordinate Judge for execution of a decree which he had obtained against *N* in that Judge's Court, and the same debt was then attached. The proceedings, however, under the Small Cause Court decree were continued, and the debt was sold in execution and was purchased by the applicant. *Held*, following *Naranji Mororji* v. *Haridas Navalram, I. L. R. 18 Bom. 458*, that the sale by the Small Cause Court was not rendered invalid by the subsequent proceeding in the First Class Subordinate Judge's Court. The term "grade" in s. 285 of the Civil Procedure Code (Act XIV of 1882) has the same meaning as it had in s. 5 of the Code (Act VIII of 1859)—that is, it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and therefore, as s. 285 is applicable to Small Cause Courts, the Small Cause Court is inferior in grade to the Court of the First Class Subordinate Judge. TURMUKLAL HARKISANRAI *v.* KALYANDAS KHUSHAL . **I. L. R. 19 Bom. 127**

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

72. ——— *Decrees of different Courts against same judgment-debtor—Leave given by both Courts to judgment-debtor to raise amount by private sale—Civil Procedure Code, 1882, s. 305—Confirmation of such sale by one Court—Subsequent application for confirmation to other Court.* *P* obtained a decree against *V* in the Court of the second class Subordinate Judge at Saundatti. He applied (darkhast of 1893) for execution, but *V*, on the 19th April 1893, obtained permission, under s. 305 of the Civil Procedure Code (Act XIV of 1882), to raise the amount of the decree by private sale on or before the 6th June 1893, the day fixed for the sale. She obtained a certificate of leave under s. 305. Another decree was obtained against *V* in the Court of the First Class Subordinate Judge at Belgaum by one *R*, and he attached in execution (darkhast 351 of 1892) the same lands which were already attached by the Saundatti Court. From the Belgaum Court, however, *V* also obtained a certificate under s. 305 of the Civil Procedure Code, on 22nd April 1893, authorizing a private sale. Relying on these two certificates, *V* sold the lands under attachment to the applicant *A* for R2,000 by deed dated 25th May 1893. On the 28th June 1893 *A* applied to the First Class Subordinate Judge in Belgaum, under s. 305 of the Civil Procedure Code, for confirmation of the sale, and that the purchase-money paid by him should be distributed as follows, *viz.*, R518-14-2 in satisfaction of the decree of the Belgaum Court, R128-7-10 in satisfaction of the decree of the Saundatti Court, and the balance, R1,352-10-0, to be paid to *V*. The Court of Belgaum granted the application, and directed that the above sum of R128-7-10 should be paid into the Court of Saundatti. On the 17th July 1893 *A* applied to the Court at Saundatti to confirm the sale already confirmed by the Belgaum Court, and he brought into Court the said sum of R128-7-10. On the 19th June 1893, while the above proceedings were going on, a third decree-holder (the opponent) had applied to the Second Class Subordinate Judge at Saundatti for execution of his decree. He objected to the confirmation of the sale applied for by the applicant. The Subordinate Judge allowed the objection and refused confirmation of the sale. The applicant then applied to the High Court under its extraordinary jurisdiction. *Held*, that the Judge of the Belgaum Court had concurrent jurisdiction to sell and confirm the sale notwithstanding the execution and leave to sale by the Saundatti Court. The application to the Saundatti Court by *A* was therefore superfluous and ought to have been rejected, inasmuch as the sale had already been confirmed by a competent Court (*viz.*, the Court of Belgaum), and nothing further remained to be done in regard to it. ANDANAPA *v.* BHIMRAO ANNAJI **I. L. R. 19 Bom. 539**

73. ——— *Attachment of same property by different Courts—Sale by both*

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

Courts—Titles of the respective purchasers at such sales—Civil Procedure Code (Act XIV of 1882), s. 285. *A* and *B* obtained decrees against *C*. *A's* decree was obtained in the Court of the Subordinate Judge at Surat. *B's* decree was obtained in the Small Cause Court at Surat. In execution of their respective decrees, both *A* and *B* obtained orders of attachment on the same day of a certain debt due to *C* by the Municipality of Surat. Notice of the attachment was given by the Subordinate Judge to the Small Cause Court, under s. 285 of the Civil Procedure Code (Act XIV of 1882). On the 16th November 1893 the Subordinate Judge issued an order for sale of the attached debt, and on the 18th December the Small Cause Court issued a similar order. Both Courts sold the debt on the 6th January 1894, the Small Cause Court selling first in point of time. At the sale by the Subordinate Judge the plaintiff bought the debt and the defendant was the purchaser at the sale by the Small Cause Court. The defendant, after his purchase, sued the Municipality for the debt, making the plaintiff a party defendant, and he obtained a decree against the Municipality. The plaintiff also sued the Municipality, making the defendant a party, and he also obtained a decree which was confirmed by the District Court. Against this decree the defendant appealed to the High Court. *Held*, that the plaintiff had the better title. The defendant had bought at the sale held by the Small Cause Court. The sale by that Court after it had received notice of the attachment proceedings in the Court of the Subordinate Judge was in direct contravention of the provisions of s. 285 of the Civil Procedure Code (Act XIV of 1882). The Small Cause Court had full notice of the proceedings in the Subordinate Judge's Court, and there was no reason to suppose that the defendant himself had not similar knowledge. The defendant did not set up the plea that he was a *bonâ fide* purchaser without notice. *Per* FARRAN, *C.J.*—The sale by the Small Cause Court was an act done in the irregular exercise of admitted jurisdiction. But when property is attached by more Courts than one, although each has jurisdiction to sell, that jurisdiction should be exercised by the Court of the highest grade (s. 285). If by a mistake of law, or in ignorance of an earlier attachment in a Court of higher grade, a Court of lower grade proceeds to sale, it is not deprived of jurisdiction to do so by s. 285. The jurisdiction of a Court cannot depend upon its knowledge of facts. If an attachment in a higher Court deprives a Court of lower grade of jurisdiction to sell, the sale must be, I apprehend, invalid, whether the Court of lower grade knows of it or not. If the sale is held to be in such cases only irregular, the purchaser will take an indefeasible or defeasible title according to whether he knows or does not know of the irregularity. If he buys *bonâ fide* and without notice, his title would be perfect, and he will not be affected by the irregularity of the proceedings in the sale. *Rewa Mahton* v. *Ram Kishen, L. R. 13 I. A. 111.* If he purchases with notice, he runs the risk of his purchase being set aside. ABDUL KARIM *v.* THAKORDAS TRIBHOBAN DAS **I. L. R. 22 Bom. 88**

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

74. ——— *Civil Procedure Code (Act XIV of 1882), ss. 15, 285—Sale in execution by inferior Court of property already under an attachment by a superior Court—Jurisdiction of Munsif—Preferential right of purchasers in execution-sale—Concurrent decrees, execution of.* *A* obtained a decree against *B* in the Court of the Munsif of Jamui, and in execution thereof attached *B's* property on the 16th March 1891 ; the property was sold on the 20th April 1891 and purchased by *C*, who obtained possession of it on the 3rd of August 1891, and then sold his interest to the plaintiff. At the same time the defendant *R* had a decree for costs against *B* and his heirs in the Court of the Subordinate Judge of Monghyr, and in execution thereof attached the same property on the 4th February 1891, and sold it on the 24th August 1891, *i.e.*, about four months after the sale of the property by the Munsif. The plaintiff sued for possession on the ground that, having purchased the property of *B* before the second sale by the Subordinate Judge, she was entitled to the property. The defendant contended that the sale by the Munsif of the property under attachment by a Court of a higher grade was absolutely void, and the Munsif had no jurisdiction to sell the property under s. 285 of the Civil Procedure Code. *Held*, that the sale by the Munsif was not without jurisdiction, and that it conveyed to the plaintiff a valid title to the property. S. 285 of the Civil Procedure Code is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by different Courts. *Bykant Nath Shaha* v. *Rajendra Narain Rai, I. L. R. 12 Calc. 333, Dwarka Nath Das* v. *Banku Behari Bose, I. L. R. 19 Calc. 651,* and *Patel Naranji Morarji* v. *Haridas Navalran, I. L. R. 18 Bom. 458,* referred to. RAM NARAIN SINGH *v.* MINA KOERY **I. L. R. 25 Calc. 46**

75. ——— *Civil Procedure Code, 1882, s. 285—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers.* Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, s. 285 of the Code of Civil Procedure does not take away the jurisdiction of the inferior Court, and any proceedings by such inferior Court in contravention of that section will be vitiated only where there has been notice of the proceedings in the superior Court. KUNHAYAN *v.* ITHUKUTTI **I. L. R. 22 Mad. 295**

76. ——— *Mortgage-decree for sale of properties in different districts and jurisdictions—Civil Procedure Code (Act XIV of 1882),*

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

ss. 19, 223 (c), Sch. IV, Form 128. A decree obtained in a suit, brought under the provisions of s. 19 of the Code of Civil Procedure, in the Court of the Subordinate Judge of Rajshahye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshahye and Nyadumka, directed that the properties mentioned in the mortgage should be sold, and the proceeds applied in payment of the mortgage-debt, and the properties were sold by the Court of Rajshahye. *Held*, that the authority given by s. 19 of the Code included an authority to make the orders for the sale of the properties, and that the Rajshahye Court was within its jurisdiction in directing and carrying out the sale. *Quære:* Whether, where a sale takes place under a money-decree of property partly within the local limits of the Court whose decree is being executed and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of ss. 19 and 223 of the Code of Civil Procedure. MASEYK *v.* STEEL & Co. **I. L. R. 14 Calc. 661**

77. ——— *Property outside jurisdiction of Court executing decree—Code of Civil Procedure (Act XIV of 1882), ss. 16, 233, 649.* A Court has no jurisdiction, in execution of a decree, to sell property over which it has no territorial jurisdiction at the time it passed the order of sale. The decree-holder at a sale under a mortgage-decree purchased the mortgaged property with leave of the Court. Before the order of sale was passed, the mortgaged property had been transferred by an order of Government to the jurisdiction of another Court. *Held*, by the Full Bench, that the sale must be set aside as being without jurisdiction. *Kamini Soondari Chowdhrani* v. *Kali Prosonno Ghose, L. R. 12 I. A. 215 : I. L. R. 12 Calc. 225*, followed. PREM CHAND DEY *v.* MOKHODA DEBI . . **I. L. R. 17 Calc. 699**

See DAKHINA CHURN CHATTOPADHYA *v.* BILASH CHUNDER ROY . **I. L. R. 18 Calc. 526**

78. ——— *Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 13, cl. 3—Civil Procedure Code, 1882, s. 25—Transfer of civil case.* A suit on a mortgage-bond, praying for the decree for sale, was transferred under s. 25 of the Civil Procedure Code from the Court of the Second Subordinate Judge to that of the Third Subordinate Judge in the district for trial in that Court. The suit was decreed, and an order for sale was passed by the Third Subordinate Judge. After the sale, an application was made to set it aside on the ground, *inter alia*, that the Court of the Third Subordinate Judge had no jurisdiction to sell the property, it being within the local jurisdiction of the Second Subordinate Judge's Court. The jurisdiction of the Third Subordinate Judge to try the suit was not questioned. *Held*, that s. 13, cl. 3, of the Bengal, N.-W. P., and Assam Civil Courts Act (XII

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

1887) dealt with matters of this description, and the Court which passed the decree and the order for sale had jurisdiction to hold the sale. *Prem Chand Day* v. *Mokhoda Debi, I. L. R. 17 Calc. 699*, distinguished. *Gopi Mohan Roy* v. *Doybaki Nundun Sen, I. L. R. 19 Calc. 3*, and *Tincowrie Debya* v. *Shiv Chandra Pal Chowdhury, I. L. R. 21 Calc. 639*, referred to. JAGERNATH SAHAI *v.* DIP RANI KOER . . **I. L. R. 22 Calc. 871**

TINCOURI DEBYA *v.* SHIB CHANDRA PAL CHOWDHURY . . . **I. L. R. 21 Calc. 639**

79. ——— *Decree set aside as made without jurisdiction.* When, on a re-hearing, a Deputy Collector set aside his former judgment as passed without jurisdiction, it was *held* that his proceedings under that judgment were of themselves null and void, and that it did not require any order in words to set aside the sale which they involved. ONUNGO MOONJUREE DOSSIA *v.* PUNCHANAN BOSE . . **12 W. R. 72**

80. ——— *Decree afterwards set aside as having been passed without jurisdiction—Invalidity of sale.* Under a decree passed by a Court which had no jurisdiction to try the suit, the right, title, and interest of the judgment-debtor, *A*, in a certain property was sold, and purchased by *B*. The decree was, after the sale, set aside as having been passed without jurisdiction. In a suit by *A* against *B* for confirmation of possession, on the ground that *B* was about to take possession of the property under the purchase:—*Held*, that the sale in execution was a nullity, as the decree had been passed without jurisdiction. *Jan Ali* v. *Jan Ali Chowdhry, 1 B. L. R. A. C. 56 : 10 W. R. 154*, and *Peareemonee Dossee* v. *Collector of Beerbhoom, 8 W. R. 300*, distinguished. JADU NATH KUNDU CHOWDHRY *v.* BRAJA NATH KUNDU **6 B. L. R. Ap 90**

81. ——— *Sale by Sheriff ultra vires—Right of purchaser.* Where the Sheriff sells under a *fi. fa.* property which could not legally be sold,—*e.g.*, an equity of redemption:—*Held*, that the sale was null and void, and the purchaser took nothing by his purchase. When, therefore, the purchaser was also a mortgagee who was in right of his purchase put into possession:—*Held*, that, notwithstanding his possession, the right of redemption still existed, and he must be taken to have been in possession as mortgagee only. HURRO PERSHAD GHOSAL *v.* HURRO MONEE DEBEE **8 W. R. 210**

82. ——— *Sale of ancestral land by order of the Court—Act X of 1877 (Civil Procedure Code), ss. 311, 320—Rules prescribed by Local Government under s. 320—Invalidity of sale.* A Subordinate Judge made an order for the sale in execution of a decree of certain immoveable property, which was "ancestral" within the meaning of the notification by the Local Government, No. 671, dated the 30th August 1880, under which

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*contd.*

execution of such decree should have been transferred to the Collector ; and such property was sold accordingly. *Held*, that the order for the sale of such property having been made without jurisdiction, the sale was void and should be set aside. SUKHDEO RAI *v.* SHEO GHULAM **I. L. R. 4 All. 382**

83. ——— *Fieri facias, writ of—Sheriff, jurisdiction of.* Inasmuch as since the establishment of the High Court, or at all events since 1865, a writ of *fieri facias* could not run beyond the High Court's original jurisdiction, a sale in execution of a decree by the mofussil Court of property in the mofussil will pass a good title to the purchaser, notwithstanding that, at the time of such sale, the Sheriff was in possession of the property under a writ of *fieri facias* issued subsequently to 1865. *Monomothonath Dey* v. *Greender Chunder Ghose, 24 W. R. 366*, cited. GRISH CHUNDER DAS *v.* BROJO JIBUN BOSE . . **8 C. L. R. 4**

84. ——— *Sale set aside as being without jurisdiction—Title of purchaser—Certificate of sale.* In 1862 a suit was filed on the Equity Side of the Supreme Court for partition of the property of a Hindu family, and an injunction was issued prohibiting *V*, a party to the suit, from interfering with the property. In 1863 a decree was passed for the administration of the property under the direction of the High Court, and the injunction against *V* was continued, and on July 7th, 1866, part of the property, a house at Chingleput, was sold by the master and bought by the plaintiff's predecessor in title. In 1865 *V* and his son (the second defendant), who was no party to the suit, mortgaged the house at Chingleput to the first defendant, who remained in possession from that date. *Held*, in a suit brought on July 6th, 1878, to recover the property, that, as the High Court had no jurisdiction before the Letters Patent of 1865 in suits for immoveable property partly within and partly without the town of Madras, the sale of the house at Chingleput in 1866 by the Court was *ultra vires*, and the plaintiff acquired no title thereby. SADAGOPA EDINTARA MAHA DESIKA SWAMIAR *v.* JAMUNA BHAI AMMAL . **I. L. R. 5 Mad. 54**

This decision was afterwards reversed on review so far as it decided that the High Court prior to 1865 had no power to execute a decree in a partition suit between Hindu inhabitants of Madras by selling immoveable property situated in Chingleput district. JAMUNA BHAI AMMAL *v.* SADAGOPA EDINTARA MAHA DESIKA SWAMIAR **I. L. R. 7 Mad. 56**

85. ——— *Suit to recover property sold in execution by Court not having jurisdiction—Civil Procedure Code, 1859, s. 257.* A suit to recover property alleged to have been sold in execution by a Court which had no jurisdiction was not barred by Act VIII of 1859, s. 257. KANHAYE SINGH *v.* OOMADHUR BHUTT . **21 W. R. 29**

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*l*) WANT OF JURISDICTION—*concld.*

86. ——— *Sale of property for purpose of realising Court-fees erroneously supposed to be due to Government—Ultra vires—Want of jurisdiction.* An order for sale and a sale under such order are *ultra vires* and nullities when in fact there was no jurisdiction in the Court to make the order. *Ram Lall Moitra* v. *Bama Sundari Dabia, I. L. R. 12 Calc. 307*, referred to. BALWANT RAO *v.* MUHAMMAD HUSAIN . **I. L. R. 15 All. 324**

87. ——— *Sale in execution of decree—Sale by inferior Courts of property attached by a superior Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 284, 285.* Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of lower grade is not a nullity. S. 285 of the Code of Civil Procedure is a directory section dealing with procedure, and does not take away the jurisdiction to sell conferred on the Court by s. 284. GOPI CHAND BOTHRA *v.* KASIMUNISSA KHATUN (1907). **I. L. R. 34 Calc. 836**

(*m*) DECREES BARRED BY LIMITATION.

88. ——— **Suit to recover purchased property**—*Right of suit.* A suit to recover possession of, and to establish the right to, property purchased in execution of a decree declared after the sale to be null and void as being barred by limitation at the time of execution, will not lie. PARADUTT LALL *v.* RUTTUN SINGH . **5 N. W. 242**

See ZUMEER SIRDAR *v.* ASSEEMOODDEEN SIRDAR **23 W. R. 257**

89. ——— **Objection to validity of sale**—*Civil Procedure Code, s. 230—Decree, execution of, after twelve years.* After a sale of land in execution of a decree and before its confirmation, the judgment-debtor cannot object to the validity of the sale on the ground that the execution of the decree is barred by the provisions of s. 230 of the Code of Civil Procedure, 1877. GANGATHARA PANDITHAR *v.* RATHABAI AMMAL **I. L. R. 6 Mad. 237**

90. ——— **"Subsisting decree," meaning of**—*Sale certificate, effect of—Act XIV of 1882, ss. 244, 316—Costs.* The words "subsisting decree," in the proviso to s. 316 of the Code of Civil Procedure, refer to a decree which is unreversed and in full force, and not merely to a decree the execution of which is not barred by limitation. Where a decree under which a sale takes place remains unreversed, and the sale under it has been confirmed, a sale certificate will operate as a valid transfer of the property sold, notwithstanding that the sale has actually taken place at a time when execution of the decree is barred by limitation. SARODA CHURN CHUCKERBUTTY *v.* MAHOMED ISUF MEAH . . . **I. L. R. 11 Calc. 376**

91. ——— **Effect on validity of sale—** *Execution of decree barred at time of sale—Purchase*

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*contd.*

(*m*) DECREES BARRED BY LIMITATION—*contd.*

of decree-holder. *G A* obtained a decree against *M*. Afterwards *L N*, who had obtained a decree against *G A*, attached the decree which he (*G A*) had obtained against *M*, and upon sale in execution, became himself the purchaser of that decree. It afterwards appeared that the decree held by *L N* against *G A* was barred by limitation. *Held*, that the execution of *L N's* decree against *G A*, being barred by lapse of time at the time of sale, the sale was invalid. GOLAM ASGAR *v.* LAKHIMANI DEBI **5 B. L. R. 68 : 13 W. R. 273**

92. ——— Separate suit for declaration that decree was barred by limitation at time of sale—*Right of suit.* *A* sued for possession of certain lands to which he alleged he was entitled as wussee (executor) under a wusseeut-namah (will), and which *B* had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a decree the execution of which was barred by lapse of time. *B* had become the purchaser at such sale. *Held*, that a suit would not lie for the purpose of having it determined the the execution of *B's* decree was barred. NOJABUT ALI CHOWDHRY *v.* MOHA BUSSEEROOLAH CHOWDHRY . . **11 B. L. R. 42 : 20 W. R. 5**

93. ——— Suit to recover property sold—*Sale set aside, execution of decree being found to be barred by limitation—Suit to recover the property from purchaser.* A creditor obtained a decree against his debtor, and applied for and obtained an order for execution. This application was unsuccessfully opposed by the judgment-debtor on the ground that execution was barred by limitation. Certain properties of the judgment-debtor were attached and sold in execution of this decree, the judgment-creditor himself becoming the purchaser. In due course the sale was confirmed, and a certificate granted to the purchaser. Subsequently to this, the order granting execution came up before the High Court on appeal, and that Court decided that execution was barred. The person who had been the judgment-debtor then brought a regular suit against the purchaser to recover the properties sold in execution. *Held*, that he was entitled to have the sale set aside by regular suit. *Jan Ali* v. *Jan Ali Chowdhry, 1 B. L. R. A. C. 56 : 10 W. R. 154*, distinguished. MINA KUMARI BIBEE *v.* JAGAT SATTANI BIBEE . . **I. L. R. 10 Calc. 220**

94. ——— Right to deposit by judgment-debtor in execution-proceedings after execution of decree is barred—*Limitation—Money of moveable property deposited in Court to stay sale—Order for sale confirmed—No execution taken out within the three years after deposit.* When money or moveable property has been deposited in Court on behalf of a judgment-debtor in lieu of security, for the purpose of staying a sale in execution of a decree pending an appeal against an order directing the sale, which is afterwards confirmed on

SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*concld.*

(*m*) DECREES BARRED BY LIMITATION—*concld.*

appeal, neither the depositor nor the judgment-debtor can afterwards claim to have such deposit refunded or restored to him, notwithstanding that the decree-holder has omitted to draw it out of Court for more than three years, and that more than three years have elapsed since any proceedings have been taken inexecution of the decree, and that the decree for that reason is incapable of execution. *Semble:* When money or immoveable property is deposited in Court in such a case as the above, the Court, upon confirmation of the order for a sale, holds the deposit in trust for the decree-holder, and is at liberty to realize it and pay the proceeds over to him to the extent of his decree. SHEO GHOLAM SAHOO *v.* RAHUT HOSSEIN . **I. L. R. 4 Calc. 6**

S.C. SHEO GHOLAM SAHU *v.* KHUB LALL **2 C. L. R. 206**

95. Order setting aside sale after confirmation—*Certificate and confirmation of sale—Execution barred at time of sale—Position of auction-purchaser—Civil Procedure Code (Act X of 1877), s. 316—Act XII of 1879—Limitation Act (XV of 1877), Sch. II, Art. 165.* A person purchased certain property at a sale in execution of a decree in November 1878; his purchase was confirmed, and he obtained a certificate of sale on the 23rd May 1879, from which date he remained in possession. The judgment-debtor applied to have the sale set aside for irregularity, but his application was dismissed both at the hearing and on appeal. He had applied, before the sale took place, to stay the sale, on the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceedings, or that he was cognizant of the application. Two years from the date of the sale and one and-a-half years from its confirmation, the judgment-debtor, on a summary application, obtained an order setting aside the sale and putting the auction-purchaser out of possession. *Held*, that the order was erroneous, the Subordinate Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order. The words "subsisting decree," in s. 316 of Act X of 1877, as amended by Act XII of 1879, mean a decree und reversed and in full force, and not merely one upon which execution cannot be issued. *In the matter of the petition of* MAHOMED HOSSEIN *v.* KOKI SINGH . **I. L. R. 7 Calc. 91 : 9 C. L. R. 53**

(*n*) SALE PENDING APPEAL.

96. ——— Sale of property released from attachment pending appeal from decree declaring property liable—*Civil Procedure Code, 1877, ss. 28, 283, and 545.* S. 283 of th Code of Civil Procedure, 1877, does not constitute an exception to the Procedure laid down by s. 545. When property has been released from

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SALE IN EXECUTION OF DECREE— *contd.*

16. INVALID SALES—*concld.*

(*n*) SALE PENDING APPEAL—*concld.*

attachment under s. 280 and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal by virtue of the provisions of s. 283. FATHULA *v.* MUNIYAPPA **I. L. R. 6 Mad. 98**

97. _____ Decree setting aside sale—Second sale pending appeal to which decree-holder not made party—*Confirmation of first sale in appeal—Purchasers of the same property in execution of decree, priority between—Laches of appellant in not obtaining stay of execution.* A sale in execution of a mortgage-decree was set aside and the auction-purchaser appealed to the High Court without making the decree-holder a party to the appeal. The decree-holder applied for a fresh sale, and at a second sale, held pending the appeal, purchased the property and obtained possession. On appeal to the High Court the first sale was upheld, and an order passed confirming the sale. In a suit by the decree-holder purchaser at the second sale :—*Held*, that the effect of plaintiff's not being made a party to the appeal is practically the same as if he had not been a party to the suit. *Held*, also, that the plaintiff was not a party to the subsequent proceedings and could not be said to have bid at the sale with the effect of those proceedings hanging over his head. *Jan Ali* v. *Jan Ali Chowdhry, 1 B. L. R. A. C. 56 ; 10 W. R. 154*, referred to. *Held*, that the defendant could have applied to the High Court for a stay of execution, and if the execution had been stayed, the present litigation would not have arisen. GONESH PERSHAD *v.* FAZUL AMAM KHAN . **I. L. R. 23 Calc. 857**

17. SETTING ASIDE SALE.

(*a*) GENERAL CASES.

1. _____ Right of judgment-debtor to set aside sale on deposit of the amount of debt—*Civil Procedure Code, 1882, s. 301 A (a)—Poundage money—Costs.* A judgment-debtor, whose land had been sold in execution, is entitled to have the sale set aside under the Civil Procedure Code, s. 310 A (*a*), if he deposits 5 per cent. of the purchase-money, including that deducted by the Court for poundage, and fulfils the requirements of cl. (*b*), even though something more on account of the poundage was recoverable from him under the head of costs. MUTHU AYYAR *v.* RAMASAMI SASTRIAL **I. L. R. 20 Mad. 158**

2. _____ Setting aside sale by deposit of the debt due to the decree-holder at whose instance the property is sold—*Code of Civil Procedure (Act XIV of 1882), ss. 295, 310A—Application for rateable distribution.* When property has been sold in execution of a decree and there are other decree-holders who, prior to the sale have applied under s. 295, Civil Procedure

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

Code, for rateable distribution, the person whose property has been sold is competent to have the sale set aside under s. 310A by depositing only the amount of the decree, for the satisfaction of which the sale was proclaimed and took place. HARI SUNDARI DASYA *v.* SHASHI BALA DASYA **1 C. W. N. 195**

S. 295 does not apply to a deposit made under s. 310A by the judgment-debtor. BIHARI LAL PAL *v.* GOPAL LAL SEAL . . **1 C. W. N. 695**

3. _____ Sale under mortgage-decree—*Sale in execution of a money-decree, effect of, before the sale in execution of mortgage-decree confirmed—Code of Civil Procedure, 1882, ss. 310A, 311, and 312—Effect of sale not being set aside either under s. 310A or 311 of the Code.* A certain property was sold on the 16th August 1895 in execution of a mortgage-decree, dated the 9th December 1892, and was purchased by *A*. In the meantime an eight-anna share of the said property was sold in execution of a money-decree and was purchased by *R* on the 22nd May 1893. On the 10th September 1895 the judgment-debtor applied to set aside the mortgage-sale under s. 311 of the Code of Civil Procedure, and on the 14th September 1895 a similar application was made by *R*. On the 28th March 1896 both these applications came on for hearing before the Subordinate Judge, who passed no order ; and on the same date *R* presented a petition asking the Court to set aside the sale held in execution of the mortgage-decree, upon payment by him of the mortgage-money, with interest and costs, and also to declare that he might be entitled to redeem the property. On the 30th March 1895 the Subordinate Judge allowed the petition and ordered the sale to be set aside upon the aforesaid terms. *Held*, that, inasmuch as under s. 312 of the Code of Civil Procedure *A* was entitled to have an order confirming the sale of the 16th August 1895, unless the sale were set aside under s. 310A or s. 311 of the Code of Civil Procedure, and as the sale was not set aside under either of those sections, the Court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage-money with interest and costs. *Birj Mohun Thakur* v. *Uma Nath Chowdhry, I. L. R. 20 Calc. 8*, referred to. KHETTER NATH BISWAS *v.* FAIZUDDIN ALI . . . **I. L. R. 24 Calc. 682**

4. _____ Amount payable incorrectly calculated by an officer of the Court—*Civil Procedure Code (Act XIV of 1882), s. 310A—Civil Procedure Code Amendment Act (V of 1894).* The judgment-debtor within thirty days from the date of sale deposited in Court, under s. 310A of the Code of Civil Procedure, the amount calculated in the office of the Munsif as payable under the section. The Munsif set aside the sale. On appeal to the High Court by the auction-purchaser on the ground that the amount deposited by the judgment-debtor was not in compliance with

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(a) GENERAL CASES—*contd.*

s. 310A, and that before the sale could be set aside it was necessary for the judgment-debtor to pay, in addition to what he deposited, a sum equal to 5 per cent. of the purchase-money :—*Held*, that, when the amount payable by the judgment-debtor under s. 310A of the Code of Civil Procedure has been calculated by an officer of the Court and has been deposited, an order setting aside the sale must be made by the Court as a matter of right; the Munsif therefore was justified in setting aside the sale. *Ugrah Lall v. Radha Pershad Singh, I. L. R. 18 Calc. 255*, referred to. MAKBOOL AHMED CHOWDHRY *v.* BAZLE SABAN CHOWDHRY
I. L. R. 25 Calc. 609

See ABDOOL LALIF MOONSHI *v.* JADUB CHANDRA MITTER . . . **I. L. R. 25 Calc. 216**

5. ——— *Civil Procedure Code, 1882, s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Power of a Court to set aside a sale if the deposit provided for in s. 310A be not paid within thirty days. Held* (by the Full Bench). —Where the judgment-debtor has not within thirty days from the date of sale deposited in Court a sum equal to 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent. and of the sum specified in such proclamation of sale, and there is nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside. *Makbool Ahmed Chowdhry* v. *Bazle Sabhan Chowdhry, I. L. R. 25 Calc. 609*, distinguished. CHUNDI CHARAN MANDAL *v.* BANKE BEHARY LAL MANDAL . . **I. L. R. 26 Calc. 449**
3 C. W. N. 283

6. ——— **Application to set aside sale of mortgaged property**—*Civil Procedure Code, 1882, s. 310A—Execution of decrees—Transfer of Property Act (IV of 1882), s. 88.* S. 310A of the Code of Civil Procedure applies where a sale of immoveable property has taken place under a mortgage-decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside. Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to 5 per cent. on the purchase-money, for payment to the purchaser, even where the land has been purchased by the decree-holder. TIRUMAL RAO *v.* DASTAGHIRI MIYAH . . **I. L. R. 22 Mad. 286**

7. ——— **Actual receipt of sale-proceeds by decree-holder necessary to set aside a sale**—*Civil Procedure Code, 1882, s. 310A as amended by Act V of 1894.* The words in cl. (*b*) of s. 310A of the Code of Civil Procedure as amended by Act V of 1894—"less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder"—contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale-proceeds into Court does not satisfy the requirements of the section. A proclamation of sale ordered that for the recovery of R843-9-9 certain immoveable property belonging to the judgment-debtor should be sold in two lots, A and B. Lot A was sold for R420, and on the next day lot B was sold for R584. The judgment-debtor afterwards paid into Court R452-13-0, and applied to have the sale of lot B set aside alleging that he had purchased lot A through a third party, and that the sale-proceeds had been paid into Court. *Held*, that the mere payment of the sale-proceeds into Court was not a sufficient compliance with the requirements of s. 310A of the Code of Civil Procedure, and as it had not been shown that the sale-proceeds had been received by the decree-holder, the sale could not be set aside. TRIMBAK NARAYAN *v.* RAMCHANDRA NARSINGRAO . . **I. L. R. 23 Bom. 723**

8. ——— **Property sold in lots**—*Civil Procedure Code (Act XIV of 1882), s. 310A—Deposit—Deposit sufficient to cause sale of one lot.* When at a sale in execution of a decree the properties attached were sold separately in nine lots, and the judgment-debtor prayed to have the sale of one of the properties set aside under s. 310A, Civil Procedure Code, by tendering the balance (together with the percentage required under the law) due under the decree after deducting the amounts bid by the decree-holder for some of the properties and the amounts deposited by the other purchasers :—*Held*, that s. 310A did not apply to this case, and that there was no deposit within the terms of that section. KRIPA NATH PAL *v.* RAM LAKSHMI DASYA
1 C. W. N. 703

9. ——— **Application to set aside a sale on the ground of fraud and material irregularity in conducting sale-proceedings**—*Code of Civil Procedure (Act XIV of 1882), ss. 244, 311, 312, 588—Zur-i-peshgi lease—Thica right and zur-i-peshgi money, attachment of—Bengal Tenancy Act (VIII of 1885), ss. 162, 163—Sale of the defaulting tenure—Sale of zur-i-peshgi claim whether valid.* *A* advanced some money to *B* upon a zur-i-peshgi of certain property and sub-let the same property to *B*, on a certain rent reserved; subsequently *A* brought a suit for the rent so reserved, and a decree upon a compromise entered into between the parties was awarded in favour of *A* for realization of a sum of money; *A* applied for execution and attached and proclaimed for sale not only the thica right held by *B* under him (*A*), but also the zur-i-peshgi claim which *B* had against him, and the

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

property was sold and purchased by *A*, the decree-holder himself; an application for setting aside the sale was made by the judgment-debtor *B* to the Court which sold the property, upon the ground that the sale proceedings were vitiated by fraud on the part of the decree-holder in the conduct of the sale. The Subordinate Judge found that there was fraud, and set aside the sale as bad in law. On appeal this order was confirmed by the District Judge, who, however, expressed no opinion on the question of fraud. On second appeal it was contended that the sale could not be set aside under s. 312 unless it was found that there was fraud. *Held*, that, if the application of the judgment-debtor be regarded as one under s. 311 of the Code of Civil Procedure, it would be necessary to come to some conclusion or other upon the question of fraud, and unless it is found that the fraud came to the knowledge of the judgment-debtor within thirty days before the date of his application, the sale could not be set aside under s. 312 of the Code. That having regard to the provisions of ss. 162 and 163 of the Bengal Tenancy Act, nothing but the tenure in default could have been sold, and that the sale of the claim which the judgment-debtor had against the decree-holder was altogether bad. LUCHMIPAT *v.* MANDIL KOER **3 C. W. N. 333**

10. ——— **Ground for setting aside sale**—*Civil Procedure Code, 1859, ss. 256, 257—Suit to cancel order setting aside sale.—Act XXIII of 1861, s. 11.* A Munsif having cancelled an auction-sale of landed property on the sole objection of the judgment-debtor that the property realized a low price, and the Judge having dismissed the auction-purchaser's appeal from the said order on the ground that the Munsif had no authority to cancel the sale under the terms of s. 257 of Act VIII of 1859 without some irregularity in conducting or publishing the sale being proved, and that the said order must therefore be taken to have been passed under s. 11, Act XXIII of 1861, which admits of no appeal by the auction-purchaser, who was no party to the execution-proceedings:—*Held*, that such order passed by the Munsif was not a proceeding under s. 11 of Act XXIII of 1861, but an order passed *ultra vires* under s. 257 of Act VIII of 1859, and that a suit would lie for its cancelment—the finality of an order under ss. 256 and 257 of Act VIII of 1859 depending on its compliance with the terms of those sections. SUKHAI *v.* DARYAI **I. L. R. 1 All. 374**

11. ——— *Civil Procedure Code, 1882, ss. 311, 312, 313, 644—Act XII of 1879, Sch. IV, Form 149—Suit to set aside sale.* Under Act XII of 1879, Form 149 of Sch. IV of the Code of Civil Procedure, provided that sixty days should elapse between a sale in execution of a decree and its confirmation. A sale having been confirmed before the expiry of sixty days:—*Held*, that the sale was not rendered inoperative, and that its effect

SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

was not postponed by reason of the provision in Form No. 149. HAJI *v.* ATHARAMAN. MUSSA *v.* ATHARAMAN . . **I. L. R. 7 Mad. 512**

12. ——— *Order confirming sale after order setting it aside.* A sale in execution of a decree was set aside by a subsequent decree of 9th March 1861, but was afterwards allowed to stand by an order of 7th May 1862. As no suit was brought to set aside the latter order, it was *held* to be a final judicial proceeding, and the sale declared to be good and valid. MUNNOO LALL *v.* CHOONEE SHAHOO . . **7 W. R. 116**

13. ——— *Objection for irregularity disallowed—Sale set aside on other grounds.* On application by the judgment-debtor to the Principal Sudder Ameen to set aside the sale by auction of a house in execution of a decree, on the grounds of material irregularities in publishing and conducting the sale, from which the applicant sustained substantial injury, the objections were disallowed as untenable, and the sale confirmed. But the District Judge on appeal set aside the sale on a ground on which he had no authority to interfere. On petition to the High Court by the purchaser of the house:—*Held*, that the order of the Judge must be set aside as illegal, and the original order, confirming the sale, allowed to stand. KOSHTI *v.* NARAYAN DHULAPPA **3 Bom. A. C. 110**

14. ——— *Security by manager of lunatic—Second attachment and sale before security given—Attachment without sale, validity of.* The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and meanwhile the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court), that the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed. Under the Code of Civil Procedure, property may be attached without view to immediate sale. SARODA PROSAUD MULLICK *v.* LUTCHMEEPAT SINGH DOOGUR . . . **10 B. L. R. 214**
17 W. R. 289: 14 Moo. I. A. 529

15. ——— *Second sale before confirmation—Separate suit—Effect of sale before confirmation.* The plaintiff and the defendants *C* and *D* were the co-owners of a portion of a shikmi talukh in the 10 annas share of a zamindari

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

belonging to the defendant *A*. *A*, having succeeded in enhancing the rent of the tenure, obtained a decree for arrears of rent at the enhanced rate, which she proceeded to execute in 1880. In 1881 she obtained another decree for arrears of rent of a subsequent period, in execution of which the tenure was put up to auction and sold for Rs. 15,000 on 20th July 1881, *A* herself being the purchaser. Before this sale was confirmed, the tenure was, on 20th September 1881, again put up for sale in execution of the first decree, and was purchased by *A* for Rs. 10. The plaintiff and *C* and *D* applied to have both sales set aside on the ground of irregularity. The application as regarded the sale of 20th September 1881 was rejected on 30th December 1881, and this order was confirmed by the High Court on 14th August 1882 and (on review) 21st March 1883. Meanwhile the sale of the 20th July 1881 was set aside by the order of the Subordinate Judge on 19th June 1882. In a suit against *A*, *B* (the agent of *A*), *C*, and *D*, brought on the 20th March 1884, in which the plaintiff prayed that the sale of 20th September 1881 "be declared ineffectual and be set aside, and that the plaintiff do recover possession of the property:"—*Held*, that the suit being not one to set aside the sale on the ground of fraud or anything connected with the sale itself, but on account of the setting aside of the first sale, which took place long after the second sale had been confirmed, and when no execution-proceedings were pending in which it was possible for the plaintiff to raise the question, the suit would lie. *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah, I. L. R. 11 Calc. 376*, distinguished. *Held*, also, that the first sale, not having been set aside at the time of the the sale, was at that time, although it had not been confirmed, a good and effectual sale to pass the property as against the plaintiff and *C* and *D*, so that there was nothing left to pass under the second sale. In the interval between the sale and the confirmation of sale there is not merely a contract for sale, but an inchoate transfer of title which only requires confirmation to protect it; a sale actually takes place which, if not made absolute, must be set aside. *Saroda Prosad Mullick* v. *Luchmeeput Singh Doogur, 14 Moo. I. A. 529: 10 B. L. R. 214* cited. PRANGOUR MAZOOMDAR *v.* HIMANTA KUMARI DEBYA . . **I. L. R. 12 Calc. 597**

16. ———— *Civil Procedure Code, ss. 311, 312—Objection to sale—Legal disability—Limitation Act (XV of 1877), s. 7—Order confirming sale before time for filing objections has expired—Appeal from order.* Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute. An application under s. 311 of the Civil Procedure Code, on behalf of a judgment-debtor, who was a minor, was rejected on the ground that the applicant did not legally represent the minor and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which no proper application of objection had been filed. From this order the judgment-debtor appealed. *Held*, that the appeal must be considered to be one from an order under the first paragraph of s. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would therefore lie. *Held*, that, assuming the first application on the minor's behalf to have been rightly rejected, the second was made by a duly authorized guardian, and with regard to s. 7 of the Limitation Act (XV of 1877) was not barred by limitation; the judgment-debtor had therefore a right to make it, and the Court should have entertained and dealt with it before proceeding to confirm the sale or grant a sale certificate. The order disallowing the application and the order confirming the sale were set aside, and the case remanded for disposal of the appellant's objections. *Phoolbas Koonwur* v. *Jogeshur Sahoy, I. L. R., 1 Calc. 226*, referred to. BALDEO SINGH *v.* KISHAN LAL . . . . . **I. L. R. 9 All. 411**

17. ———— **Applicant**—*Civil Procedure Code (Act XIV of 1882), s. 310A*—"*Whose immoveable property has been sold,*" *in s. 310A, meaning of*—*Sale in execution of rent-decree*—*Simple mortgagee, right of, to apply to set aside sale.* A simple mortgagee is not a person entitled to have a sale set aside under s. 310A, Civil Procedure Code. *Hamidal Huq* v. *Matangini Dasi, 2 C. W. N. cclviii; Rakhal Chunder Bose* v. *Dwarka Nath Misser, 1. L. R. 13 Calc. 346*, distinguished. NITYA NANDA PATRA *v.* HIRA LAL KARMAKAR (1900) **5 C. W. N. 63**

18. ———— *Application by an attaching creditor of the property sold—Locus standi*—"*Any person whose immoveable property has been sold,*" *meaning of.* An attaching creditor is not a "person whose immvoeable property is sold," within the meaning of s. 310A, Civil Procedure Code, and he is not entitled to make an application to set aside the sale under that section. *Matungini Dassi* v. *Monmotha Nath Bose, 4 C. W. N. 542*, referred to. KEDAR NATH SEN *v.* UMA CHARAN (1900) . . . . **6 C. W. N. 57**

19. ———— *Civil Procedure Code (Act XIV of 1882), ss. 278, 283, 310A.* A

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

person who purchased property before it was attached in execution of a decree, and who unsuccessfully preferred a claim after it was attached, and then brought a regular suit for title, cannot be considered to be a person whose immoveable property has been sold, within the meaning of s. 310A of the Civil Procedure Code, and, as such, is not competent to apply under that section for setting aside the sale. ARJAN MOLLAH *v.* JADUNATH ROY CHOWDRY (1902) . . . **7 C. W. N. 243**

20. ——— **Application of Civil Procedure Code, ss. 304 to 319**—*Civil Procedure Code (Act XIV of 1882), s. 310A, as amended by Act V of 1894—Transfer of Property Act (IV of 1882), s. 89,* The provisions of s. 310A of the Civil Procedure Code (Act XIV of 1882), as amended by Act V of 1894, are applicable to sales held in execution of mortgage decrees passed under the Transfer of Property Act (IV of 1882). Ss. 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property. KRISHNAJI *v.* MAHADEV VINAYAK (1900) **I. L. R. 25 Bom. 104**

21. ——— **Application of Civil Procedure Code, ss. 310A, 311.** Ss. 310A and 311 of the Code of Civil Procedure apply to sales of mortgaged property in execution of mortgage-decrees. *Kedar Nath Raut* v. *Kali Churn Ram, I. L. R. 25 Calc. 703,* commented on. *Tirumal Rao* v. *Syed Dastaghiri Miyah, I. L. R. 22 Mad. 286, Raja Ram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205,* and *Krishnaji* v. *Mahadev Vinayak, I. L. R. 25 Bom. 104,* approved. MALLIKARJUNADU SETTI *v.* LINGAMURTI PANTULU (F.B. 1902) **I. L. R. 25 Mad. 244**

22. ——— **Beneficial owner**—*Suit for possession—Benamidar—Beneficial owner—Party——Whether, in a proceeding for setting aside a sale, the beneficial owner is a necessary party—Execution-proceedings—Benamidar—Civil Procedure Code (Act XIV of 1882), ss. 244, 311, and 437.* A beneficial owner is not a necessary party to a proceeding for setting aside an execution-sale. It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner, although his *benamdar* only, and not he, is made a party to the proceeding. BARODA KANTA BOSE *v.* CHUNDER KANTA GHOSE (1902) **I. L. R. 29 Calc. 682 s.c. 6 C. W. N. 706**

23. ——— **Collector's proceedings**—*Civil Procedure Code, ss. 310A, 320—Execution of decree—S. 310A not applicable to proceedings in execution held by a Collector under s. 320. Held,* that the provisions of s. 310A of the Code of Civil Procedure have no application to execution-proceedings taken by a Collector under s. 320 of the Code and the rules framed by the Local Government thereunder governing such proceedings. SHEO PRASAD *v.* MUHAMMAD MOHSIN KHAN (1902) **I. L. R. 25 All. 167**

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

24. ——— **"Decree-holder"**—"*Decree-holder," meaning of—Civil Procedure Code (Act XIV of 1882), ss. 311 and 295—Execution—What class of decree-holder can come in under s. 295—Locus standi—Appeal.* "The decree-holder," in s. 311 of the Civil Procedure Code, includes any decree-holder for the enforcement and satisfaction of whose decree the sale has been held, and would therefore include all decree-holders who, prior to sale have applied to the Court under s. 295, for execution of their decrees. *Lakshmi* v. *Kuttunni, I. L. R. 10 Mad. 57,* and *Chattrapat Singh* v. *Jadukul Prosad Mukerjee, I. L. R. 20 Calc. 673,* referred to. *A* obtained a decree on the Original Side of the High Court against *B,* and transferred it to the District Judge at Moorshedabad for execution, who again transferred it to the Subordinate Judge, when the execution-proceedings were registered and a date was fixed for the sale of *B's* immoveable property attached by *A* in execution of his decree. Before the date fixed for sale, *C,* who had also obtained a decree against *B,* applied to the District Judge at Moorshedabad for attachment and sale of the property of *B. B's* property was attached and sold in execution of *C's* decree; but, prior to the sale, several other persons who held decrees against *B* having applied to the District Judge for execution of their decrees, the sale-proceeds were rateably distributed amongst them all. Thereupon *A* made an application to the District Judge to set aside the said sale under s. 311. *Held,* that, inasmuch as *A* was not entitled to come in and share in the rateable distribution of assets under s. 295, he was not the "decree-holder" within the meaning of s. 311, and had therefore no *locus standi* to make an application under that section. *Matungini Dassi* v. *Monmotha Nath Bose, 4 C. W. N. 542,* referred to. An appeal lies from an order passed under s. 312, refusing to set aside a sale on the ground that the applicant had no *locus standi* to apply under s. 311. BEJOY SINGH DUDHURIA *v.* HUKUM CHAND (1902) . . . . **I. L. R. 29 Calc. 548**

25. ——— **Deposit by Co-sharer**—*Deposit in Court—Civil Procedure Code (Act XIV of 1882), s. 310A.* A person claiming under the Mahomedan law a share in some immoveable property which has been sold in execution of a decree against his co-sharers, cannot come in and make a deposit under s. 310A of the Civil Procedure Code. *Ramchandra* v. *Rakhmabai, I. L. R. 23 Bom. 450; Paresh Nath Singha* v. *Nabogopal Chattopadhya, I. L. R. 29 Calc. 1,* referred to, *Srinivasa Ayyangar* v. *Ayyathorai Pillai, I. L. R. 21 Mad. 416,* distinguished. ABDUL RAHAMAN *v.* MATIYAR RAHAMAN (1902) . . **I. L. R. 30 Calc. 425**

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

26. ——— **Fraud**—*Sale in execution of decree fraudulently obtained—Fraud—Innocent purchaser—Purchase for valuable consideration—Inadequacy of price—Suit to set aside sale.* An *ex parte* decree was fraudulently obtained by the first defendant against the plaintiff, and in execution certain land of the plaintiffs, worth R 2,000, was sold by auction, and was purchased by the second defendant for R400. The plaintiff sued to set aside the sale and to recover possession of the land. The facts found by the lower Courts were (i) that the decree was obtained by fraud, (ii) and that the property was sold at a considerable undervalue. The purchaser had no knowledge of the fraud: *Held*, dismissing the suit, that the plaintiff was not entitled, as against the purchaser (defendant 2), to have the sale set aside. When property is sold in execution of a decree fraudulently obtained, mere inadequacy of price, apart from participation in or knowledge of the fraud, is not in itself a circumstance sufficient to justify the setting aside of the sale. *Abdool Hye* v. *Nawab Raj, 9 W. R. 196*, commented on. CHITAMBAR SHRINIVASBHAT *v.* KRISHNAPPA (1902) . **I. L. R. 26 Bom. 543**

27. ——— **Gift**—*Civil Procedure Code (Act XIV of 1882), s. 310A—Application to set aside a sale—Gift of the land prior to attachment—Effect of sale—Applicability of the section.* Certain land was attached under a decree and sold. Application was thereupon made by a person, who claimed as donee of the land from the judgment-debtor, to have the sale set aside under s. 310A of the Code of Civil Procedure. It was alleged that the gift had been made prior to the date of attachment. *Held*, that the interest of the donee (assuming his gift to be valid) could not be affected by the subsequent attachment and sale, and that, in consequence, he could not see to set the sale aside under s. 310A. If the gift had been made while the property was under attachment, the sale would have been binding on the donee, who, in consequence, could have applied under s. 310A. Anyone whose interest in immoveable property is bound by a sale may apply under s. 310A, though he be no party to the suit or to the decree under which the sale took place. ERODE MANIKKOTH KRISHNAN NAIR *v.* PUTHIEDETH CHEMBAKKOSERI KRISHNAN NAIR (1902) **I. L. R. 26 Mad. 365**

28. ——— **"Immovable property"**—*Civil Procedure Code, s. 311—Mortgage-decree whether immoveable property.* Having regard to the definition of "immovable property," in the General Clauses Act, a decree upon a mortgage is incapable of being described or regarded as immoveable property; and, when a mortgage of certain immoveable property is sold inexecution of a decree, an application under s. 311, Civil Procedure Code, to set aside the sale is incompetent. *Gous Mahomed* v. *Khawas Ali Khan, I. L. R. 23 Calc. 450*, relied upon. BAIJ NATH LOHEA *v.* BINOYENDRA NATH PALIT (1901) . **6 C. W. N. 5**

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

29. ——— **Limitation**—*Civil Procedure Code (Act XIV of 1882), ss. 310A, 551—Sale—Sale set aside on deposit of debt within 30 days—"Date of sale"—Limitation—Limitation Act (XV of 1877), s. 14, Sch. II, Art. 12—Appellate Court, order of—Second appeal—Exclusion of time during which a second appeal was pending.* Certain property was sold in execution of a decree against the judgment-debtor on the 22nd May 1900. The sale was set aside by the first Court on the 25th May following, but was declared valid by the Appellate Court on the 2nd August 1900. The judgment-debtor preferred a second appeal to the High Court on the 15th August 1900, which appeal was dismissed on the 5th September following. On the 12th September the judgment-debtor applied, under s. 310A of the Civil Procedure Code, to have the sale set aside on deposit of the requisite sum. *Held*, that the application was barred by limitation, not having been made within 30 days from the date of sale; and that although, in computing the period of limitation, the time between the 25th May and the 2nd August might be excluded, the time between the 15th August and the 5th September, spent in prosecuting the second appeal, could not be excluded. CHOWDHRY KESRI SAHAY *v.* GIANI ROY (1902) . **I. L. R. 29 Calc. 626: s.c. 6 C. W. N. 776**

30. ——— **Private sale by judgment-debtor prior to Court sale**—*Civil Procedure Code (Act XIV of 1882), s. 310A and s. 244—Property privately sold by judgment-debtor prior to Court sale—Application by judgment-debtor to set aside a Court sale—Application rejected—Application to High Court under s. 622—Practice.* In execution of a decree passed against a judgment-debtor, his property was sold by auction. Prior, however, to the execution-sale, he effected a private sale to another person, and out of the proceeds he paid off the judgment-creditor, who duly certified that the decree was satisfied. Subsequently the judgment-debtor applied under s. 310A to set aside the execution-sale. His application was refused by the Judge, on the ground that, at the date of the execution-sale, he had no interest in the property, having disposed of it by private sale. He held, therefore, that he could not apply under s. 310A. Against this order the judgment-debtor applied to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882). It was contended (i) that the order was one under s. 244 of the Civil Procedure Code; that an appeal lay from an order under that section, and that therefore he had no right of application under s. 622, and (ii) that, he having disposed of his property by private sale, s. 310A did not apply. *Held*, that s. 244 did not appply, inasmuch as the auction-purchaser certainly could not be taken to be the representative of the

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*contd.*

decree-holder, and, even assuming him to be a representative of the judgment-debtor, that section did not apply to a question between a party to the suit and his representative. S. 244, therefore, did not apply to the order complained of, which was consequently not appealable, for an order under s. 310A is only appealable so far as it comes under s. 244 (*c*). There being no appeal, the judgment-debtor could therefore apply under s. 622 of the Code. Notwithstanding the private sale, the judgment-debtor could apply under s. 310A of the Code to set aside the execution-sale. MAGANLAL MULJI *v.* DOSHI MULJI BHAICHAND (1901)

I. L. R. 25 Bom. 631

31. ——— **Recovery of money**—*Indian Contract Act (IX of 1872), s. 69—Transfer of Property Act (IV of 1882), s. 108 (g)—Non-agricultural lands, tenant and under-tenant of—Civil Procedure Code (Act XIV of 1882), s. 310A—Right of under-tenant to pay money due by his lessor—Suit by under-tenant to recover money paid for his lessor under s. 310A, Civil Procedure Code.* A suit does not lie by an under-tenant of non-agricultural land to recover from the tenant, his lessor, money which had been paid by him under s. 310A, Civil Procedure Code, to set aside a sale of his lessor's interest under a decree passed against the lessor. The money paid by the under-tenant after the sale was not money which the tenant was "bound by law to pay" under s. 310A, Civil Procedure Code, within the meaning of either s. 69 of the Contract Act or s. 108 (*g*) of the Transfer of Property Act. *Quære*: Whether the under-tenant has any status to pay in the money under s. 310A, Civil Procedure Code. BEPIN BEHARI SARNOKAR *v.* KALIDAS CHATTERJEE (1901) . **6 C. W. N. 336**

32. ——— **Suit in which applicant was not a party**—*Civil Procedure Code (Act XIV of 1882), s. 310A—Application by second mortgagee to set aside sale of mortgaged property under decree obtained by first mortgagee in suit to which second mortgagee had not been made a party—"Person whose immoveable property has been sold"—Transfer of Property Act (IV of 1882), s. 75.* Land, which was subject to two mortgages was sold under a decree obtained by the first mortgagee, in a suit in which the second mortgagee was not made party. The second mortgagee then applied to have the sale set aside, and paid into Court the amount due to the first mortgagee. *Held*, that the second mortgagee was not entitled to have the sale set aside. Inasmuch as he had not been made a party to the suit in which the decree was obtained, his interest had not passed under the sale, and his right to redeem the prior mortgage continued. He was, therefore, not a person whose immoveable property had been sold, within the meaning of s. 310A of the Civil Procedure Code, and had no *locus standi* to apply

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*a*) GENERAL CASES—*concld.*

under that section. MALLIKARJUNADU SETTI *v.* LINGA MURTI PANTULU (1902)

I. L. R. 26 Mad. 332

33. ——— **Sale by Collector**—*Application to Court by judgment-debtor to set aside sale—Refusal by the Court—Appeal—Collector's power—Rules 16 and 17 of the Local Rules and Orders made under enactments applying to Bombay—Civil Procedure Code (Act XIV of 1882), ss. 320, 310A and 244. Held*, that s. 310A of the Code applies even if the execution-proceedings be referred to the Collector, who has no power to set aside a sale under the provisions of the Code. There is nothing in the section which precludes the Court from setting aside the sale merely because it had been confirmed. As s. 310A prescribes that the Court *shall* pass an order setting aside the sale whenever its provisions are complied with, the order refusing to set aside the sale reversed. PITA *v.* CHUNILAL (1906) . . **I. L. R. 31 Bom. 207**

(*b*) IRREGULARITY.

34. ——— **Objections to sale for irregularity**—*Duty of Court Procedure.* Where a judgment-debtor objects to the sale of attached property, it is the duty of the Court executing the decree to try the validity of the objections. GUNESH LALL TEWAREE *v.* BINDOO BASHINEE

24 W. R. 85

35. ——— **Application to set aside sale**—*Civil Procedure Code, 1859, s. 256—Procedure.* The issue which arises when a petition is preferred under Act VIII of 1859, s. 256, is a judicial proceeding and ought to be carried out with regularity, the Court fixing a day for the hearing of the matter of the petition and giving reasonable notice to all parties,—*i.e.*, such as would afford to each party fair and reasonable opportunity of bringing the necessary evidence on or before that day. *In the matter of the petition of* BROJO MOHUN THAKOOR. BROJO MOHUN THAKOOR *v.* AMEENOODDEEN . . **20 W. R. 424**

36. ——— *Discretion of Judge—Presentation of application.* A Judge has discretion to receive an application to set aside a sale in execution of a decree when made to him after the lapse of thirty days, but before the confirmation of the sale. POULSON *v.* DUNN

18 W. R. 11

In the matter of UMRITO LALL BOSE

18 W. R. 11 note

(*Contra*) RAJ COOMAR SINGH *alias* NANHOO LALL *v.* LALLJEE SAHOO . . **18 W. R. 333**

where the Court, however, *held* that the applicant was bound to show some valid excuse for not making the application in proper time.

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

As to what the term "applicant" included, there were under Act VIII of 1859 diverse rulings, some holding that it was not confined to the parties to the suit, but included any person who had sustained substantial injury by reason of any material irregularity in publishing or conducting the sale. KRISHNARAV VENKATESH *v.* VASUDEV ANANT **11 Bom. 15**

and others that judgment-debtors and not third parties were meant. LUCHMEEPUT SINGH DOOGUR *v.* MOOKTAKASHEE DEBIA **9 W. R. 388**

s.c. upheld on review. MOOKTA KESHEE DEBIA *v.* LUCHMEEPUT SINGH DOOGUR **10 W. R. 137**

JOGE NARAIN SINGH *v.* BHUGBANO **2 W. R. Mis. 13**

PURSHOTTAM VITHAL *v.* PURSHOTTAM ISWAR **I. L. R. 8 Bom. 532**

LUCHMEEPUT SINGH *v.* ADOYTO CHURN MULLICK . . . . **24 W. R. 452**

HARADHONE SHAMUNTO *v.* GOLUCK CHUNDER SHAMUNTO . **25 W. R. 79**

MAINA KOER *v.* LUCHMUN BHUGGUT **1 C. L. R. 250**

MAN KUAR *v.* TARA SINGH **I. L. R. 7 All. 583**

37. ——— **By whom application may be made**—*Objection to sale by third person—Civil Procedure Code, 1882, s. 311. Held*, that persons other than the decree-holders or the persons whose property was sold in execution of decree were not competent to apply to the Court under s. 311 of the Civil Procedure Code to set aside the sale. MAN KUAR *v.* TARA SINGH . **I. L. R. 7 All. 583**

38. ——— *Code of Civil Procedure (Act X of 1877), s. 311.* The words "any person whose immoveable property has been sold" in s. 311 of the Code of Civil Procedure do not include a person who has purchased the same property at a prior execution-sale, such prior sale not having been confirmed. *In the matter of the petition of* BHAGABUTI CHURN BHUTTACHARJEE CHOWDHRY. BHAGABUTI CHURN BHUTTACHARJEE CHOWDHRY *v.* BISHESHWAR SEN **I. L. R. 8 Calc. 367**

s.c. BHAGABATI CHARAN BHUTTACHARJEE *v.* KALI KUMAR CHUTTAH . **10 C. L. R. 441**

39. ——— *Civil Procedure Code, 1885, s. 311—"Any person whose immoveable property has been sold," interpretation of.* The words, "any person whose immoveable property has been sold," in s. 311, are sufficiently wide to include a person who is neither the decree-holder nor the judgment-debtor, nor the auction-purchaser; but who alleges that the property sold in execution is his. ABDUL HUQ MOZOOMDAR *v.* MOHINI MOHUN SHAHA . . **I. L. R. 14 Calc. 240**

SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

40. ——— *Civil Procedure Code, ss. 311, 295—Person entitled to apply to set aside sale—"Decree-holders," entitled to rateable distribution.* Where one decree-holder had attached certain land, and another decree-holder against the same debtor had entitled himself to rateable distribution of the assets under s. 295 of the Code of Civil Procedure:—*Held*, that the latter was entitled to apply, under s. 311 of the Code, to set aside the sale on the ground of material irregularity. LAKSHMI *v.* KUTTUNNI . . . **I. L. R. 10 Mad. 57**

ATHAPPA CHETTI *v.* RAMA KRIHSNA NAYAKHAR **I. L. R. 21 Mad. 51**

41. ——— *Civil Procedure Code, s. 311—Objection to sale by wife of judgment-debtor.* A person who claims to be a purchaser from a judgment-debtor prior to an attachment is not entitled to come in under s. 311 of the Civil Procedure Code and object to the sale of the judgment-debtor's property. *Abdul Huq Mozoomdar* v. *Mohini Mohun Shaha, I. L. R. 14 Calc. 240*, overruled. Rule that a person applying to set aside a sale for irregularity must be one who has sustained substantial injury arising thereform, as laid down in *Joge Narain Singh* v. *Bhugbano, 2 W. R. Mis. 13*, and explained by *Krishnarav Venkatesh* v. *Vasudev Anant, 11 Bom. H. C. 15*, approved. ASMUTUNISSA BEGUM *v.* ASHRUFF ALI **I. L. R. 15 Calc. 488**

42. ——— *Person claiming by title paramount to, or independently of, judgment-debtor—Civil Procedure Code, s. 311. Held*, by MAHMOOD, *J.*, that a person claiming by title paramount to, or independent of, the judgment-debtor is within the meaning of s. 311 of the Code. *Asmutunnissa Begum* v. *Ashruff Ali, I. L. R. 15 Calc. 488*, dissented from. *Abdul Huq Mozoomdar* v. *Mohini Mohan Shaha, I. L. R. 14 Calc. 240*, followed. SHEO PRASAD *v.* HIRA LAL **I. L. R. 12 All. 440**

43. ——— *Civil Procedure Code, s. 311—Application to set aside execution-sale—Remedy of one claiming adversely to the judgment-debtor.* A person alleging himself to be the undivided brother and, as such, the legal representative of a deceased judgment-debtor applied to have set aside a sale of certain property alleged by him to be joint family property, which had taken place in execution of the decree. *Held*, that the proper remedy of the applicant was a regular suit, and not a proceeding under Civil Procedure Code, s. 311. SUBBARAYADU *v.* PEDDA SUBBARAZU . . **I. L. R. 16 Mad. 476**

44. ——— *Civil Procedure Code, ss. 311, 295—"Decree-holder."* The term "decree-holder" in s. 311 of the Code of Civil Procedure is not limited to the decree-holder who instituted the execution-proceedings, but may include a decree-holder who is entitled to come in and

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

share in the proceeds under s. 295 of the Code. *Lakshmi* v. *Kuttunni, I. L. R. 10 Mad. 57*, approved. AJUDHIA PRASAD *v.* NAND LAL SINGH **I. L. R. 15 All. 318**

45. ——— *Civil Procedure Code, s. 311—Application to set aside sale in execution—Decree-holder—Parties.* The decree-holder is a necessary party to an application under s. 311 of the Code of Civil Procedure. Hence where a judgment-debtor applied under the above-mentioned section to have a sale in execution of a decree against him set aside and made no attempt to implead the decree-holder until long after limitation had expired: —*Held*, that the application must be dismissed. *Karamat Khan* v. *Mir Ali Ahmed, All. Weekly Notes (1891) 121*, referred to. ALI GAUHAR KHAN *v.* BANSIDHAR . . **I. L. R. 15 All. 407**

46. ——— *Civil Procedure Code (Act XIV of 1882), ss. 311, 312, 313, 622—Application by auction-purchaser to set aside sale on ground of his having been deceived as to extent of estate sold—Remedy of auction-purchaser—Superintendence of High Court.* A purchaser at a Court-sale, alleging that he had been misled by a misrepresentation as to the extent of the estate which he had believed to be put up for sale, obtained, on his petition before confirmation, a summary order setting aside the sale. *Held*, that the High Court had rightly cancelled this order, exercising its authority under s. 622 of the Code of Civil Procedure; that the purchaser, though he would have his remedy, on his taking the appropriate one, if he had been induced by fraud to pay a larger price than he otherwise would have offered, had no right to apply under either s. 311 or 313 of the Code of Civil Procedure (as they provided only for the particular cases to which they referred); and that s. 312, in the absence of cases falling within those sections, required that the sale should be confirmed. BIRJ MOHUN THAKUR *v.* RAI UMA NATH CHOWDHRY **I. L. R. 20 Calc. 8 L. R. 19 I. A. 154**

47. ——— *Civil Procedure Code, s. 311—Objection to sale by person claiming to be the real owner—Benamidar, decree against. Per* PETHERAM, *C.J.*, and GHOSE, *J.* (BEVERLEY, *J.*, dissenting), where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under s. 311 of the Code of Civil Procedure and object to the sale. *Asmutunnissa Begum* v. *Ashruff Ali, I. L. R. 15 Calc. 488*, followed. ABDUL GANI *v.* DUNNE **I. L. R. 20 Calc. 418**

48. ——— *Civil Procedure Code, ss. 295, 311—Rateable distribution of sale-proceeds—"Decree-holder."* A person who is not entitled to come in under s. 295 of the Civil Procedure Code and share in the distribution of the sale-proceeds is not included within the term "decree-holder" in s. 311, nor is he entitled to apply under that section to set aside the sale. *Deboki Nundon Sen* v. *Hart, I. L. R. 12 Calc. 294*, and *Lakshmi* v. *Kuttunni, I. L. R. 10 Mad. 57*, referred to. CHATTRAPAT SINGH *v.* JADUKUL PROSAD MUKERJEE . **I. L. R. 20 Calc. 673**

49. ——— *Civil Procedure Code, 1882, s. 311—Application to set aside a sale of a tenure by a purchaser from the judgment-debtor prior to attachment.* A person who claims to be a purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent is entitled to apply, under s. 311 of the Code of Civil Procedure, to set aside the sale. *Asmutunnissa Begum* v. *Ashruff Ali, I. L. R. 15 Calc. 488*, distinguished. AUBHOYA DASSI *v.* PUDMO LOCHUN MONDOL **I. L. R. 22 Calc. 802**

50. ——— *Civil Procedure Code, s. 311—"Decree-holder"—Attaching creditor—Application to set aside sale.* An attaching creditor is not a "person whose immoveable property is sold" within the meaning of s. 311, nor does he come within the words "the decree-holder" which appear at the commencement of that section. The term "decree-holder" in s. 311 means the decree-holder who brings the property to sale and not any decree-holder. *Asmutunnissa Begum* v. *Ashruff Ali, I. L. R. 15 Calc. 488*, referred to. *Lakshmi* v. *Kuttunni, I. L. R. 10 Mad. 57*; *Ajudhia Prasad* v. *Nand Lal Singh, I. L. R. 15 All. 318*; and *Sorabji Edalji* v. *Gobind Ranji, I. L. R. 16 Bom. 91*, dissented from. *Chatrapat Singh* v. *Jadukul Prosad Mukherjee, I. L. R. 20 Calc. 673*; *Clark* v. *Alexander, I. L. R. 21 Calc. 209*; and *Har Bhojal Das Marwari* v. *Ananda Ram Marwari, 2 C. W. N. 126*, distinguished. MATUNGINI DASSI *v.* MONMOTHANATH BOSE . . **4 C. W. N. 542**

51. ——— *Civil Procedure Code, 1882 (as amended by Act V of 1894), s. 310A—Judgment-debtor under decree on mortgage passed under Transfer of Property Act, s. 88—Effect of former application by other judgment-debtor under s. 311 of the Civil Procedure Code.* The judgment debtor in a mortgage-decree passed under s. 88 of the Transfer of Property Act (IV of 1882) may apply to set aside a sale under the provisions of s. 310A of the Civil Procedure Code (XIV of 1882, as amended by Act V of 1894). After the rejection by the lower Court of an application under s. 310A, judgment-debtors other than the applicant made an application under s. 311 of the Code. *Held*, that the present application under s. 310A was not barred by reason of the proviso to that section. ASHRUF ALI CHOWDHRY *v.* NET LAL SAHU **I. L. R. 23 Calc. 682**

52. ——— *Code of Civil Procedure, 1882, ss. 310A and 311—Meaning of*

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

the words "he shall not be entitled to make an application under this section" in the proviso of s. 310A—Civil Procedure Code Amendment Act (V of 1894). The words "he shall not be entitled to make an application under this section" in the proviso of s. 310A do not mean merely "he shall not be able to present an application" under the section, but the word "make" means "carry on" or "prosecute." In a case where, after an application under s. 310A of the Code of Civil Procedure, another application was made under s. 311 of the Code, the applicant was not entitled to have the benefit of the former section. RAJENDRA NATH HALDAR *v.* NILRATAN MITTER.
I. L. R. 23 Calc. 958

53. ——— *Civil Procedure Code (Act XIV of 1882), s. 310A—Right of a mortgagee to the benefit of s. 310A.* A mortgagee being a party to a suit, objected that the mortgage premises had been attached and sold in execution of the decree, and applied to have the sale set aside on payment being made by him under Civil Procedure Code, s. 310A. The purchaser was the decree-holder. The application having been refused by the Courts of first instance and first appeal, the applicant appealed to the High Court. *Held*, that the appeal was maintainable, and the appellant was entitled to the relief sought. SRINIVASA AYYANGAR *v.* AYYATHORAI PILLAI
I. L. R. 21 Mad. 416

54. ——— *Civil Procedure Code (Act XIV of 1882), s. 310A—Sale in execution of mortgage-decree—Application by mortgagor under s. 310A, Civil Procedure Code—Transfer of Property Act (IV of 1882), s. 104, rules framed under—Civil Procedure Code Amendment Act (V of 1894.* *Held* by the Full Bench, that s. 310A of the Civil Procedure Code (Act XIV of 1882, as amended by Act V of 1894) does not apply to sales of mortgaged property under the Transfer of Property Act (IV of 1882). The rules framed by the High Court (Circular order No. 13, dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not make s. 310A applicable to such sales. *Ashruf Ali Chowdhry* v. *Net Lat Sahu, I. L. R. 23 Calc. 682*, overruled. *Raja Ram Singhji* v. *Chunni Lal, I. L. R. 19 All. 205*, dissented from. *Quœre:* Whether a rule by the High Court under s. 104 of the Transfer of Property Act making s. 310A of the Civil Procedure Code applicable to sales of mortgaged property under the said Act would not be *ultra vires*. KEDAR NATH RAUT *v.* KALI CHURN RAM . . . . **I. L. R. 25 Calc. 703**
2 C. W. N. 353

See DAKSHINA MOHUN ROY *v.* BASUMATI DEBI
4 C. W. N. 474

where this case is explained and where it was held that s. 104 of Transfer of Property Act is an enabling section and the rules made by the High Court (Circular order No. 13, dated 27th April 1892) under the provision of s. 104 do not limit the applicability of the Code of Civil Procedure as regards sales held in execution of mortgage decrees.

55. ——— *Civil Procedure Code (Act XIV of 1882), s. 310A—Right to apply under the section—Person who has contracted to purchase land.* A person who has contracted to purchase land, or an interest in land, does not by such contract become the owner in equity of such land or such interest (s. 54 of the Transfer of Property Act, IV of 1882). He has a personal right against his vendor or the assignee with notice of his vendor to compel the latter by a suit for specific performance to perform his contract: but he has no direct right over the land. *Held*, accordingly, that a person who had contracted to purchase certain land which was subject to mortgage, and was sold in execution by the mortgagee, was not the owner of the land, and was therefore not entitled to apply to set aside the sale under s. 310A of the Civil Procedure Code. MAHADEO CHINTAMAN WADEKAR *v.* VASUDEV J. KIRTIKAR **I. L. R. 23 Bom. 181**

56. ——— *Civil Procedure Code, 1882, s. 310A—Civil Procedure Code Amendment Act (V of 1894)—Execution-sale—"Person whose immoveable property has been sold"—Prior private purchaser of property sold in execution.* A person who has purchased property which is afterwards sold in execution of a decree obtained against his vendor is not entitled under s. 310A of the Civil Procedure Code to have the execution-sale set aside. RAMCHANDRA DHONDO *v.* RAKHMABAI
I. L. R. 23 Bom. 450

57. ——— *Civil Procedure Code, 1882, s. 310A—Right of benamidar to apply to set aside sale.* A benamidar of a person whose immoveable property is sold has a right to apply to have the sale set aside under s. 310A of the Code of Civil Procedure. BASI PODDAR *v.* RAM KRISHNA PODDAR . . . **1 C. W. N. 135**

58. ——— *Civil Procedure Code (Act XIV of 1882), s. 310A—Application to set aside sale by purchaser from judgment-debtor after auction-sale.* A purchaser at a private sale from the judgment-debtor after sale in execution has no *locus standi* to make an application under s. 310A of the Civil Procedure Code. HAZARI RAM *v.* BADRI RAM . . **1 C. W. N. 279**

59. ——— *Civil Procedure Code, 1882, s. 311—Application by person not party to decree.* Land having been sold in execution of decree, one claiming that it had been held by the judgment-debtor benami for him applied that the sale be cancelled under s. 311. He was not a party to the decree, and on that ground his petition was dismissed. *Held*, that the fact of the

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SALE IN EXECUTION OF DECREE— *contd.*

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(*b*) IRREGULARITY—*contd.*

petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under s. 311. TIMMANA BANTA *v.* MAHABALA BHATTA . . . **I. L. R. 19 Mad. 167**

60. ——— *Civil Procedure Code, 1882, s. 311—Application to set aside sale in execution—Plea to jurisdiction of Court to sell—Civil Procedure Code, s. 320. Held,* that in an appliion under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree, it is not competent to the applicant to raise, nor to the Court to entertain, any plea to the jurisdiction of the Court executing the decree, as, for example, a plea that the property sold, or part of it, was ancestral and ought to have been sold in accordance with the provisions of s. 320 of the Code. SHIRIN BEGAM *v.* AGHA ALI KHAN **I. L. R. 18 All. 141**

61. ——— *Application to set aside sale—Grounds which alone may be taken.* A Court to which an application under s. 311 of the Code of Civil Procedure, to set aside a sale held in execution of a decree, is made, is limited to the grounds set forth in that section. If the Court fails to find both a material irregularity in publishing or conducting the sale together with consequent loss to the applicant, it is bound to dismiss the application and confirm the sale. It cannot set aside the sale upon other grounds not pleaded by the applicant. *Tassaduk Rasul Khan* v. *Ahmad Husain, I. L. R. 21 Calc. 66 : L. R. 20 I. A. 176,* and *Shirin Begum* v. *Agha Ali Khan, I. L. R. 18 All. 141,* referred to. HARBANS LAL *v.* KUNDAN LAL . . . **I. L. R. 21 All. 140**

62. ——— *Civil Procedure Code, s. 311—Person whose property has been sold—Mortgagee—Transfer of Property Act (IV of 1882), ss. 86, 87.* The mortgagees of a certain tenure obtained, on 11th September 1884, under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside for material irregularity. *Held,* that, under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, "person whose property has been sold," and entitled them to make the application. RAKHAL CHUNDER BOSE *v.* DWARKA NATH MISSER **I. L. R. 13 Calc. 346**

63. ——— **Right to have sale set aside as against bonâ fide purchaser—** *Question of right how to be determined.* It cannot be laid down as a general proposition of law that under no circumstances can a sale in execution of a decree be set aside as against a *bonâ fide* purchaser for valuable consideration and without notice. In a suit brought to set aside such a sale, it is for the Court to determine whether it will be in accordance with the principal of justice, equity, and good conscience that the sale ought to be set aside or not. ABDUL HYE *v.* NAWAB RAJ . **B. L. R. Sup. Vol. 911 9 W. R. 196**

64. ——— **Evidence of irregularity—** *Objections to sale-proceedings.* Where objections to sale-proceedings are presented by judgment-debtors, the Court ought to make a careful investigation into the circumstances attending such sale, and not rely on the mere report of a nazir. SOOKH RAJ SINGH *v.* TUFFAZZOOL HOSSEIN **2 N. W. 142**

65. ——— **Finding as to irregularity—** *Civil Procedure Code, 1859, s. 256—Material injury.* On an application to set aside a sale of immoveable property in execution of a decree under s. 256, Act VIII of 1859, before ascertaining whether any substantial injury has accrued to the debtor, it was *held* that the Court must come to a distinct finding that there has been an irregularity in publishing or conducting the sale. PARBUTTY *v.* GIRDAREE LAL . . . **6 W. R. Mis. 125**

66. ——— **Objections to sale being made absolute—***Civil Procedure Code, 1859, ss. 256, 257.* Objections by the judgment-debtor to sale in execution of decree being made absolute could be raised and disposed of only under ss. 256 and 257 of the Code of Civil Procedure, under which a sale could be set aside on the ground of material irregularity in publishing or conducting it. NIL KOMUL CHUCKERBUTTY *v.* SHAMA SOONDUREE **6 W. R. Mis. 46**

VIRSINGAPPA BIN BASLINGAPPA *v.* SADASHIVAPPA APPA GOLKHANDI . . **7 Bom. A. C. 74**

67. ——— **Ground for setting aside sale—***Allegation of having no interest to sell—Sale by representative of debtor.* An allegation by a representative that he took nothing from the judgment-debtor, and that therefore the sale conveyed nothing, is an objection which must be raised before the sale in execution, and is not a ground for setting aside the sale for irregularity. CHOWDHRY WAHED ALI *v.* JUMAYE . **6 W. R. Mis. 116**

68. ——— *Civil Procedure Code, 1882, ss. 311 and 224—Omission to transmit certificate to Court executing decree.* The omission to transfer to the Court executing the decree the certificate required by s. 224, Civil Procedure Code, is a mere irregularity which would not vitiate the sale. ABBUBAKER SAHEB *v.* MOHIDIN SAHEB . . . **I. L. R. 20 Mad. 10**

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

83. ——— *Irregularity in issue of notification of sale and attachment—Misconduct of decree-holder.* Before a sale is confirmed, a party objecting to the irregularity of the sale proceedings, on the ground that the notification of sale and attachment has not been properly issued, should be allowed proof of non-service or of insufficient service. The misconduct of a decree-holder may be a good cause of action, but cannot be a ground for setting aside a sale. This can only be done summarily if irregularity in the sale-proceedings resulting in material injury to the debtor be proved. RETHBUNJUN SINGH *v.* MITTURJEET SINGH . . . **4 W. R. Mis. 9**

84. ——— *Irregularity in service of prohibitory order—Act VIII of 1859, ss. 236 and 243—Purchase of property by decree-holder—Practice of English Courts.* In execution of a decree, the defendant caused a decree of the plaintiff awarding him R925 to be attached, and under s. 236, Act VIII of 1859, caused the prohibitory order to be fixed in a conspicuous part of the Court-house, and copies thereof to be delivered to the judgment-debtors. The decree was subsequently sold by auction, and the defendant purchased it for R20. On special appeal by the plaintiff, upon the ground that the sale was irregular, as the prohibitory order had not been served upon him :—*Held*, that the prohibitory order having been served in accordance with the provisions of s. 236, Act VIII of 1859, was legal and regular. *Held*, also, that the Court executing the defendant's decree ought not to have sold the plaintiff's decree, but should have, under s. 243, appointed a manager to enforce plaintiff's decree. That a decree-holder ought not to be allowed to bid and purchase at a sale in execution of his decree, without an order of Court previously obtained upon notice to the judgment-debtor. Practice of English Courts regarding sale in execution of decrees discussed. BANDHU ROY *v.* HANUMAN SINGH

3 B. L. R. A. C. 320 : 14 W. R. 406 note

85. ——— *Irregularity in applying for execution of decree—Act VIII of 1859, s. 257.* *G* and *M* obtained a money-decree against *K* in the Court of the Principal Sudder Ameen on the 12th December 1864. This decree was reversed by the District Judge, but on the 5th March 1866 the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May 1866 the District Judge affirmed the decree of the Court of first instance. On the 3rd December 1866 the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January 1867 the District Judge again affirmed the decree of the Court of first instance, and, no appeal being preferred, the decree became final. The decree-holders had in the meantime taken proceedings to execute the decree, dated the 5th May 1866, and from time to time and finally on the 7th November 1870 they renewed these proceedings, in each instance referring to the decree dated the 5th May 1866, even after it was set aside, and the decree dated the 14th January 1867 passed. On the last application a sale of certain immoveable property belonging to *K* was ordered and took place on the 15th February 1871. *K* objected to the confirmation of the sale on the ground of the irregularity in the application, but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction-purchaser on the ground that the sale was a nullity. *Held per* STUART, *C.J.*, and PEARSON, TURNER, and SPANKIE, *JJ.*, that the sale ought not to be set aside, as the irregularity in applying for execution of the decree, dated the 5th May 1866, was an irregularity which did not prejudice the judgment-debtor. *Per* OLDFIELD, *J.*—That with reference to s. 257, Act VIII of 1859, the suit was not maintainable. GHAZI *v.* KADIR BAKSH . . . **I. L. R. 1 All. 212**

86. ——— *Irregularity in attachment—Confirmation of sale—Objection that property is not liable to attachment—Civil Procedure Code, 1882, ss. 278, 311, 312. Held*, that an objection made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, that he was no party to the decree, and his property was not liable to be attached and sold, and therefore the sale was invalid, was not an objection entertainable under s. 311 of the Civil Procedure Code, and was consequently no ground for setting aside the sale under that section, especially as it was preferred for the first time on appeal, and, moreover, might have been taken under s. 278 at the time of attachment, when the objector would have had his remedy as therein provided. HUB LAL *v.* KANHIA LAL . . . **I. L. R. 7 All. 365**

87. ——— *Sale of property other than that hypothecated.* A decree-holder is not precluded from taking any of his judgment-debtor's property in execution of his decree merely because he had a lien on particular properties. A sale therefore is not liable to be set aside because the property sold was other than that hypothecated in the bond. LALJEE *v.* SADIT HOSSEIN

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88. ——— *Sale of property of third person—Right of suit—Civil Procedure Code, 1859, s. 252.* A sale in execution of decree transfers to the purchaser nothing more than the rights and interests of the judgment-debtor at the time of attachment and sale; and s. 252 of Act VIII of 1859 did not prohibit an enquiry into the extent of those rights, or declare the owner of the property attached in execution of a decree passed against a third party, incompetent to assert

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SALE IN EXECUTION OF DECREE— *contd.*

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(*b*) IRREGULARITY—*contd.*

the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale, but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order, then passed, could not be used against the purchaser. Also *per* MAHMOOD, *J.*, that it was doubtful whether the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself were valid ; but that everything that was said against these proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enable parties to object to confirmation of sale ; and that therefore, even assuming that the sale and confirmation of sale were subject to the objection of " material irregularity in publishing or conducting " the sale, within the meaning of s. 311, a suit like the present, upon that ground alone, was prohibited by the last part of s. 312. RAGHUBAR DYAL *v.* ILAHI BUKSH
I. L. R. 7 All. 450

93. ——— **Omission to give due notice of sale**—*Material injury.* Where, in an execution sale, there had been some irregularity which left it doubtful whether the judgment-debtor had been duly apprized of the sale of his dwelling house :—*Held*, that the irregularity had caused material injury to the judgment-debtor, and that the sale must be set aside. JOYNARAIN GIRI *v.* GOLUCK CHUNDER MYTEE . . **25 W. R. 183**

94. ——— *Omission to give notice of execution—Civil Procedure Code, 1877, s. 248.* An omission to give notice to the party against whom execution is proceeding, as provided by s. 248 of the Civil Procedure Code, invalidates a sale in execution of the decree. *In the matter of the petition of* RAMESSURI DASSEE. RAMESSURI DASSEE *v.* DOORGADAS CHATTERJEE
I. L. R. 6 Calc. 103 : 7 C. L. R. 85

(*Contra*) MUFASA *v.* MAHOMED AKBAR GAZEE
2 W. R. 74

95. ——— *Omission to give notice of application for execution.* The omission to give the notice required by s. 248 of Act X of 1877 to the judgment-debtor, on application for execution of the decree, affects the regularity of the sale which subsequently takes place in execution of the decree and the validity of the entire execution-proceedings. *Ramessuri Dassee* v. *Doorgadass Chatterjee, I. L. R. 6 Calc. 103*, followed. *Held*, therefore, where execution of a decree was applied for against the legal representative of a deceased judgment-debtor, and the notice required by s. 248 of Act X of 1877 was not given to such legal representative, and certain immoveable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission. *Quœre :* Whether such omission was an irregularity in " publishing or conducting " the sale within the meaning of s. 311 of that Act. IMAM-UN-NISSA BIBI *v.* LIAKAT HUSAIN . **I. L. R. 3 All. 424**

96. ——— *Omission to re-issue process after proceedings have been struck off.* After the striking off of an execution case, the omission to re-issue the processes required by law on the admission of a third party as decree-holder is not a material irregularity in the case. BISHEN DYAL SINGH *v.* KHUDEEMUN . . **W. R. 1864, 359**

97. ——— *Irregularity in notice of sale—Death of decree-holder.* The issue of a notice of sale after the death of the original decree-holder, and before any person had applied to be registered as the substituted decree-holder, is not an irregularity which would warrant the setting aside of a sale under Act VIII of 1859, s. 256. GOBIND CHUNDER AOOCH *v.* BAMUN DOSS MOOKERJEE
22 W. R. 481

98. ——— *Irregularity in notice of sale—Proclamation of notice of liens.* The inam village of Chundunpuri was sold by auction under a decree. The notice of sale stated that the sale would begin either at Maligam or Chundunpuri, and be completed at Maligam. *Held*, that the notice of sale was sufficiently certain. The practice of karkuns reading aloud notices of liens on property about to be sold by auction is objectionable, but in the absence of proof that the value of the property has been thereby deteriorated, it is not such an irregularity as will vitiate the sale. GOVIND HARI VALEKAR *v.* BANK OF INDIA. BANK OF INDIA *v.* RAGHO NARAYAN . **4 Bom. A. C. 164**

99. ——— **Irregularity in giving particulars of sale**—*Omission to mention numbers, etc., of notes—Sale and production of notes—Civil Procedure Code, 1859, ss. 201, 238, 248, 249.* The omission in a sale proclamation to mention particulars as to the numbers, value, etc., of Government promissory notes under attachment for sale is not such an irregularity as will vitiate the sale, though the lower Court would have exercised a sound discretion, under s. 249 of the Code, if it had called for such particulars. The sale of such notes through a broker is permissive under s. 248 and not obligatory. The production of the notes in Court was not essential, as they were in the custody of the Collector ; s. 238 applying to cases in which property is in the possession or power of the judgment-debtor. LUCHMEEPUT *v.* LEKRAJ ROY . **8 W. R. 415**

100. ——— *Proclamation of sale not in prescribed form and without necessary particulars—Right of holders of other decrees to object—Civil Procedure Code, 1882, ss. 311, 314.* A zamindar mortgaged his estate to a bank and the mortgagee obtained a decree in the High Court

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

in execution of which it was ordered that the zamindari should be sold village by village. Other persons held money decrees against the zamindar. One of them, in execution of his decree, had the zamindari put up for sale in one subject to the bank's mortgage, and with the leave of the Court purchased it himself. The other decree-holders applied to have the sale (which had not been confirmed) set aside on the ground of material irregularity in publishing the sale by which substantial injury was caused to them. The irregularities relied on were that the proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, or the amount of income derived from it, and no mention was made of the order of the High Court. *Held*, that the sale should not be confirmed. ATHAPPA CHETTI *v.* RAMAKRISHNA NAYAKAN
I. L. R. 21 Mad. 51

See LAKSHMI *v.* KUTTUNNI **I. L. R. 10 Mad. 57**

101. ——— *Sale of property otherwise than as advertised—Proof of damage—Advertisement of sale.* When property is advertised to be sold in separate lots, and is afterwards sold in a lump, this is an irregularity, but the person who wishes to set aside the sale on the ground of such irregularity must show affirmatively, to the satisfaction of the Court, that substantial damage has, in fact, been sustained by him on account of such irregularity. Where therefore such damage had not been distinctly proved :—*Held*, that the sale could not be set aside on the ground of the irregularity complained of. ROY NANDIPAT MAHATA *v.* URQUHART
4 B. L. R. A. C. 181 : 13 W. R. 209

reversing URQUHART *v.* NUNDEEPUT MAHAPUTTUR
12 W. R. 492

102. ——— **Sale of property in separate lots instead of in one lot as advertised in proclamation of sale.** *A* attached a decree which *B*, his judgment-debtor, had obtained against *C*, and in execution thereof he brought to sale land belonging to *C*. After the publication of the proclamation of sale, one of the advertised lots was subdivided into various lots for the purposes of the sale. *B* applied to have the sale set aside, and his application was refused. *Held*, on appeal by *B*, that the sub-division of the lots was no irregularity and the appellant was not entitled to the relief sought by him. SAMI PILLAI *v.* KRISHNASAMI CHETTI
I. L. R. 21 Mad. 417

103. ——— **Omission to make proclamation of sale**—*Civil Procedure Code (Act X of 1877), s. 311—Irregularity in publication of intended sale.* An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of Appeal, on application to set aside the sale on the ground that it had taken place without proclamation made having been rejected by the Court of first instance, which found that proclamation had been made :—*Held*, that the objection was taken too late, although, if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity ; substantial damage, resulting from it, remaining to be proved as required by s. 311 of Act X of 1877. *Held*, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved to the satisfaction of the Court that he had sustained substantial damage by reason of such irregularity. MACNAGHTEN *v.* MAHABIR PERSHAD SINGH
I. L. R. 9 Calc. 656

S. C. OLPHERTS *v.* MAHABIR PERSHAD SINGH
11 C. L. R. 494
L. R. 10 I. A. 25

reversing decision of High Court in MAHABIR PERSHAD SINGH *v.* OLPHERTS **9 C. L. R. 134**

104. ——— **Error in proclamation of sale as to incumbrance to which property was liable**—*Civil Procedure Code, 1882, ss. 311, 312.* In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property aggregating about R1,000. There was in fact one charge only, amounting to about R800. *Held*, that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it KANJI MAL *v.* SAILO
I .L. R. 8 All. 116

105. ——— *Civil Procedure Code, 1882, ss. 287, 311—"Material irregularity" in publishing or conducting a sale—Omission to state amount of Government tax payable—Right of person complaining to prove substantial loss.* In a proclamation of intended sale issued under s. 287 of the Code of Civil Procedure, the omission to state the amount of Government tax payable in respect of the land to be sold is a material irregularity within the meaning of s. 311 of the Code. On such an irregularity being committed, the judgment-debtor whose lands have been sold is *primâ facie* entitled to be given an opportunity for proving that he has sustained substantial loss by reason of it. MADARSAH MARACAYAR *v.* PALANIAPPA CHETTI
I. L. R. 23 Mad. 628

106. ——— *Error in over-statement of balance due on decree.* A sale in

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

execution of a decree is not invalidated by the fact that the balance really due is overstated, there being no other irregularity in the publication and conduct of the sale. CHUTTUR SING *v.* DHURRUM KOONWAR
1 N. W. Part 2, p. 1: Ed. 1873, 61

107. ——— *Omission to give notice of amount of decree—Civil Procedure Code, 1859, s. 252.* A Judge is not required by law to give notice at the time of the sale of the amount of the decree to be sold, and his omission to do so did not constitute an irregularity in the sale entitling the plaintiff to claim damages under s. 252, Act VIII of 1859. KASSEE NATH ROY CHOWDHRY *v.* HULLODHUR ROY . . . . . **2 W. R. 60**

108. ——— *Omission to state amount of decree—Civil Procedure Code, 1882, s. 311.* The mere fact that the amount of rent payable in respect of a tenure brought to sale in execution of a decree is not stated in the sale-proclamation, is not a material irregularity within the meaning of s. 311 of the Civil Procedure Code (Act X of 1877), though if the amount of rent payable were stated to be more than it actually was, that might constitute such an irregularity as tending to lessen the price at which purchasers might be willing to buy. MOHENDRO COOMAR DUTT *v.* HEERA MOHUN COONDOO. ISHANESWARY DASEE *v.* GOPAL DAS DUTT . . . **I. L. R. 7 Calc. 723**

109. ——— **Omission of material part of notification of sale.** The sale-notification, referred to in circular order of the 18th August 1873, should contain a special notice that the property will be sold on the day named, or so soon thereafter as its turn may come in the list of properties advertised to be sold. Without this special notification buyers would be summoned for one day, whereas the property might not be sold on that day or for several days after, and that would be an irregularity which would vitiate the sale, if the property were sold at an under-value for want of bidders. BYKUNT NATH SANDYAL *v.* JUGGUT MOHUN SHAHA . . . **24 W. R. 240**

110. ——— **Irregularity in affixing notification of sale.** The affixing, in the Principal Sudder Ameen's Court, of a notification of sale in execution of a decree of the Small Cause Court was *held* to be no irregularity in the sale by reason of which damages could be recovered under s. 252, Code of Civil Procedure, 1859; the law making no provision for the service of the notification of sale on the judgment-debtor in person, or in the village in which he lives. ROMESH CHUNDER BANERJEE *v.* JADUB CHUNDER CHATTERJEE
6 W. R. Civ. Ref. 14

111. ——— **Irregularity in publication of sale.** Where the sudder cutchery of the zamindar was beyond the jurisdiction of the District Court, the publication of the notice of sale at one of the inferior cutcheries was *held* to be legal and sufficient. HUBEEBOOL HOSSEIN *v.* ALLENDER. HUBEEBOOL HOSSEIN *v.* LAND MORTGAGE BANK
14 W. R. 44

112. ——— *Irregularity in publication of sale.* The affixing of a notice of sale in a not very conspicuous part of the land, when the judgment-debtor resides in a different district, is not sufficient to satisfy the requirements of justice. GOBIND CHUNDER MOOKERJEE *v.* RAM KOMUL CHATTERJEE . . . **25 W. R. 364**

113. ——— *Irregularity in publication of sale—Beng. Reg. XLV of 1793, s. 12—Delay.* A suit was brought in 1852 to set aside an execution-sale made in 1841 on the ground of irregularity in not complying with the provisions of Bengal Regulation XLV, s. 12, of 1893, for the due publication of the sale. A summary suit under Bengal Regulation VII of 1825, s. 5, had been brought shortly after the date of the sale by the judgment-debtor, to set it aside on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared from the evidence in the suit of 1852 that the notice of sale was affixed at the dwelling-house of the judgment-debtor, the place where his rents were paid, but which was not part of the estate sold. It was not pleaded in the suit of 1852 that there was a town or village where the notification could be fixed as required by s. 12, Bengal Regulation XLV of 1793. The Sudder Court held that there had been an irregularity in the publication of the notice of sale as it was not made within the ambit of the estate sold, and set the sale aside on that ground. On appeal:—*Held* by the Judicial Committee reversing such decree, *first*, that as it did not appear that there was any town or village within the pergunnah at which the notification required by the provisions of Bengal Regulation XLV of 1793, s. 12, could be affixed, there had been no irregularity in posting the notice at the house of the judgment-debtor, so as to vitiate the sale; and, *secondly*, that even if there had been an informality in that respect it ought to have been objected to in the summary suit brought in 1841, and could not be opened eleven years afterwards. LAMB *v.* BEJOY KISHEN DASS
8 Moo. I. A. 427

114. ——— *Irregularity in publication of sale—Execution-sale of groups of property under one decree—Irregularity and damage, their necessary relation—Code of Civil Procedure (Act XIV of 1882), ss. 289 and 311.* The words "on the spot where the property is attached" in s. 289 of the Civil Procedure Code refer to each property attached, and not to a group of separate properties attached under one proceeding or order in one execution case, and therefore when distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation in each of such properties amounts to an irregularity

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

in the publication of the sale. *Held*, also, that, where there is no evidence to connect the two elements of irregularity and injury under s. 311, it must appear, before a Court can set aside an execution-sale, that the injury complained of is the reasonable and natural consequence of the irregularity and attributable to it alone. TRIPURA SUNDARI *v.* DURGA CHURN PAL . . I. L. R. 11 Calc. 74

115. ——— *Irregularity in publication of sale —Material irregularity—Civil Procedure Code (Act X of 1877), ss. 274, 289, 311.* Under ss. 289 and 274 of the Civil Procedure Code, it is necessary that a copy of the sale-proclamation should be affixed to some conspicuous place on the property attached; and the omission to do so is a material irregularity within the meaning of s. 311 of the Code of Civil Procedure. KALYTARA CHOWDHRAIN *v.* RAM COOMAR GOOPTA
I. L. R. 7 Calc. 466 : 9 C. L. R. 114

116. ——— *Irregularities in publication of sale—Material irregularities—Civil Procedure Code (Act X of 1877), ss. 287, 289.* Upon an application to set aside a sale in execution of a decree, on the ground of material irregularit es in publishing and conducting it, it appeared that the sale-notification had not been fixed up in the Collector's office as required by s. 289 of Act X of 1877; that no affidavit as to search having been made in the Registry office with regard to incumbrances as required by s. 287 of the Act had been filed; and that the sale took place on, and not after, the thirtieth day from the publication of the notice; but it also appeared that the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities. *Held*, that there was no ground for setting aside the sale. BANDY ALI *v.* MADHUB CHUNDER NAG
I. L. R. 8 Calc. 932

117. ——— *Proclamation of sale—Civil Procedure Code (Act XIV of 1882), ss. 289, 311—Substantial injury.* A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale-proclamation not having been fixed up in the Collector's office as required by s. 289 of the Code of Civil Procedure. An omission so to fix up such notice is an irregularity, the remedy for which can only be by an application under s. 311. NANA KUMAR ROY *v.* GOLAM CHUNDER DEY
I. L. R. 18 Calc. 422

118. ——— *Irregularities in publication of sale—Evidence of such irregularities—Affixing proclamation of sale—Nazir's report—Civil Procedure Code (Act X of 1877), ss. 274, 290, 291 and 295—Sale to satisfy judgment-creditor who has not attached.* The proclamation of sale required by s. 274 of the Civil Procedure Code to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a

SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

conspicuous part of the property, are acts which must precede the posting of the notices in the Court-house as required by s. 290. Three mouzahs were attached in execution of decrees obtained by *A* and *B*. Prior to the sale, *C*, who had also obtained a decree against the owner of the land, applied for leave to execute his decree, in order that he might participate in the sale-proceeds under s. 295 of the Civil Procedure Code. Upon the day fixed for the sale, the Deputy Commissioner was unable, through illness, to attend; and he postponed the sale for three days. Two of the mouzahs were sold, and realized more than enough to satisfy the decrees of *A* and *B*. The third was then sold in satisfaction of *C's* decree. Upon an application by the judgment-debtor to set aside the sale on the ground of irregularity, it appeared that notice of the sale had been posted in the Court-house more than thirty days before the date fixed for the sale, but had only been published on the properties to be sold five days before that date; that notice of the existence of a mortgage on the properties, but no further particulars was given, and the mortgagee was allowed to purchase; and that the Deputy Commissioner had accepted the reports of the Nazir and Court-peon as to the proclamation of sale, and had refused to allow the judgment-debtor to give evidence of its insufficiency. *Held*, that the proclamation of sale on the property having taken place only five days prior to the date of sale, and the particulars of the mortgage not having been given, there had been such material irregularities in the publication as to entitle the judgment-debtor to give evidence of them and the other allegations made by him, in order to show that he had suffered material injury by reason of such irregularities. *Held*, also, that the Deputy Commissioner was not entitled to proceed upon the reports of the Nazir and Court-peon, but was bound to hear the evidence tendered by the judgment-debtor, though he was justified, under s. 291, in postponing the sale as he had done. *Held*, further, that the third judgment-creditor, who had not attached the property, was still entitled to have the sale proceeded with and his decree satisfied under the provisions of s. 295. MEGH LALL POOREE *v.* SHIB PERSHAD MADI . . . I. L. R. 7 Calc. 34

S. C. MEGH LAL POOREE *v.* MOHAMMED DUTT JHA . . . 8 C. L. R. 369

119. ——— *Irregularity in publication of sale—Civil Procedure Code, ss. 274 and 289—Omission to beat drum—Material irregularity.* Omission to have a drum beaten as required by ss. 289 and 274 of the Civil Procedure Code (Act XIV of 1882) *held* to be a material irregularity so as to render a sale held in execution of a decree liable to be set aside. TRIMBAK RAVJI *v.* NANA . . . I. L. R. 10 Bom. 504

120. ——— *Irregularity in publishing and conducting a sale—Waiver of irregularity by the judgment-debtor.* Previous to the

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

date fixed for the sale of certain property in execution of a decree, the judgment-debtors presented a petition, praying for a month's further time to be allowed them in order that they might complete the arrangements they were making for the purpose of paying off the debt, and stating that the decree-holders had attached and advertised the property for sale. That petition being refused, the sale took place; and subsequently the judgment-debtors came in and objected to the sale, and asked to have it set aside, on the ground that there had been material irregularity in the publication of the attachment and sale-proclamation, and that consequently they had suffered substantial injury. The Subordinate Judge refused to hear evidence on this point, holding that the petition was an admission that the proceedings were in order. *Held*, that the petition presented prior to the sale did not amount to an admission by the judgment-debtors that the publication and proclamation of the sale had been duly made; and that consequently the Court was bound to hear the evidence tendered by the judgment-debtors on that point, and to find whether there had been such irregularities in publishing and conducting the sale as to occasion substantial injury to the judgment-debtors. *Giridhari Singh* v. *Hurdeo Narain Singh, L. R. 3 I. A. 230*, distinguished. THAKOOR MAHATAB DEO *v.* LEELANUND SINGH
I. L. R. 7 Calc. 613 : 9 C. L. R. 398

121. ——— *Irregular publication of proclamation of sale—Sale held too soon after proclamation.* It is a material irregularity for the proclamation to be published less than thirty days prior to a sale in execution of a decree, and where damage has resulted, the sale may be set aside. *Megh Lal Pooree* v. *Mohammed Dutt Jha, 8 C. L. R. 369 : I. L. R. 7 Calc. 34*, followed. ABDUL NOSSIA *v.* DOOLAL DOSS . . **11 C. L. R. 303**

(*Contra*) RAMCHANDAR BAHADUR *v.* KAMTA PRASAD . . . . **I. L. R. 4 All. 300**

122. ——— **Sale held too soon after proclamation**—*Sale of immoveable property in execution before thirty days from date of fixing up proclamation—Material irregularity in publishing or conducting sale—Civil Procedure Code, 1882, ss. 290, 311.* An infringement of the rule contained in s. 290 of the Civil Procedure Code is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which s. 311 refers. BAKHSHI NAND KISHORE *v.* MALAK CHAND
I. L. R. 7 All. 289

123. ——— *Civil Procedure Code, s. 306—Delay in making deposit—Adjournment of sale—Absence of substantial injury.* The commencement of a Court-sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by s. 306, or the adjournment of the sale from time to time without sufficient ground, is not more than a mere irregularity and does not vitiate the sale. VENKATA *v.* SAMA
I. L. R. 14 Mad. 227

124. ——— *Civil Procedure Code, 1882, ss. 290, 311—Material irregularity—Proof of substantial injury.* The non-compliance with the requirement of s. 290 of the Civil Procedure Code that before sales of immoveables in execution of decree thirty days should intervene between proclamation and sale, is a material irregularity within the meaning of s. 311. But its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. As to this, the latter section requires affirmative evidence. TASADDUK RASUL KHAN *v.* AHMAD HUSAIN
I. L. R 21 Calc. 66
L. R. 20 I. A. 176

125. ——— *Civil Procedure Code, s. 311—Material irregularity in publishing or conducting sale—Substantial injury—Notification omitting to state place of sale—Sale held after date advertised—Civil Procedure Code, ss. 287, 290.* Where a proclamation of sale of immoveable property in execution of a decree omitted to state the place of sale, and where the sale took place on a date other than that notified in the proclamation, and before the expiration of the thirty days required by s. 290 of the Civil Procedure Code :—*Held*, that the non-compliance with the provisions of ss. 287 and 290 of the Code was more than mere irregularity, that it must have caused substantial injury, and that the order confirming the sale must be set aside. *Bakshi Nand Kishore* v. *Malak Chand, I. L. R. 7 All. 289*, referred to. *Per* MAHMOOD, *J.*—*Quœre :* Whether material irregularities such as the above were not in themselves sufficient within the meaning of the first paragraph of s. 311 of the Code, to justify a Court in setting aside a sale without inquiring whether such irregularities had resulted in substantial injury within the meaning of the second paragraph. JASODA *v.* MATHURA DAS . . . . **I. L. R. 9 All. 511**

126. ——— *Civil Procedure Code, 1882, s. 290—Ground for setting aside sale.* The infringement of the provisions of s. 290 of the Civil Procedure Code is not a mere irregularity, but it vitiates the sale. *Bakhshi Nand Kishore* v. *Malak Chand, I. L. R. 7 All. 289.* SADHUSARAN SINGH *v.* PANCHDEO LAL . **I. L. R. 14 Calc. 1**

127. ——— *Civil Procedure Code, ss. 290, 311—Sale of immoveable property in execution of decree—Sale held before expiration of thirty days from the proclamation—Application by judgment-debtor to set aside sale—"Illegality"—"Material irregularity."—Proof of substantial injury whether necessary.* Where a sale of immoveable property in execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code and without

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

the consent of the judgment-debtor :—*Held*, by EDGE, *C.J.* (BRODHURST, *J.*, dissenting), that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury. *Held*, by BRODHURST, *J.*, (*contra*) that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a " material irregularity " within the meaning of s. 311,—that expression being wide enough to include illegalities,—and that, before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury by reason of such irregularity. *Olpherts* v. *Mahabir Pershad Singh, L. R. 10 I. A. 25 ; Megh Lall Pooree* v. *Shib Pershad Madi, I. L. R. 7 Calc. 34 ; Kalytara Chowdhrain* v. *Ramcoomar Goopta, I. L. R. 7 Calc. 466 ; Tripura Sundari* v. *Durga Churn Pal, I. L. R. 11 Calc. 74 ; Bonomali Mozumdar* v. *Woomesh Chunder Bundopadhya, I. L. R. 7 Calc. 730 ; Bundy Ali* v. *Madhub Chunder Nag, I. L. R. 8 Calc. 932 ; Nothu* v. *Harbhuj, All. Weekly Notes (1885) 304 ; Jasoda* v. *Mathura Das, I. L. R. 9 All. 511 ;* and *Bakshi Nand Kishore* v. *Malak Chand, I. L. R. 7 All. 289*, referred to. GANGA PRASAD *v.* JAG LAL RAI
I. L. R. 11 All. 333

128. ——— *Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287—Sale set aside as being no sale.* A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation. *Held*, that there had been no sale within the meaning of the Code, proclamation of the time and place of sale and the holding of the sale at such time and place being conditions precedent to the sale being a sale under the Code. BASHARUTULLA *v.* UMA CHURN DUTT
I. L. R. 16 Calc. 794

129. ——— **Property sold before advertised time**—*Sale invalid.* A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code. The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale. Where property which was advertised for sale by public auction in execution of a decree at 11 A.M was sold at 7 A.M.:—*Held*, that the mistake was more than a mere irregularity in conducting the sale, and

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

that the whole of the proceedings were invalid. CHEDAMI LAL *v.* AMIR BEG **I. L. R. 7 All. 676**

130. ——— *Property sold before advertised time.* Where the fact of an execution-sale having taken place about two hours earlier than the hour announced was alleged to be a material irregularity seriously prejudicial to the interests of the judgment-debtor, it was *held* to be the bounden duty of the Court to take evidence and determine whether bidders had been prevented from attending, and whether an irregularity of a material kind had occurred. KHODEJA BEBEE *v.* RAM NARAIN DAN **12 W. R. 511**

131. ——— *Property not sold at advertised time—Alteration in sale order.* Where property is advertised to be sold in execution, a change in the specified order of sale or other sudden alteration of programme, without notice to intending bidders, or the express consent of the judgment-debtor, was an irregularity under s. 256, Code of Civil Procedure, 1859, vitiating the sale. POKHRAJ SINGH *v.* GOSSAIN MUNRAJ POOREE
12 W. R. 281

132. ——— *Property not sold at advertised time—Purchase by decree-holder at inadequate price.* Where a judgment-debtor's property has been sold without further notice on a date subsequent to that originally fixed, and especially when the execution-creditor is the purchaser for a very inadequate value, there is an irregularity which may cause material injury to the debtor. KISHEN PROSSUNNO MOJOMDAR *v.* NURDUMA DOSSEE . . . . **17 W. R. 339**

133. ——— **Alteration in particulars of property after advertising for sale**—*Material irregularity.* The property of a judgment-debtor was proclaimed and advertised for sale in execution of a decree on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party. Notwithstanding this fact, no fresh proclamation was made, and the sale took place on the day originally fixed. *Held*, that the omission to issue a fresh proclamation was a material irregularity, inasmuch as the judgment-debtor was entitled to have a proclamation issued accurately describing the property to be sold, and that such proclamation should be published thirty days before the sale. SHIB PROKASH SINGH *v.* SARDAR DOYAL SINGH
I. L. R. 3 Calc. 544: 2 C. L. R. 260

134. ——— *Civil Procedure Code, ss. 247 and 289—Proclamation—Property broken up into lots—Separate proclamations.* Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

is so divided. A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done. DE PENHA *v.* JALBHOY ARDESHIR SET **I. L. R. 12 Bom. 368**

135. ——— **Adjournment of sale—** *Notice—Discretion of person selling.* An auctioneer who sells under a decree has power to adjourn the sale from time to time (upon giving proper notice), but whether he does so or not is a matter in his own discretion. GOVIND HARI VALEKHAR *v.* BANK OF INDIA. BANK OF INDIA *v.* RAGHO NARAYAN . . **4 Bom. A. C. 164**

136. ——— *Adjournment of sale—Notice.* An execution-sale properly notified may be adjourned with the consent of the parties. GOVIND CHUNDER AOOCH *v.* BAMUN DOSS MOOKERJEE . . . . . **22 W. R. 481**

137. ——— *Postponement of sale—Postponement without valid reason. Held,* that the judgment-debtor could not complain of the order of the Subordinate Judge postponing a sale in execution of decree from the 25th to the 26th, unless he could show that he had suffered substantially by the postponement. But the attention of the Court was called to the importance of abiding by the date fixed in the proclamations of sale as far as possible, and not postponing sales without good reason. ASMUTOONNISSA BIBEE *v.* KHUDEMOONNISSA BIBEE . . . **17 W. R. 278**

138. ——— *Postponement of sale—Civil Procedure Code, 1859, s. 343.* When property has been put up for sale at auction in execution of a decree, and bids have been *bonâ fide* made for it, the Court is not competent to postpone the sale, or to decline to conclude it, and order another auction, merely on the representation of the judgment-debtor that he can obtain a higher price by private transfer, there being shown no ground to believe that the amount of the judgment-debt would have been thus realized. LUCHMEE NARAIN *v.* BHYROO PERSHAD . . **1 Agra Mis. 11**

139. ——— *Sale, postponement of, for benefit of debtor.* Certain properties were to be sold in execution of decree. As to some, the sale took place as far as possible on the day fixed, but was publicly put off to the next day, when, no higher price being obtainable, it was concluded at the price bid on the first day. *Held,* that there was no irregularity in the conduct of the sale which could prejudice the judgment-debtor. NUDDEA KISHORE DOSS *v.* BUNGSHEE MOHUN DOSS **17 W. R. 210**

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

140. ——— *Postponement of sale—Civil Procedure Code, 1859, s. 249—Ground for postponing sale.* A Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer. An application by a Collector under s. 249 of the Civil Procedure Code for the postponement of a sale in the execution of a decree of land paying revenue to Government should not be granted where it is not alleged that satisfaction of the decree might be made within a reasonable period by a temporary alienation of the land. JAISHEE RAM *v.* BIJAI KOOER **5 N. W. 177**

141. ——— *Equitable grounds for setting aside sale—Sale contrary to order for postponement—Mistake.* Where a sale in execution took place under an order obtained notwithstanding a consent on the part of the decree-holder's pleader to a petition by the judgment-debtor for a postponement, the petition so consented to having been by mistake afterwards presented to and filed by the judgment-debtor in the wrong Court:—*Held,* that the judgment-debtor was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby. GANGA PERSHAD SAHU *v.* GOPAL SINGH **I. L. R. 11 Calc. 136 : L. R. 11 I. A. 234**

142. ——— **Sale held after postponement by Court—** *Sale after order postponing sale where order arrives too late to stay sale.* When a Court executing a decree passes an order postponing a sale, and the sale takes place notwithstanding, in consequence of the order arriving too late, the Court is justified in setting aside the sale on the ground of irregularity, and its order doing so is not appealable. MAIJHA SINGH *v.* JHOW LAL . . . . . **6 N. W. 354**

143. ——— *Order for postponement made before, but arriving at Collector's office after, sale.* The High Court passed an order postponing a sale in execution of a decree, which order arrived at the Collector's office the day after the sale. *Held,* that the publication of the sale was irregular, as the order of postponement invalidated the notification of sale. NONIDH SINGH *v.* SOHUN KOOER . . . . **4 N. W. 135**

144. ——— *Order for postponement arriving after sale had been held—Civil Procedure Code, 1877, ss. 311, 312.* On the day fixed for the sale of certain immoveable property in the execution of a decree, the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, on application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. *Held,* that the sanction to the sale originally given having been withdrawn, the sale could not legally

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid ; and in reviewing its first order and in setting aside the sale as illegal, the Court executing the decree had not acted *ultra vires* and its action was not otherwise illegal. MIAN JAN *v.* MAN SINGH . . . . . **I. L. R. 2 All. 686**

145. ——— *Sale held after postponement by Court—Order for postponement not reaching the conducting officer—Material irregularity in conducting sale—Civil Procedure Code, s. 311.* The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale, and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void. *Held*, that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed ; that his not being aware of the order was not material ; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of s. 311 of the Civil Procedure Code ; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor ; and that the Court could not confirm the illegal sale, but must hold it to be void. *Sukhdeo Rai* v. *Sheo Ghulam, I. L. R. 4 All. 332 : Ram Dial* v. *Mahtab Singh, I. L. R. 3 All. 701 ;* and *Ganga Prasad* v. *Jag Lall Rai, I. L. R. 11 All. 333,* referred to. SANT LAL *v.* UMRAO-UN-NISSA **I. L. R. 12 All. 96**

146. ——— *Code of Civil Procedure (Act XIV of 1882), s. 545—Order passed by Appellate Court for stay of execution—Sale held before communication of such an order.* An order of an Appellate Court under s. 545, Civil Procedure Code, to stay execution of a decree against which an appeal is pending, is in the nature of a prohibitory order, and as such would only take effect when communicated. If a property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as a nullity. *Foujdar Khan* v. *Bainee Doobey, 3 Agra 398 ; Maijha Singh* v. *Jhow Lal, 6 N. W. 354 ;* and *Main Jan* v. *Mian Singh, I. L. R. 2 All. 686,* distinguished. BISSESWAR CHOWDHURANI *v.* HURRO SUNDAR MOZUMDAR **1 C. W. N. 226**

147. ——— **Proclamation of adjourned sale**—*Postponement of sale.* A proclamation of thirty days is necessary when the property is first advertised for sale, not when the sale is postponed for the convenience of the debtor. S. 225 of the Civil Procedure Code, 1859, related to a re-sale, and not to a postponed sale. BUDREE NATH BHUTT *v.* CHUNDER SHEKUR MAN SINGH **1 W. R. Mis. 3**

NOORUL HOSSEIN *v.* OMATOOL FATIMA **25 W. R. 34**

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

148. ——— **Necessity for fresh proclamation**—*Postponement of sale* Where a sale is postponed, a fresh notice and proclamation ought to issue. SHOSHEE MOOKHEE BURMONYA *v.* DWARKANATH BISWAS . **6 W. R. Mis. 84**

149. ——— *Postponement of sale—Notice—Necessity for fresh proclamation—Act VIII of 1859, s. 249.* Where a sale in execution of a decree is postponed, whether indefinitely or to a fixed date, it is necessary in the absence of an express arrangement between all the parties, that a fresh proclamation should be made giving notice of the day to which the sale has been postponed. It may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury must probably have arisen to the judgment-debtor. GOOPEENATH DOBEY *v.* ROY LUCHMEEPUT SINGH **I. L. R. 3 Calc. 542 : 1 C. L. R. 349**

OKHOY CHUNDER DUTT *v.* ERSKINE **3 W. R. Mis. 11**

150. ——— *Postponement of sale—Sufficient notice of sale—Necessity for fresh notification.* Where a sale was notified to take place on the 8th, and on that day the order for the postponement of the sale to the 9th was made in open Court :—*Held*, that that was a sufficient notification of the sale being held on the 9th, and that a fresh notice was not necessary. GOWREE NATH SAHOY *v.* FUKEER CHAND . **18 W. R. 347**

151. ——— *Postponement of sale—Necessity for fresh proclamation.* Where a sale was fixed for the 21st November, but delayed until the 22nd, without any order of postponement, or any fresh proclamation of the day of sale there is a *primâ facie* case of injury to the party whose property was sold. Such a postponement was in contravention of the provisions of s. 249 of Act VIII of 1859, as, when a sale is postponed, there must be fresh proclamation of the sale and date when it is to take place. SANWUL SINGH *v.* MAKHUN PANDEY **2 N. W. 14**

152. ——— *Omission to issue fresh proclamation—Material injury.* A decree having been obtained against *A* and *B* upon a mortgage, the latter appealed to the High Court and subsequently, on the mortgaged properties being attached and advertised for sale, while the appeal was pending, applied for and obtained an order for stay of the sale as far as she was concerned. The sale, however, took place on the day originally fixed, but no fresh proclamation was issued, although it was announced previous to the sale that only *A's* rights and interests would be sold. *Held*, that the sale was irregular, as a fresh proclamation ought to have been issued, and an inquiry instituted as to *A's* share in the property ; and it having appeared that *A* was materially injured by such irregularity,

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

the sale was set aside. MOHINY MOHUN DASS CHOWDHRY *v.* BHOOBUN JOY SHAHA **6 C. L. R. 237**

153. ——— *Indefinite postponement—Fresh notice, omission of—Material injury.* Where a sale in execution does not take place on the date fixed in the original notice, an indefinite postponement cannot be regarded as an adjournment from day to day, and a fresh notice should fix another date for the sale ; and where, in consequence of an indefinite postponement, an estate has been purchased for an inadequate price, and especially by the judgment-creditor, the irregularity is one that has occasioned substantial injury and justifies a setting aside of the sale. JHOOMUCK CHOWDHRY *v.* RADHA PERSHAD SINGH . **25 W. R. 328**

154. ——— *Civil Procedure Code, 1877, s. 290—"Consent"—Lapse of time between proclamation and actual sale—Postponement of sale.* An application made on the day of sale by the judgment-debtor that a part only of his property may be sold instead of the entirety, cannot be considered such a "consent" as, by virtue of s. 290 of Act X of 1877, would do away with the necessity of a proclamation for sale being issued thirty days before the day fixed for sale. Where successive postponements of the day of sale have been made, but the last of these is made by the Court on its own motion without any application for postponement of sale being made on the part of the judgment-debtor (although such postponement might be for his benefit), a strict compliance with the rule that thirty days must elapse between the proclamation and the actual day of sale is requisite. HARBUNS SAHAI *v.* BHAIRO PERSHAD SINGH **I. L. R. 5 Calc. 259**

S.C. HURBUNS SAHAI *v.* BHAIRO PERSHAD **4 C. L. R. 23**

See also BHEKRAJ KOOERI *v.* GENDH LALL TEWARI . . . **I. L. R. 5 Calc. 878**

155. ——— *Civil Procedure Code (Act XIV of 1882), s. 291—Omission by consent to issue fresh proclamation of sale after adjournment.* Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors, who waived the issue of a fresh proclamation of sale, and the interests of both were sold :—*Held*, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation of sale under s. 291 of the Civil Procedure Code amounted only to an irregularity, and did not vitiate the sale. *Rameshur Singh* v. *Sheodin Singh, I. L. R. 12 All. 510*, and *Satish Chunder Rai Chowdhry* v. *Thomas, I. L. R. 11 Calc. 658*, followed in principle. BAGAL CHUNDER MOOKERJEE *v.* RAMESHUR MUNDUL **I. L. R. 18 Calc. 496**

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

156. ——— *Agreement as to proclamation on postponement of sale—Civil Procedure Code, 1859, s. 249.* An execution-sale which had been fixed for a certain date, was put off to the corresponding date in the following month on the application of the judgment-debtor, who consented that he would not object to any irregularities affecting the sale if it took place on any date in the following month. An istahar was also issued, and it was proclaimed only in a public place. After the sale took place as agreed upon, the judgment-debtor contended that he was entitled, under Act VIII of 1859, s. 249, to have a fresh proclamation issued on the spot where the properties were situated. *Held*, that, as at the time of his application for postponement he did not contemplate any such proclamation, he could not now object to it not having been issued. HET NARAIN SINGH *v.* GOSSAIN LUCHMEE NARAIN POOREE . **23 W. R. 256**

157. ——— **Sale on a holiday when Court is closed.** A sale in execution of a decree is illegal if made on a holiday, whether it is a fixed holiday or only a day which the Courts are closed by order of the High Court. HARO JEMADAR *v.* JADUB CHUNDER HOLDER. **3 W. R. Mis. 24**

158. ——— *Sale on close holiday—Irregularity in publication or conduct of sale.* The sale of immoveable property by an Amin on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale. RISRAM MAHTON *v.* SAHIB-UN-NISSA **I. L. R. 3 All. 333**

159. ——— **Sale under two separate decrees**—*Separate sales.* Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting the sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in the conduct of the sales. COURT OF WARDS *v.* GAYA PRASAD. **I. L. R. 2 All. 107**

160. ——— **Purchase by decree-holder without permission of Court.** A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not *ipso facto* void ; it is a good sale, unless and until set aside by the Court under the provisions of s. 294 of the Civil Procedure Code, 1877. JAVEHRBAI *v.* HARIBHAI . . **I. L. R. 5 Bom. 575**

In the matter of VEERAPAH CHETTY **6 B L. R. Ap. 37 : 14 W. R. 405**

161. ——— *Purchase by decree-holder without permission of Court—Civil Procedure Code (Act XIV of 1882), ss. 294, 311—*

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

Substantial injury. Under the terms of s. 294 of the Civil Procedure Code, it is discretionary with the High Court to set aside an execution-sale at which the decree-holder has bid and purchased without first obtaining permission from the Court so to do ; and in dealing with such a case, the Court, although considering the matter as an irregularity in the conduct of the sale, will not interfere with the sale, unless it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity. MATHURA DAS *v.* NATHUNI LALL MAHTA . . **I. L. R. 11 Calc. 731**

162. ——— *Civil Procedure Code, 1882, s. 294—Validity or otherwise of sale.* In a suit in which it was contended that a purchaser at a sale in execution of a decree had, under s. 294 of the Civil Procedure Code, taken nothing by the purchase because he was the holder of the decree in execution of which the property was sold, it was *held*, following *Javherbai* v. *Haribai, I. L. R. 5 Bom. 575*, that the purchase was not void *ab initio*, but only voidable " on the application of the judgment-debtor or other person interested in the sale." CHINTAMANRAV *v.* VITHABAI **I. L. R. 11 Bom. 588**

163. ——— *Civil Procedure Code (Act X of 1877), s. 294, amended by Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court.* Under the Civil Procedure Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment-creditor was not invalid for want of permission of the Court. That is also the law under Act XIV of 1882 ; but such a purchase may be set aside by the Court on application under s. 294 as being irregular. PARAMASIVA *v.* KRISHNA . . **I. L. R. 14 Mad. 498**

164. ——— *Purchase by judgment-creditor without leave of Court—Remedy of judgment-debtor—Civil Procedure Code (1882), s. 294.* Where a judgment-debtor without leave of the Court buys the property of his judgment-debtor at a Court-sale, the remedy of the latter is by application under s. 294 of the Civil Procedure Code (Act XIV of 1882), and not by separate suit. GENU *v.* SAKHARAM . **I. L. R. 22 Bom. 271**

165. ——— *Civil Procedure Code (Act XIV of 1882), ss. 294, 311—Application to set aside sale—Leave to bid—Assignee of decree under oral assignment.* Where the auction-purchaser at a sale in execution of a decree had before the sale merely entered into an agreement with the decree-holder to purchase the decree for a certain sum of money which, however, was not paid till after the sale, and no instrument of assignment of the decree had been executed :—*Held*, that the auction-purchaser was not a decree-holder within the meaning of s. 294, Civil Procedure Code. An assignee of a decree under an oral assignment has

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

no *locus standi* at all to apply for the execution of a decree, and it is not necessary for such an assignee to obtain leave to bid at the sale held in execution of a decree. DAKSHINA MOHAN ROY *v.* BASUMATI DEBI **4 C. W. N. 474**

166. ——— **Purchase by decree-holder** *—Refusal of application by judgment-creditor to be permitted to bid at sale—Invalidity of sale—Civil Procedure Code (Act XIV of 1882), s. 294.* A mortgagee, having obtained a decree declaring his lien on certain property, put up for sale in execution of this decree the mortgaged property. The decree-holder asked for, but was refused, leave to bid at the sale, but notwithstanding such refusal, purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession of the property. The defendants contended that, inasmuch as the plaintiff (decree-holder) had been refused leave to bid at the sale, his purchase could not be enforced. *Held*, that the plaintiff had been guilty of an abuse of the process of the Court in bidding at the sale and buying the property benami, and that the sale therefore ought not to be enforced. MAHOMED GAZEE CHOWDHRY *v.* RAM LALL SEN . . **I. L. R. 10 Calc. 757**

167. ——— *Purchase by decree-holder— Material irregularity—Dissuading purchaser from bidding—Civil Procedure Code (Act X of 1877), s. 311—Leave to bid—Decree-holder related to manager of defendant.* When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside. Where a decree-holder was joint in family with the manager of an infant defendant, and the defendant's property was to be sold in execution of the decree :—*Held*, that the decree-holder ought not to be granted leave to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant was one of the members ; and it would in fact be a purchase by an agent of the property of his principal. WOOPENDRO NATH SIRCAR *v.* BROJENDRO NATH MUNDUL **I. L. R. 7 Calc. 346 : 9 C. L. R. 263**

168. ——— *Purchase by decree-holder — " Material irregularity " —Liberty to bid—Conduct calculated to deter bidders—Civil Procedure Code (Act X of 1877), ss. 294, 311.* The holder of a decree, in execution of which property is sold, is absolutely bound, under s. 294 of Act X of 1877, to have express permission from the Court before he can purchase the property ; and whether this objection is taken and pressed or otherwise, a sale to him is invalid unless he has got explicit permission. The use at a sale of language by an

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

intending bidder in disparagement of the property for the purpose of influencing bystanders, and deterring them from bidding for the property, is a "material irregularity" sufficient to render the sale invalid under s. 311 of the same Act. RUKHINEE BULLUBH *v.* BROJONATH SIRCAR
I. L. R. 5 Calc. 308

169. ——— *Disparaging remarks by bystanders or purchasers other than the decree-holder—Notice of sale—Practice regarding sales in execution of decrees—Adjournment of sale—Civil Procedure Code (Act XIV of 1882), ss. 311, 291.* Disparaging remarks made by bystanders or by purchasers at an execution-sale other than the decree-holder do not constitute such an irregularity as is contemplated by s. 311 of the Code of Civil Procedure. *Gunga Narain Gupta* v. *Annunda Moyee Burroanee, 12 C. L. R. 494,* followed. *Woopendro Nath Sircar* v. *Brojendro Nath Mundle, I. L. R. 7 Calc. 346 : 9 C. L. R. 263,* and *Rukhinee Bullubh* v. *Brojonath Sircar, I. L. R. 5 Calc. 308,* distinguished. It is the practice of the Courts under the Rules of the High Court, which have the force of law, to place all properties intended for sale in execution of decrees on a list, and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of s. 291 of the Civil Procedure Code ; and it cannot be said in such a case that there was an irregularity in the sale not having been held on the appointed day. LAL MOHUN CHOWDHURI *v.* NUNU MOHAMED TALUKDAR . . **I. L. R. 17 Calc. 152**

170. ——— *Civil Procedure Code, 1882, s. 311—Position of decree-holder who has obtained leave to bid—Dissuading persons from bidding—Non-disclosure amounting to fraud.* A creditor had obtained a decree on the footing of a mortgage, and in execution brought the property of his judgment-debtor to sale. At the time of sale the decree-holder, who had obtained leave to bid, entered into an agreement with *P* to the effect that, if *P* would dissuade other persons from bidding, he (the decree-holder) would purchase the whole property for R83,000 and convey it on certain terms to *P*. *P* thereupon exerted his influence and succeeded in persuading would-be purchasers from bidding, and in consequence the property was sold on the 11th April 1891 for R83,000, which was a little more than half its actual value. The sale was confirmed on the 29th June 1891, and the judgment-debtor, who at the time of the sale was a minor under the Court of Wards, attained his majority on the 21st April 1894, and filed this petition praying to set aside the sale on the 15th May 1894. *Held,* that the omission on the part of the decree-holder to disclose the agreement to the Court amounted to a fraud upon the Court entitling

SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

the judgment-debtor to say that in point of law no leave to bid was granted, and that the withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore the sale must be set aside. JAYINILABDIN RAVUTTAN *v.* VIJIA RAGUNADHA AYYARAPPA NAIKAN GOPALAR . **I. L. R. 19 Mad. 315**

Held on appeal to the Privy Council—A decree-holder who has obtained leave to bid at a judicial sale is, in regard to restrictions upon him, in the same position as any other purchaser. A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. The judgment of the High Court in *Woopendro Nath Sicrar* v. *Brojendronath Mundal, I. L. R. 7 Calc. 346,* though a correct decision on the case, was too broadly expressed in comprehending any dissuasion by a bidder at a judicial sale of other persons from bidding, as a ground for setting aside the sale. The Judicial Committee affirmed the decision of the High Court that, on a petition for the setting aside of the judicial sale under s. 311 of the Code of Civil Procedure, neither the fact of the above agreement nor the dissuasion of bidders afforded sufficient ground for making the order. But the High Court had decided, in favour of the petitioner, another point—that there had been material irregularity, within that section, in an omission on the part of the decree-holding purchaser when he had applied for leave to bid. This had been that he had withheld information of the agreement from the Court, which had granted the leave to bid not having been made aware of the arrangement. The omission to disclose this fact had, in the opinion of the High Court, amounted to a fraud upon the Court executing the decree, and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had been granted. *Held,* by the Judicial Committee, that this ground had not been established by evidence on an issue between the parties having been taken for the first time in the Court of Appeal, with a change of the matter in controversy ; and that the fraud on which alone the High Court's order could be sustained had neither been alleged nor proved. MAHOMED MIRA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR . . **I. L. R. 23 Mad. 227**
L. R. 27 I. A. 17
4 C. W. N. 227

171. ——— *Purchase by son of decree-holder—Code of Civil Procedure (Act X of 1877), s. 294.* A purchase by the son of a decree-holder, undivided in interest from his father is a purchase by the decree-holder within the meaning of s. 294 of Act X of 1877 as it stood previously to its amendment by Act XII of 1879, and i

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SALE IN EXECUTION OF DECREE— *contd.*

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(*b*) IRREGULARITY—*contd.*

absolutely void if the purchase were made with funds which were joint property of the father and son. NAR YAN DESHPANDE *v.* ANAJI DESHPANDE **I. L. R. 5 Bom. 130**

Since the amendment of the Civil Procedure Code by Act XII of 1879 the sale would not be treated as absolutely void, but as liable to be set aside by the Court on application by the judgment-debtor or other party interested in the sale.

172. ——— *Rejection of highest bid—Abortive sale caused by act of judgment-debtor—Highest bidder declared not the purchaser—Validity of sale.* Three attempts to sell land taken in execution under a decree had been rendered abortive by the acts of the judgment-debtor, and a delay of seven years occasioned, during which by his conduct he defeated the execution of the decree. When the property was put up for sale for the fourth time, the Collector rejected the two highest bids, on the ground that neither of the bidders could produce a mooktearnamah from the persons for whom respectively they professed to act as agents, nor produce the required deposit, and he declared the third highest bidder the purchaser of the land. *Held*, that under the circumstances the conduct of the Collector was justifiable and the sale valid. MOHESH NARAIN SINGH *v.* KISHNANUND MISSER **Marsh. 592 2 Ind. Jur. O. S. 1 : 5 W. R. P. C. 7 9 Moo. I. A. 324**

173. ——— *Deposit by purchaser—Purchase by decree-holder.* At a sale in execution of a decree, when the sale of any lot is completed, the purchaser should then and there be required to make the deposit prescribed by the Civil Procedure Code, failing which the lot should at once be put up to sale at the risk of the first purchaser. The decree-holder, if the lot is knocked down to him, is as much bound to make the prescribed deposit as any other auction-purchaser. CHULKOO DUTT JHA *v.* LEELANUND SINGH **W. R. 1864, Mis. 30**

174. ——— *Purchase by decree-holder—Payment not in cash, but by giving receipts for amount due to him.* Where the decree-holder is himself the purchaser at a sale in execution, there is no reason why he should not, instead of paying the price in cash, give receipts for the amount due to him under his decrees, supposing their value is sufficient to cover the amount for which the property is sold. The fact that he does so is not a valid objection to the sale. KHELLAT CHUNDER GHOSE *v.* KESHUB CHUNDER PAUL CHOWDHRY **16 W. R. 46**

175. ——— **Payment of purchase-money**—*Civil Procedure Code, 1859, ss. 254, 256, 257—Default in making deposit.* Directions as to the payment of the purchase-money at sales in execution of decree arising under s. 254, Act VIII of 1859, were to be dealt with as provided by that section, and did not fall under ss. 256 and 257. A default under s. 254 was not an "irregularity in conducting the sale" under s. 256. BRINDA DEBEE DOSSEE *v.* GOPEE SOONDUREE DOSSIA **6 W. R. Mis. 82**

176. ——— *Payment of purchase-money—Civil Procedure Code, 1877, s. 294, and ss. 306, 313—Set-off of purchase-money—Omission to make deposit.* The requirements of s. 306 of the Civil Procedure Code applying to all cases of sale of immoveable property, under Ch. XIX, a decree-holder buying with permission given under s. 294, and desiring to set off his purchase-money against the amount of the decree, is not exempt from the necessity of making, at the time of sale, a deposit of 25 per cent. on the amount of such purchase-money; and such deposit must be made in cash. The option so to set off the purchase-money cannot be exercised by the purchaser until the confirmation and payment of expenses of the sale. Where, however, all parties interested in the amount to be deposited have waived their right to have that amount deposited in cash, the sale ought not to be set aside on the ground that a cash deposit has not been made. GOPAL SINGH *v.* ROY BUNWAREE LALL SAHOO . **5 C. L. R. 181**

177. ——— *Payment of purchase-money—Civil Procedure Code, 1877, s. 306—Failure to pay deposit of purchase-money required by that section.* The person declared to be the purchaser of property put up for sale in execution of a decree did not, as required by s. 306 of the Civil Procedure Code, pay a deposit of 25 per cent. on the amount of his purchase immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale. *Held*, that there was no sale at all of the property. INTIZAM ALI KHAN *v.* NARAIN SINGH **I. L. R. 5 All. 316**

178. ——— *Failure by purchaser to make the deposit required by s. 306 of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of 1882), ss. 241, 306, 308, 311, and 312.* Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per cent. on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure, constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie. *Intizam Ali Khan* v. *Narain Singh, I. L. R. 5 All. 316*, dissented from. BHIM SINGH *v.* SARWAN SINGH . **I. L. R. 16 Calc. 33**

179. ——— *Inability of purchaser to make deposit—Re-sale—Substantial injury—Civil Procedure Code (Act X of 1877), s. 293.*

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

At a sale in execution of a decree the property was knocked down to a bidder at R260. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for R50. *Held*, that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under s. 293 of the Civil Procedure Code, have recovered the difference between the original bid and the price at which the property was sold. BEPIN CHUNDER SHICKDAR *v.* PURRESHNATH BISWAS . **I. L. R. 9 Calc. 98**

S.C. BEPIN CHUNDER SHICKDAR *v.* MODHOO SUDUN CHOWDHURI . . **16 C. L. R. 316**

180. ——— *Omission to make deposit—Default of purchaser after sale of portion of property sufficient to satisfy decree.* Where a portion of the property of a judgment-debtor has been sold in execution for a sum sufficient to satisfy the decree, the Court is not justified, on default being made by the purchaser, in directing the sale of any further portion of the debtor's property, it being open either to the judgment-creditor or the judgment-debtor to apply that the balance due upon the decree, after re-sale of the portion already sold, should be realized from the defaulter. JOY CHUNDER BISWAS *v.* KALI KISHORE DEY SIRCAR . . . . **8 C. L. R. 41**

181. ——— *Failure to make deposit—Re-sale without notice—Irregular procedure.* At a Court-sale in execution of a decree, *T* bid R3,550 for the judgment-debtor's land on the 24th March 1882, but the Ameen re-sold the property the next day for R2,500 on the ground that the deposit was not duly made. *T* objected on the 28th March and a fresh sale was ordered by the Court without giving notice to the judgment-debtor, and the land was sold for R2,700 on the 13th June. On the 13th July the judgment-debtor applied to have this sale set aside and the sale to *T* confirmed. *Held*, that the judgment-debtor was entitled to have the sale of the 13th June and the order which led to it set aside, and that the Court was bound to decide whether the deposit had been duly made by *T*, or, if not, whether *T* was liable for any deficiency in the price which might be realized on a re-sale. KUPPAYAN *v.* RAMASAMI AYYAN **I. L. R. 6 Mad. 197**

182. ——— *Failure to pay purchase-money—Re-sale.* At a sale in execution of decree, certain property was knocked down to a bidder, who made default in payment of the purchase-money. Subsequently the Judge again put the property up for sale, and re-sold it at a lower price. The decree not being satisfied, the Judge put up other property which had been advertised for sale with the property abovementioned, without getting from the defaulter the difference between the price obtained at the second sale and that obtained at the first. On an application by the judgment-debtor to have the sale of the second property set aside :—*Held*, that no sufficient cause was shown for setting aside the sale. *Joy Chunder Biswas* v. *Kali Kishore Dey Sircar, 8 C. L. R. 41*, distinguished. *Khiroda Moyi Dassi* v. *Golam Abardari, 13 B. L. R. 114*, followed. GOUR CHUNDER BISWAS *v.* CHUNDER COOMAR ROY **I. L. R. 8 Calc. 291 : 10 C. L. R. 236**

183. ——— *Failure to pay deposit—Re-sale on default in deposit—Civil Procedure Code, 1859, s. 253.* In a re-sale for default under s. 253, Act VIII of 1859, the officer conducting the sale was not bound to commence from the next highest bid below that made by the defaulter, instead of commencing the sale *de novo*. GOUR MOOKH SINGH *v.* LALLA GOUR SUNKUR **1 W. R. Mis. 11**

184. ——— **Inadequacy of price.** Smallness of price is not a sufficient ground for setting aside a sale, unless it be the effect of an irregularity in the sale-proceedings. REET BHUNJUN SINGH *v.* MITTURJEET SINGH **6 W. R. Mis. 31**

NUDDEA KISHORE DOSS *v.* BUNGSHEE MOHUN DOSS . . . . . **17 W. R. 210**

HUBBEBOOL DOSS *v.* ALLENDER. HURBEEOOLA HOSSEIN *v.* LAND MORTGAGE BANK **14 W. R. 44**

ALIMOODDY CHOWDHRY *v.* CHUNDER NATH SEN **24 W. R. 227**

185. ——— *Inadequacy of price—Inadequate price produced by mistake—Misstatement in notification.* Where an irregularity in an execution-sale (*e.g.*, misstatement in the notification) produces a mistake, and the property is consequently sold at an inadequate price, the judgment-debtor is entitled to have the sale reversed. KHODEJA BIBEE *v.* JOHAD ROHEEN **14 W. R. 320**

186. ——— *Civil Procedure Code, 1882, s. 287—Misrepresentation of value in the proclamation of intended judicial sale—Substantial injury within the meaning of s. 311.* The value of property of which the sale has been ordered in execution of a decree, when stated in the proclamation of the intended sale, is a material fact within sub-s. (*e*) of s. 287 of the Code of Civil Procedure. An under-statement of the value of the property having been made in such a proclamation, which was circulated to mislead bidders, and to prevent them from offering adequate prices, or from bidding at all, and the sale having resulted in a price altogether inadequate :—*Held*, that such misstatement was a material irregularity in publishing or conducting the sale, although there might be no rule requiring publication of the value in that proclamation ; and that the special remedy provided in

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

s. 311 was applicable, as substantial injury had resulted. SAADATMAND KHAN *v.* PHUL KUAR
I. L. R. 20 All. 412
L. R. 25 I. A. 146
2 C. W. N. 550

187. ——— On a sale of property in execution of a decree, the value stated in the sale proclamation is a material fact within sub-s. (*e*) of s. 287 of the Code of Civil Procedure. Under-valuation of such property is a material irregularity in publishing or conducting the sale. SIVASAMI NAICKER *v.* RATNASAMI NAICKER
I. L. R. 23 Mad. 568

188. ——— *Inadequacy of price—Material irregularity—Confirmation of sale—Code of Civil Procedure (Act XIV of 1882), ss. 305, 311 and 314.* The sale of immoveable property to the highest bidder for a price which subsequently appears to be too low is not a material irregularity in publishing or conducting the sale. A decree-holder or a judgment-debtor cannot apply to set aside a sale on the ground of the price realized being too low. Under s. 314 of the Code of Civil Procedure, 1882, the Civil Court cannot, upon or without application, refuse to confirm a sale on the ground that the price bid is too low. LAKSHMI *v.* KRISHNABHAT
I. L. R. 8 Bom. 424

189. ——— *Inadequacy of price.* The circumstance that property was sold in execution of a decree below its proper value, and that few persons attended the sale, is not sufficient to vitiate the sale. RUGHOO NATH SINGH *v.* TOODEY SINGH . . . . . **5 N. W. 19**

190. ——— *Inadequacy of price—Error in notification—Civil Procedure Code, 1859, ss. 256, 257.* At a sale held on the 9th September 1872, in execution of a decree, the respondent purchased an estate for R55,000. The notification of sale had stated the Government revenue to be R3,146 instead of R8,146, the sale being fixed for the 5th August 1872. The sale was postponed without the issue of a second notification on an application by the judgment-debtor praying for such postponement, " the attachment and the notification of sale being maintained. On the 1st October 1872 the judgment-debtor objected under s. 256 of Act VIII of 1859 to the sale on the ground of material error in the abovementioned notification in regard to the amount of Government revenue. The Subordinate Judge overruled such objection, but omitted to pass an order under s. 257, confirming the sale. Thereupon the judgment-debtor paid into Court the amount of the decree, and then obtained from the Judge an order purporting to have been made on review under s. 376, but without notice to the respondent setting aside the sale on the ground of inadequacy of price and the abovementioned material error. Subsequently the Judge refused to confirm the sale and to issue a certificate to the respondent. The High Court, on application by the respondent under 24 & 25 Vict., c. 104, s. 15, held that the objections made were insufficient, and directed the Judge to confirm the sale. *Held*, by the Privy Council, that, although the alleged inadequacy of price was no ground for refusing to confirm the sale, yet that the above error in specifying the amount of Government revenue was an irregularity (see s. 249) for which, on proof of substantial injury to the judgment-debtor therefrom, the sale might have been set aside ; but that the above petition for postponement amounted to an admission by the judgment-debtor that the notification was correct, or that there was no such irregularity as would be likely to mislead. GIRDHARI SINGH *v.* HURDEO NARAIN SINGH
L. R. 3 I. A. 230 : 26 W. R. 44

Affirming the decision of the High Court in HURDEO NARAIN SAHOO *v.* GIRDHAREE SINGH
19 W. R. 227

191. ——— *Inadequacy of price—Error in notice of sale.* Mere inadequacy of price is not a sufficient ground for setting aside a sale in execution if no substantial injury has been caused to judgment-debtor by any material irregularity in publishing and conducting the sale ; and the mention of the name of a wrong pergunnah in the notice of sale is not such an irregularity, when the notice has been served in the right mouzah and the estate has been identified. NOORAL HOSSEIN *v.* RAM COOMAR SAHEE . . **25 W. R. 326**

192. ——— *Inadequacy of price—Irregularity in publishing or conducting sale.* If it is proved that the price obtained for property sold at an execution-sale is greatly inadequate, and if it be also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary. *Gopeenath Dobey* v. *Roy Luchmeeput Singh, I. L. R. 3 Calc. 542* approved. KALYTARA CHOWDHRAIN *v.* RAMCOOMAR GOOPTA
I. L. R. 7 Calc. 466 : 9 C. L. R. 114

193. ——— *Material irregularity—Code of Civil Procedure, 1882, ss. 291 and 311—Sale at inadequate price owing to hour of sale not being fixed.* Where a debtor's property under attachment had been ordered to be sold at a fixed date, after the disposal of a certain claim thereto made under s. 278 of the Code of Civil Procedure, but no hour had been fixed for the sale as required by s. 291, and the property was sold at a very inadequate price by reason of the paucity of bidders :—*Held*, affirming the decision of the Subordinate Judge, that there had been material irregularity causing substantial injury to the debtor, and that it is sufficient under s. 311 of the Code, if the evidence, though not " direct evidence," shows that the injury was a necessary result of the irregularity complained of. *Tassaduk Rasul*

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

Khan v. *Ahmed Husain, I. L. R. 21 Calc. 66 : L. R. 20 I. A. 176,* explained. SURNO MOYEE DEBI *v.* DAKINA RANJAN SANYAL
I. L. R. 24 Calc. 291

194. ——— *Civil Procedure Code, 1882, ss. 291 and 311—Material irregularity—Substantial loss—Inadequacy of price.* Where a material irregularity is proved to have occurred in the conduct of a Court-sale, and it is shown that the price realized is much below the true value, it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out. When a sale is adjourned under s. 291, the provisions of that section must be followed with exactitude. VENKATASUBBARAYA CHETTI *v.* ZAMINDAR OF KARVETINAGAR
I. L. R. 20 Mad. 159

195. ——— *Sale at an inadequate price, through irregularity in sale-proceedings.* Where six tenures with separate recorded jummas were lumped together and sold in execution of decree as one lot, whereby the plaintiff and his co-sharers were precluded from buying up any one or more of the six tenures, and no description of the properties to be sold was given either in the sale proclamation or lutbundi, in consequence of which the defendant was apparently the only bidder, and he purchased six tenures at an inadequate price, the sale was reversed as fraudulent and illegal. SREEKUNT DOSS *v.* RAMJEEBUN ROY
18 W. R. 312

196. ——— *Inadequacy of price—Irregularity indicating suspicions of fraud.* Where immoveable property of considerable value had been sold for R11 in a sale in execution of a decree for R17-11-0, and purchased benami by the execution-creditor in the name of a relative, and it was found that the judgment-debtor had not been informed of the sale :—*Held,* that all these circumstances taken together justified a suspicion of fraudulent deal ng, and that the judgment-debtor was entitled to recover his property on payment of the original due. GOBIND CHUNDER MOOKERJEE *v.* RAM KOMAL CHATTERJEE . **25 W. R. 364**

197. ——— *Inadequacy of price of property.* The market value of a property is not the value which ought to be taken as the standard at an auction sale in execution of a decree where the purchaser ordinarily gets neither a title nor the title-deeds as in a private sale, but only the right, title, and interest of the judgment-debtor at the time of sale. MEAH KHAN *v.* NARAIN CHUNDER CHOWDHRY . . . **18 W. R. 197**

198. ——— *Inadequacy of price—Substantial injury—Civil Procedure Code Act XIV of 1882), s. 311.* The relative cause and effectb etween a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. Where, upon an application to set aside a sale in execution of a decree, the material irregularity in the publication and conduct of the sale complained of was the notifying of an incumbrance which did not really exist, and which must, in the ordinary course of things lower the value of the property :—*Held,* that it might fairly be inferred that the irregularity in the conduct of the sale was the cause of the inadequacy of the price. *Macnaghten* v. *Mahabir Pershad Singh, I. L. R. 9 Calc. 656,* and *Lala Mobaruk Lal* v. *Secretary of State for India, I. L. R. 11 Calc. 200,* referred to. GUR BUKSH LALL *v.* JAWAHIR SINGH **I. L. R. 20 Calc. 599**

199. ——— *Civil Procedure Code (Act XIV of 1882), ss. 287, 311—Sale proclamation, contents of—Inadequacy of price.* The absence of specification in the sale-proclamation of the incumbrances to which a property advertised for sale is subject, and which are required by cl. (*c*) of s. 287 of the Civil Procedure Code to be specified, coupled with the fact that the value of the property as stated in the sale-proclamation was much below the proper price, amounts to a material misrepresentation, which must be treated as a material irregularity in publishing the sale, within the meaning of s. 311. *Saadatnand Khan* v. *Phul Kuar, 2 C. W. N. 550,* relied upon. Where a property, subject to incumbrances, was worth at least ninety thousand rupees and was sold only for forty thousand :—*Held,* that the judgment-debtor sustained a substantial injury. The fact that the inadequacy of price was the result of irregularity in publishing the sale may either be established by direct evidence or be inferred from the circumstances of the case. *Gur Buksh Lall* v. *Jawahir Singh, I. L. R. 20 Calc. 599,* and *Surnomoyee Debi* v. *Dakhina Ranjan Sanyal, I. L. R. 24 Calc. 291,* relied upon. MOTI LAUL ROY *v.* BHAWANI KUMARI DEBI (1902) . . **6 C. W. N. 836**

200. ——— **Confirmation of sale**—*Civil Procedure Code (Act XIV of 1882), ss. 310A, 311 and 312—Application to set aside sale—Application rejected—Confirmation of sale—Suit to set aside sale.* A judgment-debtor having applied under s. 310A of the Civil Procedure Code (Act XIV of 1882) to set aside an execution-sale, the application was rejected and the sale was confirmed under s. 312. Subsequently the judgment-debtor brought the present suit against the auction-purchaser, the judgment-creditor, and the assignee of the auction-purchaser, to set aside the sale. *Held,* that, where an order is passed under s. 312 confirming the sale, it is an order passed against the judgment-debtor, though no application under s. 311 has been made. Therefore, under the last paragraph of s. 312, no suit will lie to set aside the sale

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

on the ground of irregularity. DAMODAR BHAUSHET SONAR *v.* VINAYAK TRIMBAK (1901) **I. L. R. 26 Bom. 40**

201. ——— **Fraud**—*Civil Procedure Code (Act XIV of 1882), ss. 244 and 311—Execution-proceedings—Partition—Mortgage.* After a sale has been confirmed, an application to set it aside for fraud is maintainable under s. 244 of the Civil Procedure Code. *Malkarjan* v. *Narhari, I. L. R. 25 Bom. 337,* explained. A co-sharer, who has obtained a portion of the mortgaged properties on a partition after the execution of a mortgage-bond by the other co-sharers hypothecating their undivided shares in the said properties, and who has been made a party to the mortgage suit, is a necessary party to the execution-proceedings. The sale of his share of the property, held in execution of a decree obtained in his presence upon the mortgage-bond, is not a nullity, although he was not made a party to the execution-proceedings; but can be set aside in a proceeding properly set on foot for that purpose. *Ram Chundra Mukherjee* v. *Ranjit Singh, I. L. R. 27 Calc. 242,* referred to. GOLAM AHAD CHOWDHRY *v.* JUDHISTER CHUNDRA SHAHA (1902) . . **I. L. R. 30 Calc. 142; s.c. 7 C. W. N. 305**

202. ——— **Leave to bid**—*Civil Procedure Code, ss. 244, 294—Procedure—Suit to set aside sale in execution, on the ground that the real purchasers were the decree-holders, who had not obtained leave to bid—Proper remedy by application.* The plaintiff sued to set aside a sale of certain property in execution of a decree against him, on the grounds that the sale proceedings had been secretly brought about without the knowledge of the plaintiff, and that the certified auction-purchasers were *benamidars* for the decree-holders, who had not obtained permission to purchase. *Held,* that, under the above circumstances, the plaintiff's remedy was not by suit, but by application under s. 244 and the last clause of s. 294 of the Code of Civil Procedure. *Viraraghava Ayyangar* v. *Venkatacharyar, I. L. R. 5 Mad. 217; Viraghava* v. *Venkata, I. L. R. 16 Mad. 287; Chintamanrav Natu* v. *Vithabai, I. L. R. 11 Bom. 588; Genu* v. *Sakharam, I. L. R. 22 Bom. 271; Subbarayudu* v. *Kotayya, I. L. R. 15 Mad. 389; Mahomed Gazee Chowdhry* v. *Ram Loll Sen, I. L. R. 10 Calc. 757; Mohendro Narain Chaturaj* v. *Gopal Mondul, I. L. R. 17 Calc. 769; Prosuno Kumar Sanyal* v. *Kali Das Sanyal, I. L. R. 19 Calc. 683,* and *Bhuban Mohan Pal* v. *Nanda Lal Dey, I. L. R. 26 Calc. 324,* referred to. DURGA KUNWAR *v.* BALWANT SINGH (1901) . . . **I. L. R. 23 All. 478**

203. ——— **Postponement of sale**—*Civil Procedure Code (Act XIV of 1882), s. 311—Postponement of sale from proclaimed date, and subsequent sale without fresh proclamation—Waiver of fresh proclamation by judgment-debtor—Objection to sale, by other judgment-creditor, for want of proclamation—Sustainability.* *A,* the decree-holder in a suit, attached property of his judgment-debtor. *B,* the holder of another decree against the same judgment-debtor, brought the property to sale in execution of his decree. The sale was at first proclaimed for a certain date, but was twice postponed on the application of the judgment-debtor, who consented to waive the making of a fresh proclamation. *A* claimed to have the sale set aside on the ground of irregularity. *Held,* that a waiver by a judgment-debtor of a fresh proclamation after a sale has been adjourned does not necessarily prevent a judgment-creditor from objecting to a sale so held, on that ground. *Semble:* That the refusal by a Court to issue a fresh proclamation, if applied for by a judgment-creditor in such a case, would constitute a ground on which the regularity of the sale might be impeached. CHAKRAPANI CHETTIAR *v.* DHANJI SETTU (1900) . **I. L. R. 24 Mad. 311**

204. ——— *Civil Procedure Code (Act XIV of 1882), ss. 291, 311—Sale, adjournment of—Specification of hour—Irregularity in publishing and conducting sale—Inadequacy of price.* When a sale is adjourned, it is the duty of the Court to specify the date and hour of sale, notwithstanding that the adjournment is due to the application of the judgment-debtor. In the present case the sale-proclamation as originally published gave the 19th May as the date of sale and 12 A.M. as the hour; the sale was adjourned to the 26th May and no hour of sale was fixed, a further adjournment was obtained by the judgment-debtors on payment of 1,000 and the sale was fixed for the 21st July; again an adjournment was taken and the sale was fixed for the 22nd September, and subsequently on another adjournment being taken by the judgment-debtor the sale was fixed for the 24th November when the property was sold. The judgment-debtors waived fresh sale-proclamations on all these dates, and did not ask the Court to fix an hour. All these dates, *i.e.*, the 21st July, 22nd September and 24th November are days of sale in the district and 12 A.M. is the usual hour for sales to commence. The judgment-debtors complained of the non-specification of the hour in the order of the 19th of May adjourning the sale to the 26th of May. *Held,* that the sale not having taken place on the the 26th May there was no reasonable ground for holding that the irregularity in the order of the 22nd September resulted in substantial injury to the judgment-debtors. The law regarding irregularity in the publication of sale and inadequacy of price consequent thereto discussed. MAHABIR PERSHAD SINGH *v.* DHANUKHDARI SINGH (1904) **8 C. W. N. 686**

205. ——— *Civil Procedure Code (Act XIV of 1880), ss. 291, 311—Waiver—Estoppel—Adjournment on application of judgment-*

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

debtor—Fresh sale-proclamation. An application by a judgment-debtor for an adjournment of the sale "without issue of fresh proclamation and beat of drum" does not amount to a waiver preventing him from applying to set aside the sale held on the day adjourned on the ground that proclamation of sale was not served on each of the properties and consequently the sale fetched a low price, provided that when he presented his petition for adjournment he was ignorant of the fact that the proclamation had not been properly posted up on the various properties according to law. Such a waiver does not amount to a waiver of any fraud practised upon the judgment-debtor. *Giridhari Singh* v. *Hurdeo Narain Singh, L. R. 3 I. A. 220,* and *Arunachellam Chetti* v. *Arunachellam Chetti, L. R. 15 I. A. 171,* referred to. PREO LALL PAUL CHOWDHRY *v.* RADHIKA PROSAD PAUL CHOWDHRY (1901)

6 C. W. N. 42

206. ——— *Civil Procedure Code (Act XIV of 1882), ss. 291, 311—Waiver—Adjournment of sale at the instance of the judgment-debtor—Non-specification of hour.* When a sale is adjourned under s. 291, Civil Procedure Code, it is necessary to mention the hour of sale, and its non-specification is a material irregularity within the meaning of s. 311, Code of Civil Procedure. *Surnomoyee Debi* v. *Dakhina Ranjan Sanyal, I. L. R. 24 Calc. 291; Jamini Mohan* v. *Chandra Kumar Roy, 6 C. W. N. 44; Venkata Subbaraya Chetti* v. *Zamindar of Karvetinagar, I. L. R. 20 Mad. 159,* referred to. The fact that the judgment-debtor consents that the sale should be held without the issue of a fresh proclamation does not indicate that he waives the non-specification of the hour of the day to which the sale is adjourned, inasmuch as he has no control over the form of the order of the Court. To show that substantial injury was the result of the irregularity complained of, the judgment-debtor is only to show that there is reason for inferring that it was due to and resulted from material irregularity. *Surnomoyee Debi* v. *Dakhina Ranjan Sanyal, I. L. R. 24 Calc. 291; Macnaghten* v. *Mahabir Per-Ishad Singh, L. R. 16 I. A. 107;* and *Arunachellam Chetti* v. *Arunachellam Chetti, L. R. 15 I. A. 171,* referred to. BHIKARI MISRA *v.* RANI SURJA MONI PAT MAHA DAI (1901)

6 C. W. N. 48

207. Publication of proclamation—*Civil Procedure Code (Act XIV of 1882), ss. 287, 291, 311—Publication of sale-proclamation—Material irregularity.* Publication of a sale-proclamation upon the decree-holder's property, at a distance of some half-a-mile from the judgment-debtor's property, is a material irregularity in the publication of the sale. Where there is a series of short postponements of less than seven days, which, taken together, in the aggregate amount to more than seven days, a fresh proclamation of sale is necessary under s. 291. JAMINI MOHAN NUNDY *v.* CHANDRA KUMAR ROY (1901)

6 C. W. N. 44

208. Publishing and conducting sale—*Ground for setting aside sale—Civil Procedure Code (Act XIV of 1882), ss. 310A, 311.* It is not open to an applicant under s. 310A of the Civil Procedure Code to impugn the sale on the ground of irregularity in publishing and conducting it, a question which properly arises in an application under s. 311 of the Code. PHUL CHAND RAM *v.* NURSINGH PERSHAD MISSER (1899)

I. L. R. 28 Calc. 73

209. ——— **Receipt**—*Execution of decree—Joint decree—Sale in execution—Purchase by decree-holders—Receipt, for part of decretal money, given by one decree-holder on behalf of both—Sale set aside—Appeal—Civil Procedure Code, ss. 244, 294, 311.* Two persons holding a joint decree caused certain immoveable property of their judgment-debtor to be sold, and, having obtained permission to bid, themselves became the purchasers. The property was knocked down to the two decree-holders jointly. An application was then made, to the officer conducting the sale, by one of the decree-holders auction-purchasers, but purporting to act in the name of, and on behalf of, the other auction-purchaser as well, asking that the purchase-money should be set off against the amount due under the decree, and that to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of s. 294 of the Code of Civil Procedure. A receipt for the amount of the purchase-money was given to the officer conducting the sale, and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under s. 311 to the Subordinate Judge, asking to have the sale set aside. That application was rejected; but the Subordinate Judge, instead of confirming the sale, set it aside, on the ground that only one of the decree-holders auction-purchasers had put in the receipt under the second clause of s. 294, and directed a re-sale, and this notwithstanding that the other decree-holder admitted that the receipt had been presented on his behalf also. On appeal to the District Judge, the order of the Subordinate Judge was set aside, and an order passed confirming the sale. From this order the judgment-debtor appealed to the High Court, on the sole ground that no appeal lay to the District Judge. *Held,* that the order passed by the Subordinate Judge was appealable, as an order passed under s. 244 of the Code of Civil Procedure. MAKKA *v.* SRI RAM (1901) . . **I. L. R. 24 All. 108**

210. ——— **Non-payment of required portion of the purchase-money at date of sale**—*Execution of decree—Sale in execution—*

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SALE IN EXECUTION OF DECREE—*contd.*

17. SETTING ASIDE SALE—*contd.*

(*b*) IRREGULARITY—*contd.*

Irregularity Held, that the fact that an auction-purchaser at a sale held in execution of a decree did not pay the 2 per cent. of the purchase-money required by s. 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity, which would not affect the validity of the sale, unless it could be shown that substantial injury was thereby caused to the judgment-debtor. *Intizam Ali Khan* v. *Narain Singh, I. L. R. 5 All. 316*, declared to be no longer law. AHMAD BAKSH *v.* LALTA PRASAD (1905) . . . . **I. L. R. 28 All. 238**

211. ——— Jurisdiction.—*Sale, setting aside—Irregularity*—When a Court, in which an application for execution was pending, received an order from another Court under s. 273 of the Civil Procedure Code for attaching the decree and returned the order with an intimation that it did not contain information as to the amount of the decree and subsequently held the sale. *Held*, that the sale was invalid and was accordingly set aside. That it was not a mere irregularity as the Court had no jurisdiction to hold the sale. MANIK LAL SEAL *v.* BONOMALI MUKERJEE (1905) **10 C. W. N. 193**

212. ——— Value, statement of, if material—*Sale proclamation—Service, if should be in every part of the property—"Property."* The statement of the sale-proclamation of a value which proves to be inadequate is an irregularity, but not a material irregularity. Such statements are made without much consideration and it is well known that purchasers do not take serious notice of any statement in the sale-proclamation as to the value of the property to be sold. S. 274 of the Civil Procedure Code does not require that the sale-proclamation should be served in each of the villages comprised in the property to be sold. The word "property" in that section evidently refers to each "lot" to be sold separately from the rest. Though it is a sound rule to follow, *viz.*, to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to any person in or interested in the one, of what is publicly done in the other, the fact that the processes were not served in each does not necessarily constitute an infringement of the provisions of s. 274 of the Civil Procedure Code. *Tripura Sundari* v. *Durga Churn Pal, I. L. R. 11 Calc. 74*, referred to. *Pedro Antonio* v. *Jalbhoy Adeshir, I. L. R. 12 Bom. 368*, commented on. ABDUL KASHEM *v.* BENODE LAL DHONE (1907) . . . **12 C. W. N. 757**

213. ——— Absence of notice to judgment-debtor—*Decree—Execution of decree—Sale—Application to set aside sale on grounds of absence of notice and property sold at undervalue—Dismissal of application—Second appeal—"Publishing or conducting" sales, meaning of.* Certain property was sold in execution of a decree against the applicant. He applied to the Court seeking to have the sale set aside on the ground that no notice had been issued to the applicant under s. 248 of the Civil Procedure Code, 1882, and that in consequence the property was sold at an undervalue. The Court of first instance dismissed the application and the dismissal was upheld by the lower Appellate Court. On second appeal a preliminary objection was taken that the order dismissing the application fell under s. 312 of the Code and was not appealable. *Held*, that the application did not fall under s. 311 and the order dismissing the same did not come within s. 312 of the Code. *Held*, further, that the order fell under s. 244 (*c*) of the Code and was appealable as a decree. The question involved was "a question relating to the satisfaction of the decree" within the meaning of the clause. The non-issue of a notice to a party concerned is not a material irregularity in publishing or conducting the sales, within the meaning of s. 311 of the Civil Procedure Code (Act XIV of 1882). It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale. The words "publishing or conducting" in s. 311 of the Code refer respectively to the proclamation of sale under s. 287 and to the action of the officer by whom the sale was held. The sale took place eight years after the decree. *Held*, that as no notice was issued to the appellant the order of both the lower Courts must be reversed and the sale set aside. PARASHRAM *v.* BALMUKUND (1908) . **I. L. R. 32 Bom. 572**

(*c*) SUBSTANTIAL INJURY.

214. ——— Proof of substantial injury—*Civil Procedure Code, 1859, s. 256.* Even where material irregularity had occurred, as from non-issue of proclamation of sale, the party applying to set aside the sale on that ground was bound, under s. 256, Act VIII of 1859, to prove that he had sustained substantial injury thereby. JOY TARA DOSSI *v.* MAHOMED HOSSEIN **2 W. R. Mis. 2**

NILMONEE SHAHA *v.* RAM CHURN DEB **6 W. R. Mis. 45**

ABOOL MAHOMED *v.* SHIB DOOLAREE TEWAREE **11 W. R. 114**

LAEK RAM *v.* MOHESH DOSS . **12 W. R. 488**

NUJMOODDEEN AHMED *v.* ABDOOL AZEEZ **15 W. R. 95**

CHUNDER SEKHUR DEB *v.* JADUB CHUNDER SETT **19 W. R. 78**

SANWAL SINGH *v.* MAKHUN PANDEY **2 N. W. 143**

SHEO PROKASH MISSER *v.* HURDAI NARAIN **22 W. R. 550**

This now forms an express enactment in the Code.

215. ——— *Presumption as to irregularity and injury—Civil Procedure Code:*

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*contd.*

(c) SUBSTANTIAL INJURY—*contd.*

(Act XIV of 1882), s. 311. Where an application is made to set aside a sale in execution of a decree on the ground of irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former, in the absence of evidence to show that the injury is the result of the irregularity. *Macnaghten* v. *Mahabir Pershad Singh, I. L. R. 9 Calc. 656*, and *Lala Mobaruk Lal* v. *Secretary of State for India in Council, I. L. R. 11 Calc. 200*, discussed. SATISH CHUNDER RAI CHOWDHURI *v.* THOMAS
I. L. R. 11 Calc. 658

216. ———— *Presumption as to irregularity and injury—Civil Procedure Code (Act X of 1877), s. 311—Witnesses, laches in summoning.* On an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale, it appeared that there had been a material irregularity in publishing the sale ; but no witnesses were called to prove that substantial injury had been caused thereby. It also appeared that, seventeen days after the applicant had applied for proclamation to be issued to his witnesses, he deposited the requisite fees ; and that subsequently there was a delay of seven days in the office in issuing such proclamations, which were ultimately issued only three days prior to the day fixed for the hearing. On the applicant alleging that, in consequence of such delay, he had not been allowed a fair opportunity to produce his witnesses :—*Held*, that the Court cannot presume that substantial injury has been caused from the mere fact of there having been a material irregularity in publishing a sale ; but when both a material irregularity and substantial injury have been proved, the Court may reasonably presume that the substantial injury is due to such irregularity. *Held*, also, that the applicant, having been guilty of laches himself, could not be allowed to set up the delay in the office as a ground for the non-production of his witnesses. *Gopee Nath Dobay* v. *Roy Luchmeeput Singh, I. L. R. 3 Calc. 512*, considered. BONOMALI MOZUMDAR *v.* WOOMESH CHUNDER BUNDOPADHYA
I. L. R. 7 Calc. 730 : 9 C. L. R. 341

217. ———— *Civil Procedure Code, s. 311—Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting.* A judgment-debtor having allowed the execution-sale of immoveables to be completed without objecting on the ground afterwards alleged by him, *viz.*, insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more. No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *i.e.*, the alleged misdescription :—*Held*, that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. *Macnaghten* v. *Mahabir Pershad Singh, I. L. R. 9 Calc. 656*, referred to and followed. ARUNACHELLAM *v.* ARUNACHELLAM
I. L. R. 12 Mad. 19

218. ———— *Civil Procedure Code, 1882, ss. 290 and 311—Material irregularity—Proof of substantial injury.* The non-compliance with the requirement of s. 290 of the Civil Procedure Code that before sales of immoveables in execution of decree thirty days should intervene between proclamation and sale, is a material irregularity within the meaning of s. 311. But its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. As to this, the latter section requires affirmative evidence. TASADDUK RASUL KHAN *v.* AHMAD HUSAIN
I. L. R. 21 Calc. 66
L. R. 20 I. A. 176

219. ———— *Civil Procedure Code, 1882, s. 311—Application to set aside sale in execution—Proof of substantial injury.* It is not sufficient for an applicant under s. 311 of the Code of Civil Procedure to show that there has been material irregularity in publishing or conducting a sale, and that a price below the market value has been realized, but he must go on to connect the one with the other, that is, the loss with the irregularity as effect and cause, by means of direct evidence. *Tasadduk Rasul Khan* v. *Ahmad Husain, I. L. R. 21 Calc. 66*, referred to. JAGAN NATH *v.* MAKUND PRASAD
I. L. R. 18 All. 37

220. ———— *Civil Procedure Code, 1882, s. 311—Application to set aside sale in execution—Proof of substantial injury. Held*, that in an application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree, it is necessary for the applicant to show not only that there has been a material irregularity in publishing or conducting the sale, but also that substantial injury had been sustained in consequence of such material irregularity. *Arunachellam* v. *Arunachellam, I. L. R. 12 Mad. 19*, and *Tasadduk Rasul Khan* v. *Ahmed Husain, I. L. R. 21 Calc. 66*, referred to. SHIRIN BEGUM *v.* AGHA ALI KHAN
I. L. R. 18 All. 141

See also SURNOMOYEE DEBI *v.* DAKINA RANJAN SANYAL . . . **I. L. R. 24 Calc. 291**

and VENKATASUBBARAYA CHETTI *v.* ZAMINDAR OF KARVETINAGAR . **I. L. R. 20 Mad. 159**

221. ———— **Value of property**—*Civil Procedure Code (Act XIV of 1882), s. 311—Injury—Abwab.* In a proceeding arising out of an application under s. 311, Civil Procedure Code, the lower Court, in fixing the value of the property

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SALE IN EXECUTION OF DECREE— *contd.*

17. SETTING ASIDE SALE—*concld.*

(*c*) SUBSTANTIAL INJURY—*concld.*

took into consideration, not merely the rents realizable from the tenants, but also *abwabs* that used to be realised from them. *Held*, that *abwabs*, *i.e.*, illegal cesses, should not be taken into account. *Held*, also, that means loss which is injury wrongful; and, when a person loses what he has been in the habit of wrongfully gaining, it is not substantial injury or injury of any sort or kind. SHOSI BHUSAN SADHU *v.* AHMED HOSSEIN (1903) **7 C. W. N. 439**

(*d*) EXPENSES OF SALE.

222. ——— **Liability for expenses of sale**—*Sale set aside for irregularity.* Where an execution-sale was set aside, on the ground of irregularity on the part of the Ameen and other officials:—*Held*, that the judgment-debtor was not chargeable with the expenses of such sale. HULSE *v.* LUCHMUN DASS . . . . . **1 Agra Mis. 1**

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS.

(*a*) COMPENSATION.

1. ——— **Right to compensation for improvements on ejectment**—*Act XI of 1855, s. 2.* A purchaser at a Sheriff's sale was not entitled to compensation under Act XI of 1855, s. 2, for improvements to the land during his occupation if he had relied solely on the bill of sale. BHOYRUBNATH KHETTRY *v.* DOYALCHUNDER LAHA **Bourke O. C. 159**

2. ——— *Bonâ fide purchaser—Inquiry as to title—Act XI of 1855.* A person did not become a *bonâ fide* purchaser within the meaning of Act XI of 1855, unless he had made all reasonable enquiries as to the title. Enquiries from neighbours were not sufficient. When therefore a purchaser who had bought property on no further information than he could obtain from neighbours was ejected by one who showed a better title:—*Held*, that he was not entitled to compensation under Act XI of 1855. GOUR GOPAL DUTT *v.* BISSONATH GHOSE . . . **Cor. 41**

(*b*) RECOVERY OF PURCHASE-MONEY.

3. ——— **Right to refund of purchase-money**—*Mode of recovery—Civil Procedure Code, 1859, s. 258.* Under s. 258, Act VIII of 1859, when a sale of immoveable property is set aside, the purchaser is entitled to recover back his purchase-money. If the Court, reversing the sale, omit to make such order, the purchaser can sue to recover the money from the person who has received it. GREESH CHUNDER POTTAR *v.* LOOKHOODA MOYEE DABEE . . . . **1 W. R. 55**

DOOLHIN HUR NATH KOONWEREE *v.* BAIJOO OOJHA . . . . . **2 Agra 50**

SALE IN EXECUTION OF DECREE— *contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

4. ——— *Civil Procedure Code, 1859, s. 258.* When a sale of immoveable property in execution of a decree was set aside by a competent Court, the right of the purchaser to recover back his purchase-money, under s. 258, Act VIII of 1859, was absolute, even though he himself caused the property to be put up for sale, provided he was not guilty of any fraud or misrepresentation, or did not guarantee the validity of the sale under the decree. BROJENDUR ROY CHOWDHRY *v.* JUGURNATH ROY . . . . . **6 W. R. 147**

5. ——— *Subsequent reversal of decree on appeal.* The plaintiff purchased certain property at a sale under an execution upon a decree and paid the purchase-money. The purchase-money was applied partly in satisfying the decree-holder and partly in satisfying other persons admitted by the decree to participate. The decree was afterwards reversed upon appeal, and the execution-debtor reinstated in his rights. *Held*, that the plaintiff was not entitled to recover the purchase-money from the execution-debtor. CHOOLUN SINGH *v.* ROY MOHUNLALL MITTER . **Marsh. 183**

S.C. ROY MOHUN LALL MITTER *v.* CHOOLUN SINGH . . . . **1 Hay 438**

6. ——— *Civil Procedure Code (Act XIV of 1882), ss. 310A, 315—Application by a purchaser for refund of purchase-money—Madras City Civil Court, jurisdiction of.* A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought to sale, and the purchase-money was paid into the Madras City Civil Court. The sale was set aside under Civil Procedure Code, s. 310A. Part of the purchase-money was attached in execution of subsequent decree passed against the same defendant by the Small Cause Court, and was remitted to that Court under the attachment. On an application by the purchaser for the refund of the purchase-money by the various persons who had received portions thereof. *Held*, that the City Civil Court had jurisdiction to entertain the application. VIRASAMI CHETTI *v.* LILADHARA VYASS **I. L. R. 21 Mad. 398**

7. ——— *Sale set aside for want of interest of debtor in the property.* When a sale is set aside by reason of the execution-debtor having no interest in the property sold, the purchaser of such property is entitled to receive back his purchase-money as on a consideration that has failed. BANK OF HINDUSTAN, CHINA, AND JAPAN *v.* PREMCHAND RAICHAND. AHMEDBHAI HABIBHAI *v.* PREMCHAND RAICHAND **5 Bom. O. C. 83**

(*Contra*) KRISHNAPA VALAD SANTU *v.* PANCHAPA VALAD GURUPADAPA . **6 Bom. A. C. 258**

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SALE IN EXECUTION OF DECREE—*contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

KALU BIN VISAJI *v.* DAMODHAR GOBIND
9 Bom. 92

MAHOMED BASIRULLA *v.* ABDULLA
4 B. L. R. Ap. 35 : 15 W. R. 196 note

8. ——— *Proportionate share of purchase-money on portion of sale being set aside.* Where the plaintiff purchased at an auction-sale under a decree the rights and interests of a person and his minor brother in certain property, and the decree was subsequently set aside as far as it concerned the minor brother's share :—*Held*, that the purchaser was entitled to a refund of a proportionate share of the purchase-money, and that a decree for the same against the wrong-doers, the decree-holder and the judgment-debtor jointly, was a proper decree. NEEL KUNTH SAHEE *v.* ASMUN MATHO . . . . . **3 N. W. 67**

DOOLHIN HUR NATH KOONWEREE *v.* BAIJOO OOJHA . . . . . **2 Agra 50**

9. ——— *Want of interest of debtor—Right, title, and interest.* S. 258, Act VIII of 1859, only applied to cases where a sale of immoveable property had been set aside under circumstances which would, under Act VIII of 1859, authorized such a proceeding. The fact that the party whose right, title, and interest were sold had no interest at all or less than was supposed, was no ground for setting aside the sale or refunding the purchase-money. RAJIBLOCHUN *v.* BIMALAMANI DASSI . . . . . **2 B. L. R. A. C. 82**

S.C. RAJEEB LOCHUN SAWUNT *v.* MOHESSUREE DOSSEE . . . . . **10 W. R. 365**

10. ——— *Suit to recover purchase-money—Want of interest of debtor—Warranty of title—Liability of Sheriff and execution-creditor—Civil Procedure Code, 1859, s. 258—Irregularity in sale-proceedings.* A purchaser of property, whether immoveable or moveable, at a sale in execution of a decree under the Code of Civil Procedure, 1859, held in accordance with the provisions of that Code, had no right to recover his purchase-money, though it might turn out that the right, title, and interest of the execution-debtor was nothing at all, unless the sale itself be set aside, and the sale would not be set aside by reason merely of the defect or absence of title in the thing sold on the part of the execution-debtor ; but if there was an express assertion that the goods sold were the property of the execution-debtor, the Sheriff and the execution-debtor were bound by such warranty to the extent, at least, that one of them, in whose hands the purchase-money was, was bound to restore it to the purchaser, if the purchaser had not got that for which he paid. S. 258 of Act VIII of 1859 applied wherever a sale was set aside, whether for irregularity in publishing or conducting a sale or for other grounds ; and though the right of the purchaser to recover back his purchase-money, in case of the sale being set aside, was, by that Act, given expressly only where the sale was of immoveable property, yet the same consequence would follow where a sale of moveable property in execution had been set aside. Where therefore certain shares were attached by the execution-creditor as the property of the execution-debtor, and were afterwards sold in execution by the Sheriff, and the execution-orders and warrants and the Sheriff's proclamation of sale contained assertions of interest of the execution-debtor in these shares, whereas he had no such interest :—*Held*, that the purchaser at the execution-sale was entitled to have the sale set aside, and his purchase-money returned to him ; but the Sheriff's liability to the purchaser in such a case ceased so soon as he had paid over the proceeds of the sale to the execution-creditor, and the purchaser's remedy thereafter was against the execution-creditor only. *Bank of Hindustan* v. *Premchand Raichand, 5 Bom. O. C. 83*, commented upon. FRAMJI BESANJI DASTUR *v.* HORMASJI PESTANJI . . **I. L. R. 2 Bom. 258**

11. ——— *Suit to recover purchase-money when judgment-debtor had no interest—Act VIII of 1859, ss. 257, 258.* Where an auction-purchaser at a sale in execution of a decree bought the right, title, and interest of the judgment-debtor in the property sold in execution, and it was subsequently found that the judgment-debtor had no right, title, or interest whatever in the property, it was *held* that no suit would lie against the decree-holder of the judgment-debtor to recover back the money which the auction-purchaser had paid. Although a purchaser might, under s. 258 of Act VIII of 1859, recover his purchase-money, it was only when the sale was set aside for irregularity under s. 257. SOWDAMINI CHOWDHRAIN *v.* KRISHNA KISHORE PODDAR
4 B. L. R. F. B. 11 : 12 W. R. F. B. 8

See also RAJIBLOCHUN *v.* BIMALAMANI DASI
2 B. L. R. A. C. 82

12. ——— *Suit for refund of purchase-money for property bought at auction-sale in execution of decree—Uncancelled sale.* The plaintiff purchased at an auction-sale, in execution of a decree, the right, title, and interest of a judgment-debtor in certain property. The sale was confirmed on November 30, 1866. On proceeding to take possession, he was opposed by the defendant, who asserted that he was in possession of the property, and that it was his. In a suit under s. 258 Act VIII of 1859, for a refund of the purchase-money the sale still remaining uncancelled:—*Held*, that the suit must be dismissed ; that s. 258 of Act VIII of 1859 only applied to cases where the auction-sale had been cancelled ; that the proper course for the plaintiff to have pursued was to have brought a suit under s. 269 of Act VIII of 1859 for a declaration of the judgment-debtor's right

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SALE IN EXECUTION OF DECREE— *contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

title, and interest in the property. BISSESWAR PANDAY *v.* BHAGWAN DAS.
3 B. L. R. A. C. 301 : 12 W. R. 176

13. ——— *Want of interest in debtor—Civil Procedure Code, 1882, ss. 313, 315—Purchase of property where debtor has no saleable interest.* Under s. 313 of the Code of Civil Procedure, a purchaser at a sale in execution of a decree may resist the confirmation of the sale and prevent its conclusion, while under s. 315 he may apply, after the confirmation of the sale, for refund of the purchase-money on the ground that nothing passed by the sale. To entitle a purchaser, under paragraph 2 of s. 315 of the Code of Civil Procedure, to a refund of purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property which purported to be sold or that the purchaser should have obtained actual possession and have been deprived thereof. SIVARAMA *v.* RAMA . . . **I. L. R. 8 Mad. 99**

14. ——— *Suit by purchaser for purchase-money—Civil Procedure Code, 1882, ss. 313, 315—Debtor without saleable interest —Per* STRAIGHT, OLDFIELD, and TYRRELL, *JJ.*— That the words in s. 315 of the Civil Procedure Code, "no saleable interest" mean "nothing to sell," and are not intended to confine the cases in which a purchaser at an execution-sale shall be entitled to receive back his purchase-money, or to those in which the judgment-debtor, though having an interest, such interest is, by prohibition of law or for some other reason, unsaleable. *Held*, by the Full Bench, that a purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money, when it is found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315. MUNNA SINGH *v.* GAJADHAR SINGH . . . **I. L. R. 5 All. 577**

15. ——— *Purchaser deprived of property, judgment-debtor having no interest in it—Application for refund of purchase-money—Civil Procedure Code, 1877, s. 315.* Where immoveable property was sold in the execution of a decree under the provisions of Act VIII of 1859, and the auction-purchaser, having been subsequently deprived of such property, on the ground that the judgment-debtor had no saleable interest in it, applied, under s. 315 of Act X of 1877, to the Court executing such decree for the return of the purchase-money :—*Held*, that the Court could entertain the application. *In the matter of the petition of* MULO **I. L. R. 2 All. 299**

(*Contra*) HIRA LAL *v.* KARIMUNNISSA **I. L. R. 2 All. 780**

16. ——— *Collusion with judgment-debtor—Civil Procedure Code, 1882, s. 315.*

SALE IN EXECUTION OF DECREE— *contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

Upon an applicatoin for refund of purchase-money under s. 315 of the Code of Civil Procedure, the Munsif, being of opinion that the purchaser had in collusion with the judgment-debtor run up the price of the land at auction far beyond its value, with a view to prevent other property attached from being sold to satisfy the decree, rejected the application, except as to a sum of R50, which represented the alleged value of the judgment-debtor's interest in the land brought to sale by the decree-holder. *Held*, that, as the judgment-debtor was found to have no interest in the land, the purchaser was entitled to a refund of the money paid to the decree-holder. KUNHI MOIDIN *v.* TARAYAL MOIDIN . . **I. L. R. 8 Mad. 101**

17. ——— *Civil Procedure Code, 1877, s. 315—Suit to recover purchase-money where debtor is found to have no interest.* A purchaser at an auction sale of property found subsequently in a suit to which the decree-holder was a party to belong to a third party is entitled to recover back his purchase-money under s. 315 of the Civil Procedure Code, on the ground that the judgment-debtor had no saleable interest in the property sold. BENODE BEHARI NUNDI *v.* MOHESH CHUNDER GHOSE . . **12 C. L. R. 331**

18. ——— *Suit to recover purchase-money—Civil Procedure Code, ss. 313, 315—Want of saleable interest—Order confirming sale, effect of, on suit.* *P* bought certain land at a sale in execution of a decree. Before the purchase-money was paid, *P* applied to the Court by petition to set aside the sale, and returned the deposit money on the ground that the judgment-debtor had no saleable interest in the land. The Court rejected the petition and confirmed the sale on the 15th March 1881. The sale was subsequently set aside by a decree obtained by *V* in a suit against *P* and the judgment-creditor. *P* then sued the judgment-creditor to recover the purchase-money. The District Judge dismissed the suit on the ground that *P* was debarred from suing by the order of 15th March 1881. *Held*, that the order did not conclude *P* from bringing this suit. PACHAYAPPAN *v.* NARAYANA **I. L. R. 11 Mad. 269**

19. ——— *Civil Procedure Code, ss. 295, 315—Execution of decree—Suit by purchaser for return of purchase-money.* Where an auction-purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such pr ice has come as such person's rateable share of the assets of the judgment-debtor, under s. 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code. *Munna Singh* v. *Gajadhar Sing*,

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SALE IN EXECUTION OF DECREE—*contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

I. L. R. 5 All. 577, followed. KISHUN LALL *v.* MUHAMMAD SAFDAR ALI KHAN
I. L. R. 13 All. 383

20. ——— *Suit by the purchaser in execution-sale to recover the purchase-money—Civil Procedure Code (Act XIV of 1882), s. 315—Want of saleable interest.* The plaintiff purchased land sold in execution of a decree in favour of the defendant, but was subsequently evicted by the son of the judgment-debtor. He then sued in 1889 to recover the purchase-money paid by him, on the ground that the judgment-debtor possessed no saleable interest in the property in question. It appeared that the son of the judgment-debtor had obtained a decree in 1888 against the plaintiff and others declaring that she, the judgment-debtor, had no saleable interest in the property, and that in that suit the present defendant had given evidence in support of the present plaintiff's contention; the judgment in that suit was now admitted in evidence against the defendant. *Held*, that the judgment above referred to was not evidence against the defendant; that the suit should be dismissed on the ground that there was no legal evidence; that the judgment-debtor whose interest in the land had been purchased by the plaintiff possessed no legal interest therein. NILAKANTA *v.* IMAMSAHIB
I. L. R. 16 Mad. 361

21. ——— *Recovery of purchase-money—Portion of the property sold belonging to a stranger—Civil Procedure Code, 1882, ss. 313, 315, and 316—Rights of purchaser—Warranty of title.* Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by s. 315 of the Civil Procedure Code. The effect of ss. 313, 315 and 316 of the Code is that the right, title, and interest of the judgment-debtor passes to the purchaser at a Court-sale, subject, however, to the condition that the purchaser may recover back his purchase-money when he finds that the judgment-debtor has no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court-sales except so far as such extension is justified by the processual law in India, *viz.*, by s. 315 of the Civil Procedure Code. *Dorab Ally Khan* v. *Abdool Azeez, L. R. 5 I. A. 116*, followed. SUNDARA GOPALAN *v.* VENKATA VARADA AYYANGAR
I. L. R. 17 Mad. 228

22. ——— *Return of purchase-money when judgment-debtor found to have no saleable interest in property sold—Procedure for finding the fact of his having no interest—Notice to judgment-creditor—Parties—Civil Procedure Code, ss. 313, 315, and 622—Superintendent of High Court.* One *V* obtained a decree against *A*, and in execution sold certain land which was purchased by *E*, who got a certificate of sale, and obtained possession. Subsequently the land was claimed by one *B*, who sued *A*, the judgment-debtor, and *E*, the auction-purchaser, to set aside the sale and establish his title to the land. He succeeded in his suit, and in execution got possession of the land. Thereupon *E* (the auction-purchaser) applied, under s. 315 of the Civil Procedure Code (XIV of 1882), for a refund of his purchase-money, and the Subordinate Judge made an order directing *V*, the decree-holder, to repay it. *V* contended that he ought not to have been ordered to refund the money without having an opportunity of proving that the property had been properly sold in execution of his decree against *A*, and that, as he had not been made a party to *B's* suit, he had had no opportunity of doing this. On application to the High Court:—*Held*, that the order of the Subordinate Judge for the restitution of the purchase-money was wrong. S. 315 provides that the purchase-money paid at an execution-sale is to be returned when it is found that the judgment-debtor has no saleable interest in the property sold. It does not prescribe how the fact is to be ascertained, but the conclusion from s. 313 as well as from general principles is that it must be a finding on some proceedings to which the judgment-creditor was a party, or at any rate of which he had notice. In the present case there was no finding on which the Subordinate Judge could base his order for the restitution of the purchase-money. VITHOBA *v.* ESAT . . . **I. L. R. 18 Bom. 594**

23. ——— *Sale set aside—Suit by auction-purchaser to recover purchase-money—Civil Procedure Codes (Act VIII of 1859), ss. 256, 257, 258; (X of 1877) ss. 312, 315—Warranty Caveat emptor.* Certain immoveable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, *H*, as the property of his judgment-debtor. *W* objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor, but was endowed property. His objections were disallowed, and the property was put up for sale on the 20th July 1875 under the provisions of Act VIII of 1859, and was purchased by *K*. *W* subsequently sued *K* to establish his claim to the property and to have the sale set aside, and on the 18th August 1876 obtained a decree setting it aside. Thereupon *K* sued *H* to recover the purchase-money alleging a failure of consideration. *Held*, that the sale not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but having been set aside in favour of a third party who had established his title to the property, and there being no question of fraud or misrepresentation on the part of the decree-holder, the suit was not maintainable. *Rajib Lochun* v. *Bimalamoni Dasi, 2 B. L. R. A. C. 82;*

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SALE IN EXECUTION OF DECREE—*contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

and *Sowdamini Chowdhrain* v. *Krishna Kishore Poddar, 4 B. L. R. F. B. 11*, followed. *Makundi Lal* v. *Kaunsila, I. L. R. 1 All. 568 ; Neelkanth Sahee* v. *Asmun Matho, 3 N. W. 67 ;* and *Doolhin Hur Nath Koonweree* v. *Baijoo Oojha, 2 Agra 50*, distinguished. *Held*, also, that the auction-purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation. *In the matter of the petition of Mulo, I. L. R. 2 All. 299*, dissented from. *Per* STRAIGHT, *J.*—That, had the provisions of that section been applicable, instead of instituting a suit, the auction-purchaser should have applied for the return of her purchase-money in the execution of the decree. HIRA LAL *v.* KARIM-UN-NISA . . **I. L. R. 2 All. 780**

24. _____ *Sale by Sheriff under writ of fieri facias—Sale subsequently declared invalid—Suit to recover purchase-money—Liability of execution-creditor—Civil Procedure Code, 1859, ss. 201, 242.* The plaint in a suit by *A* against *B* stated that, in a suit which *B* had recovered judgment against *C*, a writ of *fi. fa.* was, on 18th June 1866, issued on the application of *B*, directing the Sheriff of Calcutta to levy the judgment-debt by seizure, and, if necessary, by sale, of the property of *C* in Bengal, Behar and Orissa, or in any other districts which were then annexed or made subject to the Presidency of Fort William in Bengal ; that the writ did not authorize the execution thereof against immoveable property in Oudh ; that under the writ the Sheriff, acting under instructions from *B*, seized and put up for sale the right, title, and interest of *C*, in a talukh in Oudh, which was purchased by *D*, to whom the Sheriff executed a bill of sale, and on receipt of the purchase-money paid a portion thereof to *B* and the balance to *C*, and put *D* into possession of the property, and he remained for some time in possession and in receipt of the rents and profits ; that eventually in proceedings in Oudh instituted by *D* for partition of the property purchased by him, the sale was pronounced to be null and void and was set aside, and *D* was removed from possession ; and that the plaintiff sued as the executor of *D* to recover the whole of the purchase-money from *B*. *Held*, on appeal, affirming the decision of PHEAR, *J.*, that the plaint disclosed no cause of action, first, because a purchaser who, after the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend, cannot recover the purchase-money from his vendors ; second, because the Sheriff was not the agent of *B* for the sale of the property, and therefore no privity of contract existed between *B* and *D* ; third, because *D* having been for some time in possession of the property and in receipt of the profits thereof, there had not been a total failure of consideration, and the plaintiff accordingly could not maintain the action in its present shape, *viz.*, for money had and received. The judgment of the High Court in *Bissessur Lall Sahoo* v. *Ramtuhul Singh, 11 B. L. R. 121*, explained by PHEAR, *J.*, and ss. 201 and 242 of Act VIII of 1859 observed upon. DORAB ALLY KHAN *v.* MOHEEOODDEEN

I. L. R. 1 Calc. 55 : 24 W. R. 372

In the same case on appeal to the Privy Council it was *held* as follows : A writ of *fieri facias* issued to the Sheriff authorizes him to seize the property of the execution-debtor which lies within his territorial jurisdiction and to pass the debtor's title to it without warranting that title to be good. But if the Sheriff acts *ultra vires*,—*e.g.*, if he seizes and sells property not within his jurisdiction,—he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell. Since there is not in India the difference between real and personal estate which obtains in England, and moveable and immoveable property there are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the Sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate. A Sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor who has received the purchase-money, if it should appear that the Sheriff has acted under his authority and by his express directions. DORAB ALLY KHAN *v.* EXECUTORS OF MOHEEOODDEEN

I. L. R. 3 Calc. 806

S.C. DORAB ALLY KHAN *v.* ABDOOL AZEEZ

L. R. 5 I. A. 116 : 2 C. L. R. 529

25. _____ *Payments of purchase-money on an agreement as to possession between purchaser and execution-creditor—Sale subsequently set aside—Suit for purchase-money—Accord and satisfaction.* On the 9th of October 1866 the Sheriff of Calcutta executed a bill of sale to *A* of a certain talukh situated in Oudh, of which *A* afterwards obtained possession. In consequence of an impression that the sale was illegal, *A* directed the Sheriff not to pay the money to *B*, the execution-creditor, and the money remained in the hands of the Sheriff until the 24th of October 1867, when *A* directed the payment of the money to *B* in consequence of an arrangement then come to between *A* and *B* to the effect that, if *A* should be ousted from the possession of the property within a year, *B*

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SALE IN EXECUTION OF DECREE—*contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

should take measures to reinstate him at his (*B's*) expense. *A* died without heirs in July 1868, and the Government of Oudh, not being aware that *A* had left a will, took possession of the talukh partly as on an escheat and partly because there were arrears of revenue due on the property. On the 2nd of October 1868 an order was passed by the Collector of the district in which the talukh was situate declaring the sale by the Sheriff illegal and directing the return of the talukh to its former owners, which was done in April 1869. In a suit brought by *A's* executors against *B* in September 1872 to recover the purchase-money as money had and received, as upon a total failure of consideration :—*Held*, that the agreement of the 24th of Octobor 1867 operated as an accord and satisfaction of all rights which *A* might have had to a return of the purchase-money or to damages, and that the only remedy which *A* had was an action on the agreement. *Held*, also, that no breach of the agreement of 24th of October 1867 had in fact occurred, and that, even if the agreement had been broken, the suit was barred by limitation. DORAB ALLY KHAN *v.* ABDOOL AZEEZ. ABDOOL AZEEZ *v.* DORAB ALLY KHAN
I. L. R. 6 Calc. 356

26. ——— *Purchase of surplus proceeds of revenue sale afterwards set aside —Suit to recover purchase-money—Voluntary payment.* An estate of which *R* was one of the registered shareholders was sold for arrears of revenue, and the amount realized, after deducting the arrears and the expenses of the sale, remained in deposit with the Collector. *S*, the holder of a decree against *R*, notwithstanding objections made by *R*, caused the interest of *R* in the surplus proceeds in the hands of the Collector to be attached and sold in execution of his decree. At the execution-sale *R's* interest was bought by *B* and from the money paid by him the judgment-debt of *S* and the debts of other judgment-creditors of *R* were satisfied. In the meanwhile *R* brought a suit to set aside the revenue sale of the estate, and obtained a decree in his favour in the High Court. *B* then applied to the Collector for *R's* share of the surplus proceeds, but his application was refused. In a suit by *B* against *R* to recover the price he had paid at the execution-sale :—*Held*, reversing the judgment of the High Court, that such a suit could not be maintained. RAM TUHUL SINGH *v.* BISESWAR LALL SAHOO
15 B. L. R. 208 : 23 W. R. 305
L. R. 2 I. A. 131

Reversing the judgment of the High Court in BISSESSUR LALL SAHOO *v.* RAM TUHUL SINGH
11 B. L. R. 121 : 19 W. R. 351

27. ——— *Suit to recover purchase-money when sale is set aside—Minor—Costs—Fraud.* A decree-holder fraudulently caused the sale in execution of his decree of certain immoveable property belonging to a minor. The minor brought a suit for a declaration that such sale was invalid and obtained possession of the property from the auction-purchaser. The auction-purchaser sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held per* PEARSON, TURNER, SPANKIE, and OLDFIELD, *JJ.*, it being found that the auction-purchaser was not a party to, or cognizant of, the fraud on the part of the decree-holder, that neither the mere fact that the auction-purchaser knew that he was purchasing the property of a minor, nor the mere fact that he did not ascertain whether or not the sale was justified by the terms of the decree, disentitled him to recover the purchase-money from the decree-holder. *Held*, also, that, being innocent of fraud and having purchased in the *bonâ fide* belief that the property of the minor was saleable, he was entitled to recover the purchase-money. *Kelly* v. *Gobind Das, 6 N. W. 168*, distinguished. *Held*, also, that he could not recover the costs incurred by him in defending the suit brought by the minor, being a suit he ought not to have defended. *Per* STUART, *C.J.*—That the auction-purchaser, being guilty of fraud, was not entitled to recover the purchase-money, and, assuming that he was innocent of fraud, that, having purchased with the knowledge that the property was the property of a minor and without ascertaining that the sale was justified by the terms of the decree, he could not recover the purchase-money. MAKUDNI LALL *v.* KAUNSILA. **I. L. R. 1 All. 568**

28. ——— *Decree passed without jurisdiction—Suit to recover possession of lands sold in execution.* The plaintiff sued to establish his right to, and to recover certain lands in, the possession of which he had been obstructed by the defendant. The plaintiff purchased the lands at a sale held in execution of a decree obtained against the first and second defendants in the Court of the District Munsif of Tripassore. The sale was directed by the District Munsif of Tripassore. Between the date of the decree and the sale, the village in which the lands were situated was transferred from the jurisdiction of the District Munsif of Tripassore to the District Munsif of Conjeveram. *Held*, that the sale was a nullity and conferred no title upon the plaintiff, but that the plaintiff was entitled to recover from the first and second defendants the amount of the purchase-money paid by him. NARAYANA SAWMY NAICK *v.* SARAVANA MUDALY . . . **6 Mad. 58**

29. ——— *Civil Procedure Code, 1859, ss. 256, 258—Right on sale being set aside for irregularity—Right to recover money expended for benefit of indigo factory.* When a sale is set aside under Act VIII of 1859, s. 256, where the purchaser had, before the sale was confirmed, taken possession, laid out money, and received rents

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SALE IN EXECUTION OF DECREE— *contd.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*contd.*

(*b*) RECOVERY OF PURCHASE-MONEY—*contd.*

or profits, and he is turned out some time after by reason of such reversal of sale, he should get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon, and should account to the judgment-debtor for the profits received by him. At the same time it would depend upon the circumstances under which the purchaser took possession, and the nature of his outlay, whether he ought in equity to be allowed to claim reimbursement of the money expended by him. Where a purchaser *bonâ fide* took possession of the property, and from time to time laid out money thereon, because he thought that otherwise from its peculiar nature it would become even worse than valueless (*e.g.*, making advances in an indigo concern lest the opportunity of the season should pass away), it was *held* that he was entitled to have it made a condition of setting aside the sale that he be repaid so much of the outlay as he could show was beneficial to the estate; he accounting for the rents and profits realized by him. MORGAN *v.* ABDOOL HYE **23 W. R. 393**

Confirming order setting aside sale. ABDOOL HYE *v.* MACRAE . . . **23 W. R. 1**

30. ———— *Suit by purchaser for interest on purchase-money—Act VIII of 1859—Act X of 1877, s. 315.* A judgment-debtor, whose property had been sold in execution of a decree under Act VIII of 1859, appealed from the order disallowing his application to set aside the sale, after Act X of 1877 (Civil Procedure Code) came into force. The Appellate Court set aside the sale. The purchaser sued the decree-holder for interest on the purchase-money and the expenses of the sale, the purchase-money having been returned to him, under the order of the Court executing the decree, without interest and less such expenses. *Held* by the Full Bench, that the provisions of Act X of 1877, and not of Act VIII of 1859, were applicable to the determination of the matter in dispute in the suit. *Held*, by the Divisional Bench (STRAIGHT and TYRRELL, *JJ.*), that, with reference to the ruling of the Full Bench, the suit was maintainable. *Held*, also, by the Divisional Bench, that, under the circumstances of the case, the plaintiff ought not to be granted the relief sought. RAGHUBAR DAYAL *v.* BANK OF UPPER INDIA . **I. L. R. 5 All. 364**

31. ———— *Civil Procedure Code (Act XIV of 1882), ss. 11, 315—Refund of purchase-money when judgment-debtor has no saleable interest in the property sold—Suit for such refund, whether maintainable—Remedy.* S. 315 of the Code of Civil Procedure is not exhaustive, and does not confine an execution purchaser to the special remedy provided by that section; and a suit lies, under s. 11 of the Code, for a claim to get a refund of the purchase-money, when the judgment-debtor is found to have no saleable interest in the property sold. *Munna Singh* v. *Gajadhar Singh, I. L. R. 5 All. 577; Kishun Lal* v. *Muhammad Safdar Ali Khan, I. L. R. 13 All. 383; and Pachayappan* v. *Narayana, I. L. R. 11 Mad. 269*, referred to. HARI DOYAL SINGH ROY *v.* SHEIKH SAMSUDDIN (1900). **5 C. W. N. 240**

SALE IN EXECUTION OF DECREE— *concld.*

18. SETTING ASIDE SALE—RIGHTS OF PURCHASERS—*concld.*

(*b*) RECOVERY OF PURCHASE-MONEY—*concld.*

32. ———— *Decree—Conditions of sale—Title, abstract of, not corresponding with original—Setting aside sale, application for—Purchase-money, return of.* A purchaser of property at the Registrar's sale in execution of a mortgage-decree accepted the conditions of sale, whereby he was required to furnish requisitions within ten days after the actual delivery of the abstract of title. The purchaser did not furnish any requisitions. On the 19th August, 1899, by an order of the Court the purchaser was to pay the balance of the purchase-money into Court (he having already made deposit), without prejudice to his right to raise any question as to title or compensation. On the 31st August, 1899, the purchaser paid the balance of the purchase-money, in compliance with the order of the 19th August, 1899. On the 26th April, 1900, the purchaser applied for annulment of the sale or for compensation. On the 30th August, 1900, the sale was set aside, but that order was reversed on appeal on the 28th February, 1902. After the order of the 28th February, 1902, the purchaser asked for inspection of the title-deeds in order to compare them with the abstract and, upon having certain Persian writing, which he discovered amongst them, read by an expert, found that the abstract of title did not correspond with the original documents of title. The purchaser then having applied to have the sale set aside and his purchase-money refunded:—*Held*, that the purchaser, though he had not furnished his requisitions within the time allowed by the conditions of sale, was not debarred from applying to the Court to set aside the sale on the ground that the abstract was incorrect and contained a material misdescription; and that he was, under the circumstances, entitled to have his purchase-money refunded. *In re Banister, L. R. 12 Ch. D. 131, 150; M'Culloch* v. *Gregory, 1 Kay and J. 286; Else* v. *Else, L. R. 13 Eq. 196; Upendra Nath Mitter* v. *Obhoy Kali Dassee, 5 C. W. N. 593*, referred to. AGHORE NATH MOOKERJEE *v.* ADMINISTRATOR-GENERAL OF BENGAL (1903) **I. L. R. 30 Calc. 468**

SALE OF GOODS.

See CONTRACT—BREACH OF CONTRACT.
See CONTRACT ACT (IX of 1872), s. 73.
15 B. L. R. 276

See CONTRACT ACT (IX of 1872), s. 78.
I. L. R. 4 Calc. 801
I. L. R. 15 Calc. 1

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION—BREACH OF CONTRACT . . **7 C. W. N. 912**

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SALE OF GOODS—*contd.*

See LIEN . . I. L. R. 18 Calc. 573
L. R. 18 I. A. 78

See PRINCIPAL AND AGENT—COMMISSION AGENTS . I. L. R. 16 Mad. 238
I. L. R. 17 Bom. 520
I. L. R. 20 Mad. 97

See SHIPMENTS . . 5 B. L. R. 619

——— agreement for—

See STAMP ACT, 1879, SCH. I, ART. 46.
I. L. R. 14 Bom. 102

See STAMP ACT, 1879, SCH. II, ART. 2.
I. L. R. 10 Mad. 27
I. L. R. 15 Mad. 150

——— by description—

See CONTRACT . I. L. R. 36 Calc. 736

——— note or memorandum of—

See STAMP ACT, 1879, SCH. I, ART. 46.
I. L. R. 14 Bom. 102

1. ——— Appropriation to vendee—*Passing of property to vendee—Bankruptcy of agents for purchase—Unpaid vendor—Stoppage in transit—Termination of transit—Goods landed in dock and held by dock authorities—Bom. Act VI of 1879, ss. 43, 62—Port Trustees of Bombay—Bye-laws of Port Trust, rule 59.* In August 1890 the plaintiffs, through *B, A & Co.*, of Bombay, ordered from *B, R & Co.*, in London, 100 bales of grey shirtings at 7*s.* 10*d.* per piece f. o. b., November-December shipment. In order to carry out this order, *B, R & Co.*, purchased goods of the required description from *D & Co.*, of Manchester. The heading of the invoice of the goods supplied by *D & Co.*, contained these words: "Proceeds to be remitted to *B, R & Co.*, London, specifically for the protection of their acceptances of *G & R D's* draft against this or any of these shipments," and the letter addressed by *D & Co.* to *B, R & Co.* forwarding draft contained the following clause: "It is understood that the proceeds of the goods are to be remitted to be held by you specifically for the protection of the enclosed bill, or any other of your acceptances of our drafts against such shipments, which please confirm." To this letter *B, R & Co.* replied: "We confirm the arrangements between us as to the disposal of remittances and against the shipments." The bales were duly marked with the plaintiffs' mark by direction of *B, R & Co.*, and were to be delivered f. o. b. at Liverpool. *D & Co.* accordingly despatched the 100 bales to Liverpool, and there *B, R & Co.* had them shipped in eight different vessels, *viz.*, 13 bales in each of the four steamers *Nubia, Clan Drummond, Inchulva*, and *Roumania*, and 12 bales in each of the ships *Hispania, Eden Hall, City of Edinburgh*, and *Wistow Hall*. The 100 bales were consigned to Bombay by *B, R & Co.* in their own name, the bills of lading being made out to "their order or to his or their assigns." *B, R & Co.* paid the freight at Liverpool and effected insurance on the plaintiffs' behalf. All the shipments were made before the 1st December 1890, except the 12 bales by the *Wistow Hall*, which were shipped on that day. On the several shipments being affected, *B, R & Co.*, accepted bills of *D & Co.*, payable three months after date. The bills of lading of the bales shipped in the *Nubia, Clan Drummond*, and *Hispania* were endorsed in blank by *B, R & Co.*, and sent by post to *B, A & Co.*, of Bombay. The *Nubia* arrived at Bombay in November, and the plaintiffs received the 13 bales shipped by her, *B, A & Co.* having endorsed the bill of lading to the plaintiffs. No specific payment was made by the plaintiffs in respect of these bales, but at that time they had a sum standing to their credit in the books of *B, A & Co.* The invoices of 25 more bales, *viz.*, 13 bales *ex Clan Drummond* and 12 bales *ex Hispania*, arrived in Bombay later in November, and were handed to the plaintiffs. On the 1st December 1890 the plaintiffs paid R25,000 to *B, A & Co.* Neither the *Clan Drummond* nor the *Hispania* had then arrived in Bombay. On the 4th December 1890 *B, R & Co.* suspended payment, and on that day a receiving order was made vesting their assests in the first defendant, *W*; and on the next day *P* was appointed special manager of the estate under s. 12 of the English Bankruptcy Act (Stat. 46 & 47 Vict., c. 52). At that time the bills of lading for the remaining 62 bales were still with *B, R & Co.*, who then handed them over to *P*. On the same 5th December 1890 *B, A & Co.* suspended payment in Bombay. On the 13th December 1890 *D & Co.* telegraphed to their agents in Bombay, *R, S & Co.*, directing them to stop the goods in transit, including the 25 bales *ex Clan Drummond* and *Hispania*. On the 15th December *R, S & Co.*, on behalf of *D & Co.*, gave notice to the agents of the *Hispania* to stop the 12 bales on board that vessel. Previously to that notice, however, the bales had been landed in the dock at Bombay. They then gave the dock authorities notices, but at that time the ships' agents had already given the plaintiffs a delivery order for the goods. On the same day, *viz.*, 15th December, *R, S & Co.* gave notice to the agents of the *Clan Drummond* to stop the 13 bales on board. These bales had not then been landed, and were then still on board. The other five steamers with the remaining 62 bales duly arrived in Bombay and went into dock. On the 22nd January 1891 the *Roumania*, the *City of Edinburgh*, and the *Wistow Hall* had landed all the bales which they had on board. The *Eden Hall* had landed 9 out of the 12 which she had brought, leaving 3 still to be discharged, and the *Inchulva* had not landed any of her bales, the whole 13 being still on board. On that day (2nd January 1891) *R. S & Co.*, on behalf of *D & Co.*, wrote to the several agents of the above steamers notices of stoppage in transit of the above bales, except in the case of the *Wistow Hall*, in respect of which no notice was sent. These notices was all delivered on the 3rd January 1891. *Held*, (i) on the evidence, that the payment of the R25,000 by the plaintiffs to *B, A & Co.* in Bombay was a payment for and on account of the 100 bales. In respect of transactions before bankruptcy, a payment to *B, A & Co.* was a payment to *B, R & Co*; but if that were not so, *B, A & Co.* were

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SALE OF GOODS—*contd.*

agents to receive payment. (ii) That on the goods being shipped at Liverpool, if not at an earlier date, the property in them passed from *D & Co.* to *B, R & Co.*, and from the latter, by reason of the plaintiffs' contract with *B, R & Co.*, to the plaintiffs,—*B, R & Co.* having, by holding the bills of lading, the constructive possessions of the goods and the legal right to their actual possession, and to retain the same until their price was paid by the plaintiffs with the charges. (iii) That the plaintiffs were entitled, as against the representatives of *B, R & Co.* and *B, A & Co.* in bankruptcy, to the bills of lading and the goods represented by them without further payment. *R, S & Co.*, as agents of the Official Receiver, had not therefore the right to with hold the bills of lading of any of these bales from the plaintiffs. (iv) On the evidence, that when *D & Co.* forwarded the goods to *B, R & Co.* at Liverpool, they really started the goods on their voyage to Bombay, and that the transit lasted until the bales were " at home " in Bombay. Until then the right of *D & Co.* to stop the goods in transit lasted. (v) That effectual notice on behalf of *D & Co.* to stop in transit was given in respect of the 13 bales *ex Roumania* by the notice sent by *R, S & Co.* on the 15th December 1890. The general notice given on that day to the agents of the *Roumania* not only as to specific bales, but as to any other bales shipped on account of *G* and *R D* to *B, A & Co.*, although indefinite, covered the shipment by the *Roumania*, and was given in time to prevent the bales on board that ship from reaching " home." (vi) That effectual notice by *R, S & Co.* on behalf of *D & Co.* to stop in transit was given in respect of the 13 bales *ex Inchulva* and the 3 bales (out of the 12) *ex Eden Hall* which were still on board and undischarged at the date of the notice of the 2nd January 1891. (vii) As to the 12 bales *ex Hispania* landed prior to the notice of the 15th December and as to the 12 bales *ex City of Edinburgh* and the 9 (out of the 12) *ex Eden Hall* landed before the notice of the 2nd January 1891, and as to the 12 *ex Wistow Hall*, in respect of which no notice at all was given, that the plaintiffs were entitled to them. (viii) That the goods ceased to be in transit when landed in dock in Bombay. LILLADHAR JAIRAM NARRANJI *v.* WREFORD.

I. L. R. 17 Bom. 62

2. ——— ——— *Promissory note accepted by vendor for value of goods—Suit for the price of goods sold and delivered and not on the notes—Maintainability—Partnership—Promissory note signed by one of two partners for the price of goods purchased—Suit by vendor against both partners, based on the original contract—Liability of both partners.* Plaintiffs had sold and delivered opium to defendants on different occasions, taking a promissory note at each sale for the value of the parcel sold. These promissory notes had been signed by one of two partners; they were made payable on demand to plaintiffs or their order; and they had not been negotiated. Plaintiffs now sued all the partners for the amount due, framing the suit as one for the price of goods sold and delivered, and not basing it on the notes. The partner who had not signed the notes contended that the suit did not lie as framed,

SALE OF GOODS—*concld.*

and that it should have been brought on the notes and not for the goods sold and delivered. *Held*, that plaintiffs were entitled to sue for the price of the goods sold and delivered, and that both of the partners were liable. DARGAVARAPU SARRAPU *v.* RAMPRATAPU (1901) . . **I. L. R. 25 Mad. 580**

SALE-PROCEEDS.

See APPEAL—EXECUTION OF DECREE—PARTIES TO SUITS.
B. L. R. Sup. Vol. 13; 927

See SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE.

See SALE FOR ARREARS OF REVENUE—SALE-PROCEEDS.

——— **application of—**

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 30 Calc. 953

——— **distribution of—**

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 29 Calc. 803

See SALE IN EXECUTION OF DECREE—DISTRIBUTION OF SALE-PROCEEDS.

——— **suit for refund of—**

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE . **W. R. F. B. 180**
I. L. R. 12 All. 546

——— **suit to recover surplus—**

See LIMITATION ACT, 1877, s. 10.
I. L. R. 18 Calc. 234

See LIMITATION ACT 1877, SCH. II—

ART. 29	**I. L. R. 30 Calc. 440**
ART. 62 .	**I. L. R. 18 Calc. 234**
ART. 120 .	**I. L. R. 20 Calc. 51**
ART. 132 . .	**5 C. W. N. 356**
ART. 145	**I. L. R. 18 Calc. 234**

See MORTGAGE—POWER OF SALE.
I. L. R. 16 Bom. 141

——— **right of Government to—**

See PAUPER SUIT—SUITS.
I. L. R. 1 All. 596

——— **taking out of Court—**

See LIMITATION ACT, 1877, ART. 179—STEP IN AID OF EXECUTION—SUIT AND OTHER PROCEEDINGS BY DECREE-HOLDERS . . . **6 W. R. Mis. 49**
15 W. R. 182
I. L. R. 6 All. 366
I. L. R. 10 Calc. 549
I. L. R. 17 Mad. 165
I. L. R. 22 Bom. 340

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SALE PROCLAMATION.

See EXECUTION . I. L. R. 33 Calc. 666

See SALE IN EXECUTION OF DECREE—IRREGULARITY.

SALSETTE.

——— Law applicable in—*Christian inhabitants of the Island of Salsette—Converts from Hinduism to Christianity—Succession to property before Succession Act—Primogeniture—Hindu law, how far applicable—Manager of family—Mortgage by manager when binding on family property—Suit for redemption of mortgage—Sale in execution of decree—Purchaser, rights of—Power of Christian inhabitant of Salsette to make a will dealing with his share in ancestral property.* The law of a conquered territory continues in force until altered by the Crown or the Legislature. The Island of Salsette was conquered from the Marathas by the British in 1774, and the law of succession for the Christian inhabitants of the island remained unaltered until the passing of the Indian Succession Act (X of 1865). Until that Act was passed, the law of primogeniture was not in force among the Christian inhabitants of Salsette. In the absence of a widow and daughter, the sons took the property of their father in equal shares. *Quære:* Whether they did so under the Hindu law or the Portuguese law, or by force of usage existing among them. A mortgage of certain property was made in 1875 by the eldest of three brothers *P*, *M*, and *E*, who were Christian inhabitants of the Island of Salsette. They had inherited the property from their father, who died in 1840. The family had originally been a Hindu family, but had been converted to Christianity. *E* died in 1876, and *M* died in 1883, bequeathing his interest in the property to his nephew, the plaintiff, who was *P's* son. In that year (1883) the mortgagee sued *P* alone upon the mortgage and obtained a decree which he afterwards assigned to the defendant, who sold the mortgaged property in execution of the decree, and at the sale purchased the property himself. The plaintiff now sued to redeem the property, and the question arose (1) whether, under the law applicable to Christian inhabitants of Salsette, the eldest brother *P* had succeeded on the father's death to the whole of the family property, and (2) if not, then to what extent the mortgage in question bound the property of the family. *Held*, (i) that the law of primogeniture prior to the passing of the Indian Succession Act (X of 1865) did not exist among the Christian inhabitants of Salsette, and that *P*, although eldest son, had not succeeded to the whole of the family property. He and his brothers took equal shares in the property of their father. (ii) That the mortgage by *P* had been authorized by the family and was for family purposes, and was binding upon the family property. Although *P* and his brothers could not be regarded as co-parceners under Hindu law, yet, having regard to the fact that they were descendants of converts from Hinduism, among whom Hindu usages largely prevailed, the question should be treated in much the same way as if the family was still a Hindu family, and the Court would not require the same direct

SALSETTE—*concld.*

proof of the manager's authority to mortgage as it would in the case of an English manager under similar circumstances. (iii) That the plaintiff was not entitled to redeem. What was intended to be sold at the sale held in execution of the decree upon the mortgage was the whole interest in the mortgaged property. The defendant purchased that interest, subject to the right of the plaintiff to show that his share derived from *M* was not bound by the mortgage, and he had failed to do so. *M's* share as well as *P's* had passed by the sale. (iv) A member of the Christian community of the Island of Salsette is entitled to deal with his share in ancestral property by will. JALBHAI ARDESHIR SHET *v.* MANOEL . . I L. R. 19 Bom. 680

SALT.

See SALT ACTS AND REGULATIONS.

——— position of peon of Salt Department—

See PUBLIC SERVANT.
I. L. R. 28 Calc. 344

——— search for contraband—

See ESCAPE FROM CUSTODY.
I. L. R. 19 Mad. 310

SALT ACT.

See SALT ACTS AND REGULATIONS.

——— breach of—

See SENTENCE—IMPRISONMENT—IMPRISONMENT IN DEFAULT OF FINE.
I. L. R. 4 Mad. 335, 335 note
5 Bom. Cr. 61

SALT ACT (XII OF 1882).

——— s. 11—*Limitation prescribed for charging with offence—Fraud in concealing date of offence.* The provisions of s. 18 of the Limitation Act of 1877 do not apply to criminal cases, and the peremptory terms of s. 11 of the Indian Salt Act (XII of 1882) are not affected by that section. QUEEN-EMPRESS *v.* NAGESHAPPA PAI
I. L. R. 20 Bom. 543

SALT, ACTS AND REGULATIONS RELATING TO.

Col.
1. BENGAL 11506
2. MADRAS 11508
3. BOMBAY 11509

1. BENGAL.

1. ——— Beng. Reg. X of 1819, s. 36—*Possession of salt—Arrangement by Government.* The absence of a protective document makes salt contraband. But where the Government has made such an arrangement with a particular party as places him in possession of a large quantity of salt, the element and condition which give a Salt officer the jurisdiction to seize salt in the absence of a protective document are wanting. KOOMARNARAIN ROY *v.* SUPERINTENDENT OF SALT CHOWKEY, JULLESSUR . . . . . 1 Hay 247

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SALT, ACTS AND REGULATIONS RELATING TO—*contd.*

1. BENGAL—*contd.*

2. ———— **Beng. Act VII of 1864, ss. 12 and 16**—*Confiscation of salt found without rowana or pass—Intention to sell.* If salt exceeding five seers is found within the limits prescribed by s. 12 of Bengal Act VII of 1864, unprotected by a *rowana* or pass, the salt is contraband and liable to seizure, and the parties transporting it are punishable under s. 16. It matters not whether any attempt or intention to sell is proved or not. QUEEN *v.* OFATULLA . . **6 B. L. R. 381**

S.C. GOVERNMENT OF BENGAL *v.* AKATOOLLAH **15 W. R Cr. 21**

3. ———— **s. 16**—*Rowana, endorsement of, by police or customs officers.* A rowana as defined by Bengal Act VII of 1864 is complete on the face of it without any certificate by way of endorsement signed by the Superintendent showing that the endorsement made by the preventive officers of customs has been examined by him. S. 16 of Act VII only gives power to fine when the salt is not specified in a rowana. *In the matter of the petition of* KISHORY MOHUN PRAMANICK . **23 W. R. Cr. 6**

4. ———— *Salt carried partly by land and partly by water.* Where a person who had taken a quantity of salt under a rowana for transit from Calcutta to his golah, part of the journey to be performed by water and part by land, conveyed a portion of it to his golah where the rowana was, and was conveying the rest in two separate batches by land, it was *held* that he could not be convicted under Bengal Act VII of 1864, s. 16. QUEEN *v.* CHUNDEE CHURN DASS **22 W. R. Cr. 71**

5. ———— **ss. 16 and 18**—*Possession of contraband salt.* In a case of conviction under s. 16, Bengal Act VII of 1864, for having in possession contraband salt, the Sessions Judge recommended that it should be set aside on the ground that the salt had already reached its destination, and was not *en route*; s. 18 consequently not applying. The High Court set aside the conviction accordingly. QUEEN *v.* CHUNDRO MOHUN BHOOYA **22 W. R. Cr. 82**

6. ———— **ss. 16 and 21**—*Possession and sale of salt.* *A* was convicted under s. 16, Bengal Act VII of 1864, and *B* under s. 21 of the same Act; the former with having had in his possession salt not covered by a rowana, and the latter with having sold to *A* the said salt. *Held*, that the conviction of *A* under s. 16 was illegal, the salt in his possession having been a portion of salt for which *B* had taken out a rowana, but that the conviction of *B* under s. 21 was proper, as he had failed to certify the salt sold by him to *A* on the back of the rowana. *In the matter of the petition of* BHAGBUT DEY . . . **18 W. R. Cr. 64**

7. ———— **s. 17**—*Infliction of penalty on owner and servant.* In a case of conviction, under Act VII of 1864, of having in possession contraband salt, the penalty cannot be inflicted on the owner of the salt and also on the servant or gomashta of

SALT, ACTS AND REGULATIONS RELATING TO—*contd.*

1. BENGAL—*concld.*

the owner who has the salt in his possession, as the possession of the latter is the possession of the former. *In the matter of the petition of* GUNGADHUR SAHOO . . . . **22 W. R. Cr. 9**

8. ———— **s. 18**—*Confiscation of salt—Power of releasing from confiscation.* By s. 18, Bengal Act VII of 1864, salt, not being conveyed by the route and to the place prescribed in the rowana, becomes absolutely confiscated. The power of releasing any such salt is vested in the Board of Revenue under s. 39 and not in the Magistrate. QUEEN *v.* BOIDONATH . . **7 W. R. Cr. 48**

9. ———— *Conviction of both principal and agent.* The High Court in this case upheld the conviction by the Magistrate, under Bengal Act VII of 1864, s. 18, both of the owner of contraband salt and of his agent who was transporting the salt, and declined to direct the Magistrate to pass sentence on the manjees of the boat in which the salt was being transported when seized, their boat having been already confiscated by the Magistrate. QUEEN *v.* MODUN MOHUN PAL CHOWDHRY **23 W. R. Cr. 7**

2. MADRAS.

1. ———— **Act XVII of 1840**—*Possession of salt-earth.* Being in possession of salt-earth, from which salt may be manufactured, with the object of making salt, is an offence under the salt laws. ANONYMOUS . . **4 Mad. Ap 53**

2. ———— **Mad. Reg. I of 1805, s. 18**—*"Spontaneous salt," possession of—Salt Excise Act, 1871.* "Spontaneous salt" is salt which, produced naturally, requires no process of manufacture to render it suitable for human consumption. To collect spontaneous salt for domestic consumption, or to be found in possession of it for that purpose, or to be found in the act of conveying it home from the place in which it is collected, are not, *per se*, acts prohibited by Regulation I of 1805, s. 18. *Semble*: In districts to which the Salt Excise Act, 1871, is extended, to obtain or to be found in possession of spontaneous salt under circumstances which show an intention to evade payment of the excise is an offence. ANONYMOUS . **I. L. R. 3 Mad. 17**

3. ———— *Salt-earth, collection of or possession of.* The collecting of salt-earth from salt-swamps, or the being in possession of salt-earth for the purpose of making salt, is not an offence within the meaning of s. 18 of Madras Regulation I of 1805. REG. *v.* PYLA ATCHI **I. L. R. 1 Mad. 278**

4. ———— **Mad. Act I of 1882, s. 26**—*Possession of salt-earth.* The possession of earth impregnated with salt, not being a natural saline efflorescence or deposit, is no offence under s. 26 of the Salt Laws Amendment Act, 1882 (Madras). QUEEN *v.* THUNJI . . **I. L. R. 7 Mad. 163**

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SALT, ACTS AND REGULATIONS RELATING TO—*contd.*

2. MADRAS—*concld.*

5. _____ cl. 3, s. 27 (e)—*Salt imported from foreign State, contraband.* S. 26 of the Salt Laws Amendment Act (Madras Act I of 1882) makes it penal to import salt by any route not legally sanctioned for that purpose, and also to possess salt known to have been imported in contravention of the salt laws; and s. 27 of the said Act authorizes, *inter alia*, the Governor in Council to make rules for regulating the import of salt by land. No such rules having been passed in 1884, *P* was convicted of being in possession of salt known to have been manufactured in, and imported from, the Native State of Pudukottai. *Held*, that the conviction was right. QUEEN-EMPRESS *v.* PODIATHAL . . . . **I. L. R. 8 Mad. 342**

3. BOMBAY.

1. _____ **Acts XXVII of 1837 and XXXI of 1850**—*Maxim "Omnia præsumuntur contra spoliatorem"—Salt thrown overboard to avoid measurement—Salt removed in excess of permit.* Applying the maxim "*Omnia præsumuntur contra spoliatorem*," the High Court held that, where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and with the assistance of the agent of the owner threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit. Where under a permit to pass a certain number of maunds of salt on which duty has been paid, an amount in excess of such number is removed, the whole of such salt must be considered as removed contrary to the provisions of the Salt Acts (Act XXVII of 1837 and Act XXXI of 1850); and the whole of such salt, and not merely the excess, is under these Acts liable to confiscation. FRAMJI HORMASJI *v.* COMMISSIONER OF CUSTOMS **7 Bom. A. C. 89**

2. _____ *Removal of salt—Property in salt naturally formed—Theft.* Dishonest removal of salt naturally formed in a creek, which was under the supervision of an officer belonging to the Customs Department, constitutes theft, the salt having been legally appropriated by such officer. (*Per* BAYLEY and WEST, *JJ.*) But removal for one's own use from a creek, of such salt not legally appropriated, constitutes no offence either under the Penal Code or Act XXXI of 1850 or XXVII of 1837, though under s. 7 of the latter Act made applicable by s. 8 of the former, the salt removed becomes liable to detention. (*Per* LLOYD and KEMBALL, *JJ.*) REG. *v.* MANSANG BHAVSANG **10 Bom. 74**

3. _____ **Bom. Act VII of 1873**—*Act XVIII of 1877—Duty paid under former Act—Effect of new Act by which duty increased coming into operation before removal of salt—Increased duty paid under protest—Suit to recover excess—Set-off—Excise*

SALT, ACTS AND REGULATIONS RELATING TO—*contd.*

3. BOMBAY—*contd.*

duty—Customs. Prior to the 28th December 1877, the excise duty on salt manufactured in Bombay was R1-13-0 per maund, and the Act which regulated the importation and transport of salt in the Presidency of Bombay was the Bombay Salt Act (VII of 1873). The plaintiffs, who were salt merchants, were desirous of exporting salt from the salt-works at Uran and Panvel, and accordingly, under the provisions of Act VII of 1873, made four several applications in writing to the Assistant Collector of Salt Revenue for the necessary permits on the following dates, *viz.*, 27th November 1877, 17th December 1877, 17th December 1877, and 24th December 1877. Each application stated the amount of salt which it was proposed to export, and at the time of sending in such applications the duty payable in respect of the amount of salt therein mentioned was paid. Receipts for the duty so paid were given to the plaintiffs, and all four applications were duly registered before the 28th December 1877. The salt comprised in the first three applications amounted in all to maunds 20,972, and the whole of this quantity, with the exception of maunds 2,748 had been removed by the plaintiffs before the 28th December 1877, but at that date no part of the salt which was the subject-matter of the last application (24th December 1877), and which consisted of maunds 10,483, had yet been removed. On the 28th December 1877 Act XVIII of 1877 came into force, by which Act the excise duty on salt manufactured in Bombay was raised from R1-13-0 to R2-8-0 per maund, and on that day the sarkarkun refused to allow the plaintiffs to remove the balance of the first three lots (*viz.*, 2,748 maunds) or the last lot of maunds 10,483, unless an additional duty, at the rate of eleven annas per maund, was paid in respect thereof, alleging that the same was leviable under Act XVIII of 1877. The plaintiffs paid under protest the additional duty demanded, amounting to R9,096-5-0, and exported the salt to British Malabar having previously obtained certificates from the Collector that excise duty, at the full rate of R2-8-0 per maund, had been paid upon the said salt. On production of these certificates at the ports of British Malabar, the salt was admitted free of customs duty. The plaintiffs subsequently brought this suit to recover the said sum of R9,096-5-0, together with a sum of R1,000 damages alleged to have been sustained by reason of the delay in removing the salt caused by the conduct of the sarkarkun. The plaintiffs contended that, having paid the duty in respect of the salt comprised in the four applications and the said duty having been received by the Collector before Act XVIII came into force, they were not liable to pay any further duty, and that Act XVIII of 1877 did not apply to the said salt. The defendant contended that the additional duty was rightly levied on the salt, and further claimed to set off against the plaintiff's claims the sum of R9,056-5-0 which the plaintiffs would have been obliged to pay in importing the salt into British Malabar if they had not already paid it to the authorities

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SALT, ACTS AND REGULATIONS RELATING TO—*concld.*

3. BOMBAY—*concld.*

in Bombay, but from payment of which they had been exempted on production of the certificates abovementioned. *Held*, that on the 28th December 1877 the plaintiffs had acquired the right to remove the salt, whenever they might think proper, by simply complying with the usual forms required by Act VII of 1873, and that Act XVIII of 1877 did not operate retrospectively so as to destroy that right and to impose on the plaintiffs a heavier burden as a condition of their removing the salt. *Held*, also, however, that, as the salt was allowed to pass into British Malabar on the strength of its having already paid the duty of R2-8-0 per maund at Bombay, the sum of R9,096-5-0 must be deemed to have been appropriated by the plaintiffs to the payment of the customs duty payable on the importation of the salt into the ports of British Malabar, and was therefore no longer recoverable from the defendant. The plaintiffs, by applying to the Collector of Customs at Bombay for certificates that the duty had been paid, by presenting them at the Malabar ports, and claiming, in virtue of such certificates, that the salt should be admitted free of customs duty, virtually appropriated the R9,096-5-0 excise duty (which remained in the hands of the customs authorities as money had and received to the use of the plaintiff) to the payment of the enhanced customs duties at such ports. BRITO *v.* SECRETARY OF STATE FOR INDIA . . . **I. L. R. 6 Bom. 251**

4. ——— **Bom. Act II of 1890, ss. 11, 47**—*Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie.* *Y* obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector. Without any such permission, however, *Y* sublet the pans to *R* who, as a security for the performance of the conditions of the sub-lease, deposited a sum of R1,000 with *Y*. The sub-lease was acted upon and on the expiration of its term *R* brought a suit for the recovery of the deposit from the representative of *Y*, the latter denied *R's* right to recover the deposit on the ground that it formed a consideration for an agreement which, having been forbidden by law, was illegal. *Held*, dismissing the suit, that the defendant's plea should prevail. The real object and the necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease although that was forbidden by law and by the terms of the license. ISMALJI YUSUFALLI *v.* RAGHUNATH LACHIRAM (1909) . . . . **I. L. R. 33 Bom. 636**

SALT-PANS, LEASE OF.

See STAMP ACT, SCH. II, ART. 13.
I. L. R. 18 Bom. 546
I. L. R. 33 Bom. 636

SALTPETRE.

——— **exclusive right to take—**

See BETTIAH RAJ . **13 C. W. N. 454**

——— **Monopoly**—*Manufacture—Regulation IV of 1814—Effect on the monopoly.* The abolition of the monopoly of the East India Company to the manufacture of saltpetre by Regulation IV of 1814 was not intended to affect the right of a purchaser of the monopoly to realize his dues either in the shape of royalty from the manufacturers or himself to manufacture saltpetre to the exclusion of all other persons or proprietors of land in the *nimaksayar mahal*. The right to grant license and realise royalty would not be inconsistent with the abolition of a monopoly . GOLAB CHAND *v.* JANKI KOER (1908) . **I. L. R. 36 Calc. 267**

SALVAGE.

See CO-SHARERS—GENERAL RIGHTS IN JOINT PROPERTY.
I. L. R. 14 All. 273

——— **consolidation of claims for—**

See PRACTICE—CIVIL CASES—ADMIRALTY COURT . **I. L. R. 22 Calc. 511**
3 C. W. N. 67

——— **lien for—**

See JURISDICTION **I. L. R. 31 Calc. 667**

See LIEN . . **I. L. R. 2 Calc. 58**

See OFFICIAL ASSIGNEE.
I. L. R. 31 Calc. 667

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—SALVAGE . **9 W. R. 252**

1. ——— **Principles of salvage lien—***Right to salvage.* A claim to salvage is founded on a principle of equity which the Courts of British India are bound to recognize It accrues irrespectively of the circumstance that the rescue is from a danger incurred on inland waters, or of the circumstance that a portion of the services may be rendered from the shore. A boat laden with indigo seed left Permit Ghât, about three miles above the pontoon bridge over the Ganges at Cawnpore, on the morning of the 6th of August. While the boatmen were endeavouring to cross the stream, the boat struck the bridge at a point where the current was running with a velocity of 530 feet per minute. The boat came athwart two of the pontoons, and by the pressure of the stream canted over on its side. From this cause, and also from the strain and other injuries, it began to take in water. Had it been allowed to remain in this position, the bridge must have broken from its moorings, or, more probably still the boat and cargo would have been submerged. The persons in charge of the bridge might have at once obviated all danger to the bridge by submerging the boat. They took measures to relieve the strain on the bridge and to remove the cargo. It was impossible to remove the boat until the whole of the cargo had been discharged. This was done, and the boat was towed to a place of safety, and the cargo was removed and stored in a warehouse.

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SALVAGE—*contd.*

Held, that a right to salvage accrued. Persons in these provinces, to whom a right of salvage has accrued, are entitled to retain the property saved until a reasonable sum has been paid or tendered to them in satisfaction of their claim. GILMORE *v.* ROSE . . . . . **6 N. W. 311**

2. ——— **Services entitling vessel to salvage**—*Towage.* Where a ship is in a condition of actual peril, and the service of a tug are sought for and directed to the purpose of releasing her from that condition, such services are salvage services. But where there is nothing in those services as regards risk or exertion or other conduct of the salvors to make them differ from ordinary towage services, their reward should be estimated as for towage with salvage liberality. *In the matter of the* "ALABAMA" . . **2 Ind. Jur. N. S. 139**

3. ——— *Towage—Extraordinary towage—Claim of master and crew—Award—Apportionment.* The S. S. *C*, while employed as a Government transport to convey troops and stores from Bombay to Egypt, broke her screw shaft and became disabled. While in that condition, the S. S. *H B* met her and towed her back to Bombay, the voyage occupying eleven days. The owners of the S.S. *C* settled the claim of the owners of the S.S. *H B* for R37,500, but refused to recognize any separate claim to remuneration to the plaintiffs, the master and crew of the S.S. *H B*. *Held*, that the services rendered were, under all the circumstances of the case, salvage and not merely towage services, and that R10,000 was a fair remuneration, for the master and crew of the salving vessel to be apportioned, R4,000 to the master, the rest to the crew according to their ratings. The plaintiffs were entitled also to one thirty-second part of the freight, if any, which might be recovered by the S.S. *C* under her charter party with the Indian Government. If towage leads to the rescue of a vessel in actual danger, or in reasonable apprehension of danger, the services should be remunerated as salvage. When the steam power of the salving vessel is the efficient cause of the salvage, the owners are entitled to the larger share of the reward. This is especially the case where the master and crew of the salving vessel incur no risk to life. But the reward of the latter ought nevertheless, in the interests of commerce and humanity alike, to be on a liberal scale. The rule no longer obtains which made the salvage reward proportionate to the value of the salved ship. The Courts are only bound to give such amount as is fit and proper with reference to all the circumstances of the case, including value. RAFFIN *v.* S.S. "CHILKA" **I. L. R. 7 Bom. 196**

4. ——— **Calculation of salvage award**—*Steamers.* The Court is bound to consider the time, labour, skill, enterprise, and risk of the salvors, as well as the value of the property engaged in the service ; and also the degree of danger from which the property is rescued, and the value of the property so rescued. Steamboats are entitled to a higher rate of reward than other vessels by reason of the promptness with which they are enabled

SALVAGE—*contd.*

to render services in such cases. *In the matter of the* "LADY JOCELYN" . . **2 Mad. 355**

5. ——— *Goods put on flat during squall.* A dinghee laden with gilders valued at R20,000 was being propelled across the river when a squall coming on and the dinghee being in some danger, the gilders were taken on board a flat for safety, and kept there till the squall subsided. *Held*, that the owners of the flat had no claim for salvage, and that R150 was a fair remuneration for services rendered. UMA CHURN CHETTY *v.* GORDON **1 Hyde 212**

6. ——— *Arrest—Excessive bail—Costs—Salvage services—Amount of award increased on appeal.* In an action of salvage in which a ship was arrested, and the bail asked for was found to be excessive, the Court (PIGOT and TREVELYAN, *JJ.*) *held* that the promovents must pay the impugnants the costs occasioned by the bail required being excessive. *George* v. *Gordon, L. R. 9 P. D. 461*, followed. In this case the Court increased the amount of salvage award from £1,500 to £2,400, in consideration of the great risk incurred by the salvors in rescuing the ship and cargo, which were very valuable, from imminent destruction. *In the matter of the Ship* "CHAMPION" **I. L. R. 17 Calc. 84**

7. ——— *Amount of salvage awarded—Mode of estimating salvage services—Allocation of salvage amongst officers and crew—Bail—Costs.* On the 13th August 1898 the S.S. *Cashmere*, being (as found by the Court) in a position of risk and hazard, which by a change in the weather might have at once become one of danger was in need of assistance which the *Naseri* afforded her. The services, however, rendered by the *Naseri* were not of an extraordinary or protracted character. The owners of the *Naseri* sued claiming R1,00,000 for salvage services, and the master and crew of the *Naseri* filed a second suit claiming R50,000. The defendant ship paid into Court R5,000 for the owners of the *Naseri* in the first suit and R2,257 for the crew in the second suit. The value of the S.S. *Cashmere* was R78,000, and that of the cargo on board was R56,510. *Held*, that the amount paid into Court by the defendant ship was sufficient for the salvage services rendered. *Held*, also, that the cargo was liable in the same proportion. Principles regarding (*a*) salvage generally, (*b*) allocation of salvage amongst officers and crew, (*c*) costs, (*d*) bail discussed. BOMBAY AND PERSIA STEAM NAVIGATION CO. *v.* S.S. "CASHMERE" . . **I. L. R. 24 Bom. 55**

8. ——— *Service to a vessel in distress, though not in imminent danger—Interruption of service by accident—Towage service convertible into salvage service—Distinction between towage and salvage service—The indicia of salvage service—Costs—Practice of the Court in giving costs.* Any service rendered to a vessel in a state of peril or risk or otherwise in distress, which contributes, in some degree to its ultimate safety, entitles the person rendering the service to salvage reward. It

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SALVAGE—*contd.*

is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered. Services rendered to a ship which is in a normal condition, and has received no injury and needs nothing more than expedition or acceleration of progress, will be treated as mere towage ; it is otherwise in the case of a vessel which is in a disabled condition or has received substantial injury. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it have all to be taken into consideration. An ordinary towage service may, in consequence of supervenient danger, be converted into salvage service ; but the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct or gross negligence on the part of the salvors. The mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners of the vessels, will not disentitle the salvors from their reward. In assessing the award the Court will take into consideration, not only danger and difficulties to which the salvor was exposed, but also the skill with which the work was performed. The shortness of service may often be taken as showing extraordinary skill and labour. When two separate salvage actions are consolidated at the instance of the common impugnant, and no order is made giving the conduct of both to one plaintiff, the promovents are entitled to separate costs. Practice of the Court followed, and costs given on the ordinary scale provided for in the rules under the Civil Procedure Code, and not under the schedule relating to Vice-Admiralty actions. *In the matter of the* STEAMSHIP "DRACHENFELS." "RETRIEVER" *v.* "DRACHENFELS." "HUGHLI" *v.* "DRACHENFELS" . **I. L. R. 27 Calc. 860**

9. ———— — *Compensation for rescuing vessel—Ingredients—Mode of assessing reward.* Salvage is not always a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation and the lives of the seamen render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are enterprise in the salvors, the degree of danger and distress from which the property is rescued, the degree of labour and skill displayed and the value of the thing saved. In a claim for salvage it was shown that the salvors had not risked their lives, that the vessel saved had drifted with several men on board fourteen miles from harbour, where she had broken loose from her moorings, had no steering gear on board, and only one sail, which those on board (only two of whom were sailors) could not set, and the evidence showed that, but for the assistance rendered by the salvor the vessel would have drifted out to sea and in all probability would have foundered. It was shown

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that a boat and some catamarans had been sent out by the owner of the vessel, but the finding of the Court was that it was most doubtful if the vessel could have been brought back to harbour by the party thus sent out, and that the danger from which she was rescued was very great, and that she was in imminent peril. The time occupied in the actual salving was about eight hours, but the salvors lost about a day in all ; the skill displayed was considerable, and the value of the vessel salved was found to be R10,000. *Held*, that plaintiffs were entitled to R2,000 for the salvage services they had rendered. CLAN LINE STEAMERS *v.* THE BALCES (1904) **I. L. R. 27 Mad. 187**

SALVATION ARMY.

———— obstruction of street by—

See MADRAS POLICE ACT, 1888, s. 71.
I. L. R. 14 Mad. 223

SAMAJ.

See BRAHMO SAMAJ.

SAMBALPUR.

See JURISDICTION OF CIVIL COURTS.
I. L. R. 34 Calc. 636 ; 853

See PROCLAMATION.
I. L. R. 35 Calc. 701

SAMBANDHA-NIRNAYA PATRA.

See WILL, VALIDITY OF.
I. L. R. 36 Calc. 149

SAMPLES.

See DAMAGES—SUITS FOR DAMAGES—BREACH OF CONTRACT.
I. L. R. 29 Calc. 323

See WARRANTY, BREACH OF.
I. L. R. 29 Calc. 587

SANAD.

See GRANT—CONSTRUCTION OF GRANTS.
I. L. R. 9 Bom. 561
I. L. R. 12 Bom. 80 ; 534 ; 595
I. L. R. 15 Bom. 222 ; 625
L. R. 18 I. A. 22
9 C. W. N. 1009

See HEREDITARY OFFICE.
I. L. R. 16 Bom. 374
L. R. 19 I. A. 39

See OUDH ESTATES ACT, 1869.
I. L. R. 17 Calc. 311 ; 444
L. R. 16 I. A. 183
L. R. 17 I. A. 54
I. L. R. 26 Calc. 81 ; 879

See OWNERSHIP, PRESUMPTION OF.
I. L. R. 15 Mad. 101
L. R. 18 I. A. 149

See SERVICE TENURE.
I. L. R. 14 Bom. 82

See SETTLEMENT—CONSTRUCTION.
I. L. R. 17 Bom. 40

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SANAD—*contd.*

See SETTLEMENT—EXPIRATION OF SETTLEMENT . **I. L. R. 4 Bom. 367**

endorsement on—

See REGISTRATION ACT, S. 17, CL. (*b*). **I. L. R. 14 Bom. 472**

——— for collection of rents by gomashta—

See STAMP ACT, 1862, SCH. A, CL. 43. **1 B. L. R. F. B. 55**

——— grant of—

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . **I. L. R. 17 Mad. 384**
L. R. 21 I. A. 93

——— production of—

See BOMBAY DISTRICT MUNICIPAL ACT, 1873, s. 33 . **I. L. R. 15 Bom. 516**

——— title under—

See OUDH ESTATES ACT, 1869. **I. L. R. 3 Calc. 645**

1. ——— **Construction of sanad**—*Mokurari. Semble:* The word "mokurari" in a sanad does not necessarily import perpetuity. GOVERNMENT OF BENGAL *v.* JAFUR HOSSEIN KHAN **5 Moo. I. A. 467**

2. ——— *Istemrar sanad, effect of.* The effect of the istemrar sanad is to ascertain and limit the demand of the Government for revenue and to recognize and confirm, subject to this the proprietary rights already in existence. *Katama Natchiar* v. *Rajah of Shivagunga, 9 Moo. I. A. 539,* distinguished. CANNAMMAL AIYAR *v.* VIJAYA RAGUNANDA RUNGASAMY SINGAPULLIAR **8 Mad. 114**

3. ——— *Right to cut timber—Prescriptive title—Construction of grant.* In construing grants by former Governments, the rule of English law as to the construction of grants to the subject by the Crown is the correct rule to be applied by the Courts in India. Where a sanad contained only the words "The village of Manavali had been conferred on you as inam, to be enjoyed by you, your son, and grandson. The Government dues of the village,—*viz.*, the koolbale koollkunoo (*i.e.*, all taxes and assessments), present taxes and future taxes, together with the house-tax, but exclusive of haks due to hakdars, shall continue to be debited from year to year, from the year next succeeding,"—it was *held* that the plaintiff's sanad did not operate as an alienation of the soil of the villages, or confer on him a proprietary title in it, and therefore gave the plaintiff no right to the timber growing upon the soil. The owner of such sanad, having only a right in the revenues and none in the soil of a village, cannot by thirty years' user become the proprietor of the timber. VAMAN JANARDAN JOSHI *v.* COLLECTOR OF THANA . **6 Bom. A. C. 191**

4. ——— *Grant of village by Government, existing rights how affected by.*

SANAD—*contd.*

The grant of a village by Government, whether native or British, is subject to all existing rights against Government, whether or not the deed of grant contains an exception or reservation of such rights. Government cannot, by alienating its own rights in a village, albeit that the sanad purports to grant the village as a whole, extinguish or affect any substantive right therein appertaining to third persons, or convey to the grantee any larger or better estate or interest than was vested in Government. DESAI HIMATSINGJI JORAVARSINGJI *v.* BHAVABHAI KAYABHAI . . . **I. L. R. 4 Bom. 643**

5. ——— *Grant by Government—Property in the soil.* A sanad by the State purporting to grant a village in inam, "including the waters, the trees, the stones and quarries, the mines, and the hidden treasures, but excluding the hakdars and inamdars," *held* to be a grant by the State of such proprietary right as it had in the soil of the village to the grantee. It is not open to the grantor to say that such words as the above mean nothing but land revenue. The saving of the rights of the hakdars and inamdars does not prevent the property in the soil, so far as it can be regarded as vested in Government, from passing to the grantee. RAVJI NARAYAN MANDLIK *v.* DADAJI BAPUJI . . . **I. L. R. 1 Bom. 523**

6. ——— *Office of bhoonyee in Cuttack—Jagirdari right.* Plaintiff's ancestor held certain lands from Government under a settlement at a fixed rent of R10-13-0, but was subsequently appointed *bhoonyee* with a remuneration of R6-8, recoverable by deduction from the rent, leaving only 6 annas and 4 pies payable to Government by way of rent. *Held,* that the sanad of appointment to the office of *bhoonyee* created no jagirdari right, but that, on the contrary, the reservation of the rent of 6 annas 4 pies seemed to indicate that the tenancy remained, giving no right of exclusive occupancy to plaintiff as against defendant. CHOITUN MOHANTEE *v.* BHIKAREE MOHANTEE **17 W. R. 410**

7. ——— *Nature of estate assigned—Prohibition of alienation.* The zamindar in possession by a sanad conveyed to *A* as the head of a branch of the grantor's family an estate, part of the zamindari, in lieu of maintenance to which *A* was entitled out of the zamindari, "to hold and enjoy possession from generation to generation," subject to an allowance for maintenance to a certain class of the family described as "lowahokans" and "motalokans" (dependants and relations). *A's* heir afterwards alienated a part of the estate for a valuable consideration. *Held, first,* in the absence of evidence of any class of persons answering the description of "lowahokans" and "motalokans" (which might have created a trust), that *A* took an absolute estate in the lands assigned to him; and, *secondly,* that the limitation in the sanad "from generation to generation" did not create such an estate as to operate as a bar to alienation by sale. NURSINGH DEB *v.* ROY KOYLASHNATH **9 Moo. I. A. 55**

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SANAD—*contd.*

8. ——— *S C*, a Hindu, granted a talukh to his sister, *K*, by a sanad in the following terms: "You are my sister; I accordingly grant you as a talukh for your support the three villages, H, F, and K, belonging to my zamindari, with all rights appertaining thereto, at a tahut jumma of R361. Being in possession of the lands and paying rent according to the tahut jumma, do you and the generations born of your womb successively (santan sreni kreme) enjoy the same. No other heir of yours shall have right or interest." At the date of the sanad *K* had one child, a daughter, *C*. She had afterwards a son, who died in her lifetime without issue, but whose widow, by his permission, adopted, after his death, a son, *C L*. *K* held undisputed possession of the talukh, during her lifetime, and by her will devised it to *C*, her daughter, and *C L*, her grandson by adoption, in equal moieties. On *K's* death, *H. C*, as heir of his father, *S C*, took possession of the talukh, whereupon *C* and *C L* claiming under the will of *K*, sued for possession. *Held*, by the Court of first instance, that *C* took an absolute estate under the sanad on the death of her mother, *K*, but that having elected to take under her mother's will, and to admit the co-plaintiff *C L* to a half share in the estate, both plaintiffs were entitled to maintain the action. *Held*, by the High Court, on appeal, that *C*, having been born before the date of the sanad, took under it a life-interest in the talukh, in succession to the life-interest of her mother; but that, as the plaintiffs had not sued in respect of the life-interest, but claimed under the will of *K*, which she was incompetent to make, the suit must be dismissed. The term "sontan" bears the wider and more general meaning of issue, and is not confined to make progeny. The true meaning of of the words "sreni kreme" in a sanad, as gathered from the context, was held to be in "succession" in the sense of succession first of the mother, and then of the children born of her womb. *Held*, by the Judicial Committee of the Privy Council, that the earlier words of the sanad, when read together, were to be taken as conferring an absolute estate on *K*; and that the effect of the concluding words "no other heir of yours, etc.," was to make the absolute estate before given defeasible in the event of a failure of issue living at the time of *K's* death, in which event the estate was to return to the donor and his heirs; but as that event had not occurred, it followed that *K* took an estate which she could dispose of by will, and consequently that the plaintiffs were entitled to succeed in their suit. BHOOBUN MOHINI DEBIA *v.* HURRISH CHUNDER CHOWDHRY

I. L. R. 4 Calc. 23: 3 C. L. R. 339
L. R. 5 I. A. 138

Reversing the decision of the High Court on the whole effect and construction of the sanad in HURISH CHUNDER CHOWDHRY *v.* CHUNDER MONEE DEBIA . . . . . **24 W. R. 268**

9. ——— *Grant of Oudh talukh to Hindu widow and her heirs—Oudh Estates Act (I of 1869), ss. 3, 4, 8, and s. 22, cl. 11—Separate property of Hindu widow, descent of.* A sanad of a talukh in Oudh which had been previously confiscated by Government was granted with full power of alienation to the widow of the last owner, a Hindu, and to her heirs for ever, her name being entered in the first and second lists under Act I of 1869, s. 8, one condition of the grant being expressed to be that in the event of her dying intestate, or of any of her successors dying intestate, the estate should descend to the nearest male heir according to the rule of primogeniture. *Held*, in suits against the widow's daughter, that the sanad conferred upon the widow and her heirs male the full proprietary right and title to the estate, and not merely an estate for life with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime. *Held*, also, as regards succession, that the limitation in the sanad was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by s. 22 of that Act, the provisions of which are not controlled in any way by ss. 3 and 4 thereof. *Held*, further, that under cl. 11 of s. 22 the above talukh, which was the separate property of the widow, descended, in the absence of a proved custom of her tribe to the contrary, to her daughter in preference to the son of the daughter of a rival widow and the remote male heirs of her husband. BRIJ INDAR BAHADUR SINGH *v.* JANKEE KOER. LAL SHUNKER BUX *v.* JANKEE KOER. LAL SEETLA BUX *v.* JANKEE KOER

L. R. 5 I. A. 1: 1 C. L. R. 318

10. ——— *Impartibility of zamindari—Partition—Succession by widow.* The owner of an impartible zamindari, which, though forming part of the family property, had by ancient custom been held and enjoyed by the eldest male member in the direct line, died leaving four sons and an infant grandson, *A*, by his eldest son who had predeceased him. During the minority of that grandson the four surviving sons executed a sanad which, after reciting certain arrangements made by their father, directed that "the zamindari should be held by *A*, the son of the eldest son. *A* and we four also shall take in equal shares the inam lands. Until *A* attains his proper age, we all should jointly manage the affairs of the said zamindari. After *A* attains his proper age the zamindari of the inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted to him." Certain jewellery was also divided in similar manner. *A* died leaving a son, *C*, who died in 1865 without issue, but leaving a widow. *Held*, by the Privy Council (reversing the decision of the High Court of Madras), that the sanad amounted to an agreement by which the joint family was divided, and that on the death of *C* his widow was entitled to the zamindari. *Periasami* v. *Periasami*, *L. R. 5 I. A. 61*, cited. VADREVU RANGANAYA KAMMA *v.* VADREVU BULLI RAMAIYA

5 C. L. R. 439

11. ——— *Impartibility—"Heirs."* In 1793 the ancient zamindari of Nuzvid, which descended to a single heir, having been before British rule a raj or principality held on the tenure

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SANAD—*contd.*

of military service, was resumed by the Government for arrears of revenue. In 1802 the Government formed two zamindaris out of it, and granted one of them, since called Nuzvid, to the second son of the rajas, under a "sanad-j-milkiat istemrari," which described the zamindari lands comprised in it as "the six pergunnahs of Nuzvid in the Kondapalli Circar." The provisions of the sanad did not differ from those of an ordinary grant under the permanent settlement. On the question whether this zamindari was, or was not, subject to the same rule of impartibility as that to which the ancient and entire zamindari of Nuzvid had been subject before 1793:—*Held*, that the six pergunnahs granted in 1802 were a new zamindari, subject only to the ordinary obligations imposed on zamindaris in general; and the word "heirs" used in the sanad construed to mean heirs of the grantee according to the ordinary rules of inheritance of the Hindu law. The Hansapur case, *Beer Pertab Sahee* v. *Rajender Pertab Sahee, 12 Moo. I. A. 1*, distinguished. VENKATA RAO *v.* COURT OF WARDS
I. L. R. 2 Mad. 128

S.C. VENKATA NARASIMHA APPA ROW *v.* NARAYYA APPA ROW . . . **6 C. L. R. 153**

S.C. VENKATA NARASIMHA APPA ROW *v.* NARAYYA APPA ROW. VENKATA NARASIMHA APPA ROW *v.* COURT OF WARDS . **L. R. 7 I. A. 38**

12. ——— *Impartibility—Mad. Reg. XXV of 1802.* A zamindari, originally impartible, having become the property of the Government, and having been granted by it to a zamindar, who, having been appointed by proclamation in 1801 and having been put into possession, received a sanad in 1803:—*Held*, that the zamindari retained the quality of impartibility. Also that this quality had not been transmuted into partibility either by the passing of the Regulation XXV of 1802 or by that law coupled with the issue of the sanad containing certain of its terms. *Venkata Rao* v. *Court of Wards, I. L. R. 2 Mad. 128* (determining that the Nuzvid zamindari could not be identified with any estate existing before the sanad of 1802 put it on the same footing with ordinary zamindaris), distinguished. Reference made to *Beer Pertab Sahee* v. *Rajender Pertab Sahee, 12 Moo. I. A. 1*, as an authority for holding that a mode of acquisition which constitutes property as "self-acquired" in the hands of a member of an undivided family, and thereby subjects it to rules of devolution and of disposition different from those applicable to ancestral property, does not thereby destroy its character of impartibility. MUTTU VADUGANADHA TEVAR *v.* DORASINGHA TEVAR . **I. L. R. 3 Mad. 290**
L. R. 8 I. A. 99

13. ——— *Impartibility—Hindu law of succession.* Where an ancient polliem was converted into a zamindari with a permanent assessment in 1803 by Government, and a "sanad-i-milkiat istemrari" (deed of permanent property) was granted to the zamindar with the usual stipulations, reservations, and directions, concluding with the words, "continuing to perform the above stipulations and to perform the duties of allegiance to the British Government, its laws and regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns at the permanent assessment therein named, the zamindari of Siavagiri." *Held*, that the Hindu law of succession was applicable, subject to such modifications as flowed from the impartible nature of the estate. MUTTYAN CHETTI *v.* SANGILI VIRA PANDIA CHINNA TAMBIAR . **I. L. R. 3 Mad. 370**

SANAD—*concld.*

14. ——— *Rent-free sanad—Purchaser at Government sale—Confirmation issued by Government.* In 1775 a rent-free sanad was granted to *M* for having put down wild elephants, the consideration in future being to cultivate and keep up a body of men and take care of the raiyats. *M* died and a fresh sanad was, in 1786, granted to *K* and *R*, they being thought to be his heirs; but in 1807, *M's* true heirs having established their title, the Government gave them a fresh sanad in lieu of the one to *K* and *R*, reciting the circumstances. The zamindari in which these lands were situated was settled in 1802, and was in 1850 sold for arrears of Government revenue. The appellant claimed to set aside the sanad of 1807, on the ground that Government had no right to give such a sanad, but he contended that, if it had, it could be set aside by a purchaser at a Government sale. *Held*, that the sanad was not a new grant, but a confirmation of the one made before the decennial settlement, and that Government was competent to give such confirmation. LOPEZ *v.* MADDAN THAKOOR
5 B. L. R. 521

S.C. LOPEZ *v.* MUDDUN MOHUN THAKOOR
13 Moo. I. A. 467: 14 W. R. P. C. 11

15. ——— **Proof of lost sanad**—*Mirasidars—Proof of title—Evidence—Long possession.* Mirasidars who had sanads, but who have lost them, and those who never had them, may prove their title by other evidence, and long possession is a strong element in such proof. A sanad is not indispensable to the proof of mirasi tenure. A mirasi right or perpetuity of tenure, like other facts, may be proved by various means. BABAJI *v.* NARAYAN
I. L. R. 3 Bom. 340

16. ——— *Evidence—Beng. Reg. II of 1819, s. 28—Beng. Reg. XIV of 1825, s. 3—Title.* Where an alleged original sanad was lost, the Judicial Committee, in view of the strict nature of the proof required in cases of claim under ancient sanads by Regulations II of 1819, s. 28, and XIV of 1825, s. 3, and taking all the circumstances into consideration, refused to consider the title under it established. FORESTER *v.* SECRETARY OF STATE
12 B. L. R. 120: 18 W. R. 349
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SANCTION.

See CIVIL PROCEDURE CODE, 1882, s. 539.
9 C. W. N. 151

See RECEIVER . **9 C. W. N. 247**

See SANCTION FOR PROSECUTION.

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SANCTION—*contd.*

—— of Board of Revenue—

See BOMBAY SURVEY AND SETTLEMENT ACT, 1865, s. 32. I. L. R. 2 Bom. 110

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See PARTITION—MISCELLANEOUS CASES. 5 B. L. R. 135 : 13 W. R. 381

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See ADMINISTRATION. I. L. R. 32 Calc. 448 9 C. W. N. 239

See CIVIL PROCEDURE CODE, 1882, s. 257A. I. L. R. 27 Bom. 96

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE. 16 W. R. P. C. 22 I. L. R. 3 Mad. 103 I. L. R. 9 Calc. 810 I. L. R. 13 Bom. 137 I. L. R. 15 Bom. 594 I. L. R. 21 Mad. 91 I. L. R. 22 Mad. 378 ; 538 I. L. R. 26 Bom. 109 13 C. W. N. 163

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See INSOLVENCY ACT (11 & 12 VIC., c. 21), s. 31. I. L. R. 30 Bom. 515

———— for sale of minor's property—

See GUARDIANS AND WARDS ACT, 1890, s. 29 . . I. L. R. 31 All. 378

———— to build—

See BENGAL MUNICIPAL ACT (III OF 1884), SS. 238 AND 273 . .5 C. W. N. 42

See CALCUTTA MUNICIPAL CONSOLIDATION ACT (II OF 1888), SS. 247, 250, 427. I. L. R. 30 Calc. 317

———— to build, given under misapprehension, induced by applicant—

See CALCUTTA MUNICIPAL ACT (BENG. ACT III OF 1899), SS. 449, 580 AND 631. 7 C. W. N. 853

—— to proceedings in lunacy—

See LUNATIC . 8 B. L. R. Ap. 50

SANCTION—*concld.*

———— to sue—

See COURT OF WARDS ACT (BENGAL ACT IX OF 1879), s. 55. I. L. R. 16 Calc 89 I. L. R. 17 Calc. 688 L. R. 17 I. A. 5 I. L. R. 27 Calc. 242

See LEAVE TO SUE.

See NAWAB OF SURAT . 12 Bom. 156 I. L. R. 12 Bom. 496

See RIGHT OF SUIT—CHARITIES AND TRUSTS.

SANCTION FOR PROSECUTION.

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See CRIMINAL PROCEDURE CODE, S. 195.
13 C. W. N. 398

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SANCTION FOR PROSECUTION—*contd.*

1. APPLICATION FOR, AND GRANT OF, SANCTION.

1. ——— **Court to which application should be made**—*Criminal Procedure Code, 1869, s. 169.* An application under s. 169 of the Criminal Procedure Code praying for sanction to institute a prosecution on a charge of perjury should, as a general rule, be first made to the Court before which the perjury is alleged to have been committed. *In the matter of the petition of* RAJAH OF VENKATAGIRI . . . . . 6 Mad. 92

In the matter of the petition of SHEEBPERSHAD CHUCKERBUTTY . . . 17 W. R. Cr. 46

2. ——— *Change of incumbents of office of subordinate Magistrate.* A subordinate Magistrate refused to grant sanction for a prosecution under s. 169 of the Criminal Procedure Code, 1861, on the sole ground that the perjury was alleged to have been committed before his predecessor in office. *Held*, that the Subordinate Magistrate was wrong in his construction of the section. The Court before which the perjury is alleged to have been committed is to give the permission: the change of incumbent leaves it still the same Court. ANONYMOUS . . . . 7 Mad. Ap. 12

3. ——— **Initiation of case needing sanction**—*Initiation by party and by Court—Criminal Procedure Code, 1861, ss. 170, 171.* In a case under s. 170, Criminal Procedure Code, 1861, the initiative was taken by the party interested, and the Court took no part in the matter except in the way of giving or refusing its sanction. S. 170 contemplated cases in which the Court itself took the initiative, but it was not intended that the Court should proceed in the manner there described except when the propriety or necessity of doing so is unmistakeable. *In the matter of* KOONJ BEHAREE GHUR
11 W. R. 171

4. ——— *Initiation by Court—Criminal Procedure Code, 1872, s. 468—False charge—Penal Code, s. 211.* There being nothing in the law requiring that sanction to prosecute under s. 211 of the Penal Code should only be granted upon application by a private prosecutor, a District Magistrate was competent, under s. 468 of the Code of Criminal Procedure, of his own motion to direct a prosecution where a complaint had been entertained and found to be false by a Magistrate subordinate to him. JUGUT MOHINI DASSI *v.* MADHU SUDHAN DUTT . . . . . 10 C. L. R. 4

5. ——— *Initiation by Court—Criminal Procedure Code, 1872, ss. 470, 471.* There was a difference in the proceedings to be adopted when a sanction was given under s. 470, and the institution by the Court of its own motion of proceedings under s. 471. GYAN CHUNDER ROY *v.* PROTAP CHUNDER DOSS
I. L. R. 7 Calc. 208 : 8 C. L. R. 267

6. ——— **Effect of grant of sanction**—*Criminal Procedure Code (Act X of 1882), ss. 195 and 478—Civil Court's power to proceed under s. 578 after sanction given to a private person—Dis-*

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SANCTION FOR PROSECUTION—*contd.*

1. APPLICATION FOR, AND GRANT OF, SANCTION—*concld.*

missal of a complaint by a private person, effect of. The granting of sanction to a private person under cl. (*c*) of s. 195 of the Code of Criminal Procedure (Act X of 1882) does not debar a Civil Court from proceeding under s. 478 ; nor can the dismissal by a Magistrate of a complaint made by a private person be held to be a bar, till set aside, to a proceeding under that section. QUEEN-EMPRESS *v.* SHANKAR **I. L. R. 13 Bom. 384**

7. ——— **Practice in granting sanction**—*Criminal Procedure Code* (*Act X of 1882*), *s. 195—Revisional power, exercise of, by High Court.* When subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. A Magistrate, in disposing of a charge of theft, delivered the following judgment : " The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. On an application to the High Court to revoke the sanction :—*Held*, that the mere fact of the charge laid by the complainant not having been proved was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked. KEDAR NATH DAS *v.* MOHESH CHUNDER CHUCKERBUTTY . **I. L. R. 16 Calc. 661**

2. WHERE SANCTION IS NECESSARY OR OTHERWISE.

1. ——— **Prosecution of Municipal Corporation**—*Presidency Magistrates' Act* (*IV of 1877*), *s. 39—Public servant.* A Municipal Corporation was not a public servant within the meaning of s. 39 of Act IV of 1877, and might therefore be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section. EMPRESS *v.* MUNICIPAL CORPORATION OF THE TOWN OF CALCUTTA **I. L. R. 3 Calc. 758 : 2 C. L. R. 520**

2. ——— **Prosecution of Judge**—*Sanction of Government—Criminal Procedure Code, 1861, s. 167.* The sanction of Government is required for the prosecution of any Judge, if a complaint is made against him as Judge. Construction of s. 167 of the Criminal Procedure Code, 1861. ANONYMOUS **6 Mad. Ap. 22**

3. ——— *Criminal Procedure Code, 1882, s. 197—Sanction to prosecute Judge for words uttered on the bench.* Where a Judge was charged with using defamatory language to a witness during the trial of a suit :—*Held*, that, under s. 197 of the Code of Criminal Procedure, the complaint could not be entertained by a Magistrate without sanction. *In re* GULAM MUHAMMAD SHARIF-UD-DAULAH . **I. L. R. 9 Mad. 439**

SANCTION FOR PROSECUTION—*contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*contd.*

4. ——— *Sanction to prosecute a Judge—Criminal Procedure Code* (*Act V of 1898*), *s. 197.* A pleader applied to the Chief Presidency Magistrate for sanction under s. 197 of the Criminal Procedure Code to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case, and sanction was refused. On application to the High Court :—*Held*, that no sanction under s. 197 of the Code is necessary, unless the Judge or public servant commits an offence in his judicial or official capacity. *Reg.* v. *Parshram Keshav, 7 Bom. H. C. Cr. 61 ; Imperatrix* v. *Lakshman Sakharam, I. L. R. 2 Bom. 481 ;* and *In re Sreemanto Chatterjee, unreported,* approved of. *In re Ghulam Muhammad, I. L. R. 9 Mad. 439,* dissented from. NANDO LAL BASAK *v.* MITTER **I. L. R. 26 Calc. 869 : 3 C. W. N. 539**

5. ——— **Offence committed in judicial proceeding**—*False evidence.* No special sanction was needed for the prosecution of a person for giving false evidence in a judicial proceeding. QUEEN *v.* RAMAOTAR PANRE . **25 W. R. Cr. 5**

6. ——— **Criminal Procedure Code, 1882, s. 195**—*Abetment of offence—Penal Code, s. 109.* Though sanction to prosecute is necessary in cases falling under the sections of the Penal Code set forth in s. 195, Criminal Procedure Code, no such sanction is required previous to the prosecution of a person charged with the abetment of such offences. QUEEN-EMPRESS *v.* ABDUL KADAR SHERIFF SAHEB **I. L. R. 20 Mad. 8**

7. ——— **Offence under s. 182, Penal Code**—*Charge and conviction under different section of Penal Code than that for which sanction was given.* In a case in which a false charge was brought, a Magistrate gave the accused (*A*) permission under s. 169, Code of Criminal Procedure, 1861, to prosecute the complainant (*B*) of an offence under s. 211, Penal Code. The Magistrate tried the complaint of *A* as a complaint under s. 211, but he subsequently framed a charge against *B* under s. 182, Penal Code, and punished him under that section. *Held*, with reference to s. 168, Code of Criminal Procedure, that the offences under ss. 182 and 211, Penal Code, being offences under Ch. XIV of the Code of Criminal Procedure, the Magistrate was wrong in framing the charge under s. 182 without obtaining the previous sanction of the Criminal Court which heard the previous complaint of *B*. RAJ COOMAR KIRTHU OJHA . . . **13 W. R. Cr. 67**

8. ——— *Prosecution by private person—Criminal Procedure Code, 1882, s. 195.* A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or

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SANCTION FOR PROSECUTION—*contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*contd.*

of his official superior. *Queen-Empress* v. *Radha Kishan, I. L. R. 5 All. 36*, overruled. QUEEN-EMPRESS *v.* JUGAL KISHORE. **I. L. R. 8 All. 382**

9. ——— **Criminal Procedure Code (Act X of 1882), s. 195**—*Presidency Magistrate, jurisdiction of—Penal Code (Act XLV of 1860), ss. 116, 193—Abetment—Instigating person to give false evidence.* *B*, without having obtained sanction under s. 195 of the Criminal Procedure Code, charged *C* before the Chief Presidency Magistrate with instigating her to give false evidence in a certain divorce suit in which *C* was co-respondent. *Held*, that the Chief Presidency Magistrate had no jurisdiction to try the case without the sanction of the Court before which the divorce proceedings were pending, as the offence charged was alleged to have been committed in relation to those proceedings. CHANDRA MOHAN BANERJEE *v.* BALFOUR **I. L. R. 26 Calc. 359**

10. ——— *Offence under Penal Code (Act XLV of 1860), s. 192—Giving false evidence—Investigation by Police.* No sanction under s. 195 of the Criminal Procedure Code is necessary for taking cognizance of an offence under s. 193 of the Penal Code when the alleged false evidence is said to have been fabricated, not in relation to any proceeding pending in any Court, but in the course of an investigation by the police into the matter of information received by them. *Chandra Mohan Banerjee* v. *Balfour, I. L. R. 26 Calc. 359*, distinguished. JAGAT CHANDRA MOZUMDAR *v.* QUEEN-EMPRESS . **I. L. R. 26 Calc. 786 3 C. W. N. 491**

11. ——— **Charge under s. 82 of Registration Act (III of 1877).** It is not necessary that sanction should be given before instituting a charge under s. 82 of the Registration Act. GOPI NATH *v.* KULDIP SINGH . **I. L. R. 11 Calc. 566**

12. ——— **Criminal Procedure Code, s. 195**—*Registration Act, s. 41—Sanction of Registrar—Condition precedent to trial for forgery of will registered.* A Sub-Registrar acting under s. 41 of the Registration Act, 1877, is a " Court " within the meaning of s. 195 of the Code of Criminal Procedure. His sanction therefore was *held* to be necessary under s. 195 before a Criminal Court could take cognizance of an offence committed before the Registrar while so acting. *In re* VENKATACHALA **I. L. R. 10 Mad. 154**

13. ——— *Police officer acting under s. 361—Prosecution for giving false evidence to a police officer.* A police constable taking down a statement under s. 161 of the Criminal Procedure Code is not a Judge, nor is the place where he officiates a Court. His sanction is therefore not necessary under s. 195 of the Criminal Procedure Code, to a prosecution for a false statement made to him, whether the charge be framed singly or alternatively. QUEEN-EMPRESS *v.* ISMAL VALAD FATARU **I. L. R. 11 Bom. 659**

SANCTION FOR PROSECUTION *contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*contd.*

14. ——— *Registration Act (III of 1877), s. 34—Forged document registered by Sub-Registrar.* A Sub-Registrar acting under s. 34 of the Registration Act, 1877, is not a " Court " within the meaning of s. 195 of the Code of Criminal Procedure. QUEEN-EMPRESS *v.* SUBBA **I. L. R. 11 Mad. 3**

15. ——— *Registration Act, 1877, ss. 82, 83.* Certain persons were charged with offences falling under s. 82 of the Indian Registration Act, 1877, and also with forgery of a document presented to, and registered by, a Sub-Registrar ; the Sub-Registrar having granted sanction to prosecute the persons concerned without holding any enquiry, the Sessions Judge referred the case to the High Court under s. 215 of the Code of Criminal Procedure, in order that the commitment might be quashed on the ground that there was no legal sanction. *Held*, that no sanction was necessary as to the charge of forgery and that the provisions of s. 195 of the Code of Criminal Procedure were not applicable. QUEEN-EMPRESS *v.* VYTHILINGA **I. L. R. 11 Mad. 500**

16. ——— *Sub-Registrar—Forgery—Penal Code (Act XLV of 1860), ss. 463, 467—Court—Judicial inquiry—Administrative inquiry.* A Sub-Registrar under the Registration Act (III of 1877) is not a Judge and therefore not a " Court " within the meaning of s. 195 of the Code of Criminal Procedure (Act X of 1882). His sanction is therefore not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office. *In re Venkatachala, I. L. R. 10 Mad. 154*, dissented from. The word " forgery " is used as a general term in s. 463 of the Penal Code (Act XLV of 1860) ; and that section is referred to in a comprehensive sense in s. 195 of the Criminal Procedure Code (Act X of 1882), so as to embrace all species of forgery, and thus includes a case falling under s. 467 of the Penal Code. The definition of " Court " given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope. Distinction between a judicial and an administrative inquiry pointed out. QUEEN-EMPRESS *v.* TULJA **I. L. R. 12 Bom. 36**

17. ——— *Registration Act (III of 1877), ss. 34, 35, 41—Forged document registered by Sub-Registrar.* A mortgagor was charged with making a fraudulent alteration in his mortgage-deed which was then registered by a Sub-Registrar. *Held*, that the sanction of the Sub-Registrar was not necessary for a prosecution on a charge of forgery. *In re Venkatachala, I. L. R. 10 Mad. 154*, and *Queen-Empress* v. *Subba, I. L. R. 11 Mad. 3*, explained. QUEEN-EMPRESS *v.* SOBHANADRI **I. L. R. 12 Mad. 201**

18. ——— *Registration Act (III of 1877), ss. 72, 75—" Court "—Sanction for prosecution for perjury.* A Registrar acting under the Registration Act, ss. 72—75, is a Court

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SANCTION FOR PROSECUTION—*contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*contd.*

for the purposes of the Criminal Procedure Code, s. 195, and his sanction is therefore necessary for a prosecution for perjury committed in respect of the representation of a document to him for registration. ATCHAYYA *v.* GANGAYYA
I. L. R. 15 Mad. 138

19. ——— *Registrar—"Court"—Registration Act, 1877, s. 73.* A Registrar acting under s. 73 of the Registration Act, 1877, is not a Court within the meaning of s. 195 of the Code of Criminal Procedure. *Atchayya* v. *Gangayya, I. L. R. 15 Mad. 138*, dissented from. QUEEN-EMPRESS *v.* RAM LAL
I. L. R. 15 All. 141

20. ——— *"Court"—Collector—Appraisement proceedings—Bengal Tenancy Act (VIII of 1885), ss. 69, 70.* The word "Court" used in s. 195 of the Criminal Procedure Code, without the previous sanction of which offences therein referred to, committed before it, cannot be taken cognizance of, has a wider meaning than the words "Court of Justice" as defined in s. 20 of the Penal Code. It includes a tribunal empowered to deal with a particular matter, and authorized to receive evidence bearing on that matter, in order to enable it to arrive at a determination. A Collector acting in appraisement proceedings under ss. 69 and 70 of the Bengal Tenancy Act is a Court within the meaning of the term as there used. Where therefore in certain appraisement proceedings some rent receipts, which were alleged to be forgeries, were filed by tenants before the Collector, and proceedings were subsequently taken against them before the Joint Magistrate charging them with offences under ss. 465 and 471 of the Penal Code:—*Held*, that the Joint Magistrate could not take cognizance of the offences charged without the previous sanction of the Collector having been granted. RAGHOOBUNS SAHOY *v.* KOKIL SINGH *alias* GOPAL SINGH
I. L. R. 17 Calc. 872

21. ——— *Criminal Procedure Code (Act X of 1882), s. 195—Complaint made to police—Penal Code (Act XLV of 1860), s. 211—Prosecution for laying false charge.* A complaint made before the police and judicially declared to be false is not an offence "committed in or in relation to, any proceeding in any Court," within the meaning of sub-s. (*b*) of s. 195 oft he Criminal Procedure Code (Act X of 1882); and no sanction is therefore necessary for the prosecution of the complainant under s. 211 of the Penal Code. PUTIRAM RUIDAS *v.* MAHOMED KASEM . . **3 C. W. N. 33**

22. ——— **Prosecution for false charge in complaint made at police station**—*Criminal Procedure Code, 1872, s. 468.* A complaint made at a police station is not made before any Civil or Criminal Court, and, if it proved false, prosecution for it did not require the sanction of any Court under s. 468, Code of Criminal Procedure. GOVERNMENT OF BENGAL *v.* GOKOOL CHUNDER CHOWDHRY . . . . . **24 W. R. Cr. 41**

SANCTION FOR PROSECUTION—*contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*contd.*

RAM RUNJUN BHANDARI *v.* MADHUB GHOSE
25 W. R. Cr. 33

23. ——— **Giving false evidence before a police patel**—*Criminal Procedure Code, 1872, ss. 467, 468—Bom. Act VIII of 1867 (Village Police), s. 13—Penal Code (Act XLV of 1860), ss. 181, 191, and 193.* A person who makes a false statement upon oath before a police patel acting under s. 13 of Bombay Act VIII of 1867 gives false evidence within the meaning of s. 191 of the Penal Code, and is punishable under s. 193; but his trial for that offence required no sanction, a police patel not being a Criminal Court within the definition of s. 4 of the Code of Criminal Procedure (see s. 468), although offences under Ch. X of the Penal Code committed before the same officer cannot be tried without a sanction. (*See* s. 467 of the Code of Criminal Procedure.) IMPERATRIX *v.* IRBASAPA
I. L. R. 4 Bom. 479

24. ——— **Prosecution of police patel**—*Criminal Procedure Code (1872), s. 466—Bombay Village Police Act (VIII of 1867), s. 9—Bombay Police Amendment Act (I of 1876).* The prosecution of a police patel, for an offence committed by him in his official capacity as such, needs no previous sanction. The provisions of the Bombay Village Police Act (VIII of 1867), s. 9, as amended by the Bombay Police Amendment Act (I of 1876), render a police patel removeable from his office without the previous sanction of Government, and therefore s. 466 of the Criminal Procedure Code (Act X of 1872) did not apply. IMPERATRIX *v.* BHAGWAN DEVRAJ
I. L. R. 4 Bom. 357

25. ——— **Prosecution on alternative charge**—*Giving false evidence in one Court or in another—Criminal Procedure Code, 1872, s. 470.* When it is intended to charge a person with having made a false statement in the Court of a Magistrate or, alternatively, a false statement in the Court of a Subordinate Judge, there must be a proper sanction for a prosecution on each branch of the alternative. *In re* BALAJI SITARAM . . **11 Bom. 34**

26. ——— *Accused to whom pardon has been tendered, contradictory statements of—False evidence.* When a pardon is legally tendered to the accused under s. 337 of the Criminal Procedure Code (Act X of 1882), and the accused makes a statement on oath which he retracts in a subsequent judicial proceeding, a proper sanction is necessary for a prosecution for giving false evidence on each branch of the alternative charges. *In re Balaji Sitaram, 11 Bom. 34*, followed. QUEEN-EMPRESS *v.* DALA JIVA . **I. L. R. 10 Bom. 190**

27. ——— *Criminal Procedure Code (Act V of 1898), s. 339—Tender of pardon—Trial of person who, having accepted a pardon, has not fulfilled the conditions on which it was offered—Prosecution for giving false evidence—Sanction of High Court.* No prosecution for the offence of giving false evidence in respect of statement made

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SANCTION FOR PROSECUTION—*contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*contd.*

by a person who has accepted a tender of pardon should be entertained without the sanction of the High Court, as provided by s. 339, cl. (3), of the Code. QUEEN-EMPRESS *v.* NATU
I. L. R. 27 Calc. 137

28. _____ **Charge of forgery**—*Forged document used in civil case—Power of Deputy Magistrate—Criminal Procedure Code, 1861, ss. 169, 170.* A Deputy Magistrate could not commit a person for forgery under s. 170 of the Code of Criminal Procedure when the Civil Court had sanctioned the prisoner's committal under s. 169, unless with the express sanction of that Court. QUEEN *v.* DWARKANATH BOSE . . . . **2 W. R. Cr. 31**

29. _____ *Forged document used in Civil case—Power of Magistrate—Criminal Procedure Code, 1861, s. 170.* S. 170, Code of Criminal Procedure, referred only to cases where a forged document had been put in evidence in a Civil or Criminal Court ; in other cases, a Magistrate was competent *proprio motu* to inquire into allegations of forgery, and no sanction under s. 170, Code of Criminal Procedure, was necessary. QUEEN *v.* RAMDHARRY SINGH . . . **10 W. R. Cr. 5**

30. _____ *Criminal Procedure Code, 1872, s. 469—Prosecution of witness for forgery.* The sanction required by s. 469 of the Criminal Procedure Code as a condition precedent to the prosecution of a party to a civil suit for forgery of a document given in evidence in such suit is unnecessary in the case of persons not parties to, but witnesses in, the suit, who are charged with the forgery of the document jointly with a party to the suit. EADARA VIRANA *v.* QUEEN
I. L. R. 3 Mad. 00

31. _____ **Offence before or against Mamlatdar's Court**—*Code of Criminal Procedure (Act X of 1872), s. 468.* The Mamlatdar's Court constituted by Bombay Act III of 1876 was a Civil Court within the meaning of s. 468 of the Code of Criminal Procedure ; therefore a complaint of an offence mentioned in that section, when such offence is committed before or against the Mamlatdar's Court, could not be entertained in the Criminal Courts except with the sanction of the Mamlatdar's Court or of the High Court to which it is subordinate. *In re* SAVANTA . **I. L. R. 5 Bom. 137**

32. _____ **Departmental inquiry into the misconduct of a revenue officer**—*Judicial proceeding—Bombay Land Revenue Code (Bom. Act V of 1879), ss. 196, 197—Criminal Procedure Code (Act X of 1882), s. 195.* A Collector, on receiving information that his Deputy Chitnis had attempted to obtain a bribe, ordered his Assistant Collector to make an inquiry into the matter, with a view to taking action under s. 32 of the Bombay Land Revenue Code. The Assistant Collector found on inquiry that the charge of bribery was unfounded, and gave a sanction to prosecute the informant and his witnesses for giving false evidence. This sanction was revoked by the Collector. The Chitnis appealed to the High Court against the order revoking the sanction. *Held*, that the inquiry made by the Assistant Collector was a departmental inquiry, and not a judicial proceeding, and that the Assistant Collector, while holding the inquiry, was not a Court. No sanction for prosecution was therefore necessary under s. 195 of the Criminal Procedure Code. *In re* CHOTALAL MATHURADAS . . **I. L. R. 22 Bom. 936**

33. _____ **Charge against Village Magistrate for alleged offence while acting not in a judicial capacity**—*Criminal Procedure Code, 1898, s. 197—Mad. Reg. XI of 1816—Penal Code, s. 19—Judge.* A Village Magistrate, having been apprized of a disturbance in his village, forcibily separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the Sub-Magistrate upon his file without any previous sanction of the Government or other authority mentioned in s. 197 of the Code of Criminal Procedure. The Village Magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary, and kept the case on his file and commenced to enquire into it. The Village Magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magistrate had no jurisdiction to try the case against village officer without sanction having been first obtained. *Held*, that sanction was not necessary under s. 197 of the Code of Criminal Procedure. The Village Magistrate, while preventing an offence, was not acting in the capacity of a Judge or a public servant not removeable from office without the sanction of Government, and therefore the sanction referred to had no application. *Held*, also, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction. *Semble :* That a Village Magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816, is a Judge within the meaning of s. 197 of the Code of Criminal Procedure and s. 19 of the Penal Code. KANDASAMI CHETTI *v.* SOLI GOUNDAN . . **I. L. R. 23 Mad. 540**

34. _____ **Disobedience to order promulgated by the Government**—*Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), s. 188—Epidemic Diseases Act (III of 1897).* Certain persons were charged with having disobeyed an order promulgated by the Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under s. 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed ; but

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SANCTION FOR PROSECUTION—*contd.*

2. WHERE SANCTION IS NECESSARY OR OTHERWISE—*concld.*

the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction. *Held*, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by the Government, and not by any public servant, no sanction was required. QUEEN-EMPRESS *v.* SOUTH (1900) . . . **I. L. R. 24 Mad. 70**

35. ——— **Public servant**—*Criminal Procedure Code (Act V of 1898), s. 197—Necessity for sanction to prosecute public servant—Cases in which the fact that accused is a public servant is a necessary element in the offence—City of Madras Municipal Act (Madras Act I of 1884), s. 341.* Under s. 341 of the City of Madras Municipal Act, any person bringing or causing to be brought timber within the City of Madras without a license, obtained on payment of a fee, is liable to a fine. The Superintendent of the Gun Carriage Factory in Madras, who is an officer holding a commission in the Royal Artillery, brought or caused to be brought timber within the aforesaid limits, without license. On a complaint being lodged against him under the section, it was contended that he was a public servant, within the meaning of s. 197 of the Code of Criminal Procedure, and that the Court could not take cognizance of the offence, inasmuch as the sanction referred to in s. 197 had not been obtained. *Held*, that sanction was not necessary as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant. *Nando Lal Basak* v. *Mitter, I. L. R. 26 Calc. 852*, followed. MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS *v.* BELL (1901) . . **I. L. R. 25 Mad. 15**

36. ——— **Tahsildar**—*Criminal Procedure Code (Act V of 1898), s. 195—Alleged forgery of documents submitted to Tahsildar holding inquiry as to transfer of names in Land Register—Revenue Court—Necessity for sanction to prosecute offender.* A *Tahsildar*, when holding an inquiry as to whether a transfer of names in a land register should be made or not, is a Revenue Court; and, before a party to any proceeding in such a Court can be prosecuted for an offence referred to in s. 195 (*c*) of the Code of Criminal Procedure, sanction should be obtained. QUEEN-EMPRESS *v.* MUNDA SHETTI (1900) . . . . **I. L. R. 24 Mad. 121**

3. WHEN SANCTION MAY BE GRANTED.

1. ——— **Sanction previous to prosecution**—*Jurisdiction of tribunal without sanction—Illegal conviction—Criminal Procedure Code, 1861, s. 167.* S. 167 of the Code of Criminal Procedure required that sanction to prosecutions therein mentioned should be given before any such prosecution was commenced, and until the sanction was obtained, the tribunal by which the offence was triable had no jurisdiction, and a conviction

SANCTION FOR PROSECUTION—*contd.*

3. WHEN SANCTION MAY BE GRANTED—*contd.*

founded on evidence taken without such sanction would be bad. REG. *v.* PARSHRAM KESHAV **7 Bom. Cr. 61**

See QUEEN *v.* MOHIMA CHUNDER CHUCKERBUTTY **7 B. L. R. 26 : 15 W. R. Cr. 45**

2. ——— **Prosecution for perjury**—*Sanction after order for committal to sessions.* Sanction to a prosecution for perjury may be given by the Court before which the perjury was committed at any time, even after the order for commitment to the sessions had been made. QUEEN *v.* GOLAB SINGH . . . . **3 B. L. R. A. Cr. 10**

QUEEN *v.* LEKHRAJ **2 N. W. 132 : Agra F. B. Ed. 1874, 206**

3. ——— **Sanction "at any time"**—*Criminal Procedure Code, 1861, s. 169—"At any time."* The words "such sanction may be given at any time" in s. 169, Code of Criminal Procedure, must be construed reasonably, and "any time" meant a time which did not unduly prejudice the party to be prosecuted, or put him in a worse position than he was before. SEETARAM SAHOO *v.* SHEWGOLAM SAHOO . . **18 W. R. Cr. 62**

4. ——— *Sanction after trial and conviction—Criminal Procedure Code, 1872, s. 470.* Under the words "at any time" in s. 470 of Act X of 1872, sanction to prosecute could not be given after the trial and conviction of the accused person. EMPRESS OF INDIA *v.* SABSUKH **I. L. R. 2 All. 533**

5. ——— *Charge of false evidence on alternative statements after tender of pardon.* The sanction necessary for a charge of giving false evidence made by the accused in retracting in a subsequent judicial proceeding a statement made by him on oath after a tender of pardon can only be granted before, and not after, the commencement of the prosecution. QUEEN-EMPRESS *v.* DALA JIVA . . . **I. L. R. 10 Bom. 190**

6. ——— *Code of Criminal Procedure (Act V of 1898), ss. 195, 203—Sanction to prosecute for bringing a false complaint—Penal Code (Act XLV of 1860), s. 211—Police-report declaring complaint false—Application for inquiry into the complaint—Complaint—Judicial determination.* An application for an inquiry into their complaint, made by persons in showing cause why they should not be prosecuted for bringing a complaint declared by the police to be false, is in effect in the nature of a complaint, and sanction for prosecution or bringing a false complaint cannot be given unless and until that complaint is judicially determined. "Judicial determination" of a complaint does not necessarily mean the trial of the persons against whom the complaint is made, but means the final determination of the matter of the complaint by the officer holding the inquiry, upon evidence produced before him. *Queen-Empress* v. *Sham Lall, I. L. R. 14 Calc. 707; Sheikh Kutab Ali* v. *Empress, 3 C. W. N. 490,*

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SANCTION FOR PROSECUTION—*contd.*

3. WHEN SANCTION MAY BE GRANTED—*concld.*

followed. SAHIRAM AGARWALLA *v.* JIBUN KAMAR (1900) . . . . . **5 C. W. N. 254**

4. NOTICE OF SANCTION.

1. ——— **Necessity of notice**—*Criminal Procedure Code (Act X of 1882), s. 195, cl. c., para. 2.* A sanction to prosecute, when applied for subsequently to the termination of the proceedings in the course of which the offence is alleged to have been committed, ought not to be granted, unless the person against whom the sanction is applied for has had notice of the application and an opportunity of being heard. ABBILAKH SINGH *v.* KHUB LALL **I. L. R. 10 Calc. 1100**

2. ——— *Criminal Procedure Code (Act X of 1882), s. 195—Notice to accused. Held,* by the Full Bench, that no notice is necessary to the person against whom it is intended to proceed before the Court, before which the alleged offence has been committed, can, under s. 195 of the Criminal Procedure Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section. *In the matter of the petition of* KRISHNANUND DAS. KRISHNANUND DAS *v.* HARI BERA . . . . **I. L. R. 12 Calc. 58**

MANGAR RAM *v.* BEHARI . **I. L. R. 18 All. 358**

3. ——— *Criminal Procedure Code, s. 195—Notice to accused.* A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused. Sanctioning a prosecution for an offence is a judicial act and the party to whose prejudice it is done must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions his prosecution for preferring a false charge, sanction cannot be said to be improperly given. QUEEN-EMPRESS *v.* BEARI **I. L. R. 10 Mad. 232**

4. ——— *Criminal Procedure Code, s. 195—Omission to give notice of sanction to accused.* A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications. The attorney for the complainant, who had expressed his willingness to have

SANCTION FOR PROSECUTION—*contd.*

4. NOTICE OF SANCTION—*concld.*

the application heard and disposed of there and then intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to, and in the absence of, the complainant or his attorney, and the Magistrate granted the sanction asked for. On an application to the High Court to revoke the sanction: —*Held,* that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard. KEDARNATH DAS *v.* MOHESH CHUNDER CHUCKERBUTTY **I. L. R. 16 Calc. 661**

5. ——— *Criminal Procedure Code (Act V of 1898), s. 195—Omission to give accused opportunity to be heard.* Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have given an opportunity to be heard. PAMPAPATI SASTRI *v.* SUBBA SASTRI . . . **I. L. R. 23 Mad. 210**

6. ——— *Criminal Procedure Code, s. 195—Notice to accused—Necessity.* There is no hard-and-fast rule that notice must be given in all cases to an accused person before sanction is accorded for his prosecution. *In the matter of* GOVINDU (1902) . **I. L. R. 26 Mad. 592**

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION.

1. ——— **Nature of sanction**—*Permissive nature of sanction—Discretion of party obtaining sanction—Criminal Procedure Code, 1872, s. 468.* The sanction to prosecute, contemplated in s. 468 of the Criminal Procedure Code, was not a direction to prosecute, but was a permission granted to a private person to exercise his own unfettered discretion as to whether he would take proceedings or not. *In the matter of the petition of* GRIDHARI MONDUL. GRIDHARI MONDUL *v.* UCHIT JHA **I. L. R. 8 Calc. 435 : 10 C. L. R. 46**

2. ——— *Sanction by High Court to prosecution for perjury—Presumption that proper procedure will be adopted.* Where the High Court sanctions a prosecution for perjury it is implied that the proper legal procedure will be adopted and the proceedings instituted in a Court having jurisdiction to entertain the charge. KEERUT SINGH *v.* NARAIN PASSEE . **25 W. R. Cr. 14**

3. ——— **Form of sanction**—*Sanction in writing and attached to record.* It is very desirable that such sanction or direction should be in writing and attached to the record, but it is by no means legally imperative. QUEEN *v.* KRISTNA RAU **7 Mad. 58**

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SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

4. ——— The law does not require the sanction to a prosecution to be given in any particular form of words. QUEEN *v.* LEKHRAJ
2 N. W. 132 : Agra F. B. Ed. 1874, 206

5. ——— *Criminal Procedure Code, 1882, s. 195—Form of sanction for prosecution for false evidence—Requisites of a proper sanction.* A sanction to prosecute for giving false evidence should specify clearly the statement alleged to be false, so that the person sought to be charged may be definitely informed what is the criminal act alleged against him. *In re* JIVAN AMBAIDAS
I. L. R. 19 Bom. 362

6. ——— *Criminal Procedure Code, 1861, ss. 169-170—Statement of particular offences.* When a Civil Court gives sanction to a prosecution under ss. 169 and 170, Code of Criminal Procedure, it should state with precision the particular offence or offences for the prosecution of which it gives sanction. QUEEN *v.* OOMA MOYEE DEBEA . . . . . **13 W. R. Cr. 25**

7. ——— *General sanction—Prosecution for false evidence—Penal Code, s. 193.* A general sanction by a Judge to a prosecution for giving false evidence under s. 193 of the Penal Code, and for false verification, is not sufficient. The exact words upon which the prosecution is based, and the exact offences which the Magistrate is to investigate, should be pointed out. QUEEN *v.* KARTICK CHUNDER HOLDAR
9 W. R. Cr. 58

(*Contra*) QUEEN *v.* KADIR BUX *alias* KADIR MAHOMED . . . . . **11 W. R. Cr. 17**

8. ——— *Prosecution under Criminal Procedure Code, 1872, s. 470—Requisites of proper sanction.* A sanction for a prosecution under s. 470 of the Criminal Procedure Code must designate the Court where the false statement was alleged to have been made and the occasion on which it was committed. It is desirable, if not necessary, that in sanction for prosecution the description of the offence intended to be prosecuted should be stated in general terms, although details may be omitted. *In re* BALAJI SITARAM
11 Bom. 34

9. ——— *Criminal Procedure Code, 1882, s. 195—False evidence—Specification of place and time of offence.* A sanction to a prosecution for giving false evidence granted under s. 195 of the Criminal Procedure Code should specify the place where, and the time when, the alleged false evidence was given, and in substance the assignments of perjury, as also the sections of the Penal Code under which proceedings are authorized. HAR DIAL *v.* DOORGA PRASAD . **I. L. R. 6 All. 105**

10. ——— *Specification of place and occasion of offence—Criminal Procedure Code, 1882, s. 195.* Sanction to a prosecution granted under s. 195, Criminal Procedure Code,

SANCTION FOR PROSECUTION—*contd*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

1882, should specify the Court or other place in which, and the occasion on which, the offence was committed; and such sanction should not be granted without a preliminary inquiry, where such inquiry is "necessary," within the meaning of s. 476 of the Code. EMPRESS *v.* NAROTAM DAS
I. L. R. 6 All. 98

11. ——— *Specification of particulars of offence—Criminal Procedure Code, 1882, s. 195—False evidence—Preliminary inquiry.* In a suit on a bond, instituted in the Court of a Munsif, the question whether the defendant had executed the bond or not was referred to arbitration. The arbitrator decided that the defendant had not executed the bond, and that it was a forgery. The Munsif dismissed the suit in accordance with the award. The defendant then applied to the Munsif for sanction to prosecute the plaintiff, without specifying in his application the offences in respect of which he desired to prosecute. The Munsif granted sanction, merely observing that there were sufficient grounds for sanctioning the prosecution, without giving any reasons or specifying the offence or offences in respect of which sanction was granted. *Held*, that the terms in which the Munsif had given his sanction to a prosecution were not sufficiently explicit, and that he should have mentioned the section or sections of the Penal Code under which he authorized criminal proceedings to be taken, as also in a general way the offence or offences to be charged, the date of commission, and the place where committed. Further, that as the Munsif himself had not determined the question of forgery in the suit, he should have made some inquiry to satisfy himself that there were materials to justify a prosecution. PARSOTAM LAL *v.* BIJAI
I. L. R. 6 All. 101

12. ——— *Omission to specify particulars of offence—False evidence—Criminal Procedure Code (Act XXV of 1861), ss. 169 and 170.* Where persons were charged with offences under ss. 471 and 193 of the Penal Code, committed in proceedings before the Civil Court, and for which therefore the sanction of the Civil Court was necessary under ss. 169 and 170 of Act XXV of 1861:—*Held*, that the sanction, which simply gave permission and did not specify the particular act or acts and the particular words which constituted the offences, was insufficient. QUEEN *v.* GABIND CHANDRA GHOSE
7 B. L. R. 28 note : 10 W. R. Cr. 41

13. ——— *Criminal Procedure Code, 1882, s. 195—Necessary contents of application for sanction.* An application for sanction to prosecute for forgery or perjury must indicate precisely the document in respect of which forgery is said to have been committed, or must set forth in detail the statements alleged to be false showing the place where and the occasion on which such alleged false statements were made. BALWANT SINGH *v.* UMED SINGH . . . **I. L. R. 18 All. 203**

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SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

14. ——— *Criminal Procedure Code (Act V of 1898), s. 195—Notice to person to prosecute whom sanction is sought—Proceedings before Sessions Court—Proper exercise of discretion.* A Sessions Court, when granting sanction to prosecute under s. 195 of the Code of Criminal Procedure, should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real question in such cases, namely, whether there was a *primâ facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction. PAMPAPATI SASTRI *v.* SUBBA SASTRI . . . **I. L. R. 23 Mad. 210**

15. ——— *Giving false evidence in a judicial proceeding—Penal Code (Act XLV of 1860), s. 193—Granting sanction to prosecute youthful offenders.* A sanction to prosecute under the provisions of s. 195 of the Criminal Procedure Code (Act X of 1882) must specify the Court in which, and the occasions on which, the offence was committed; and where the offence is that of giving false evidence in a judicial proceedings (s. 193, Penal Code), it should further specify the particular statements in respect of which the offence is imputed. Where therefore sanction was granted to prosecute certain persons, one of whom was a boy of eleven years, for giving false evidence in a dacoity case and the sanction did not contain the essentials referred to:—*Held*, that it was defective in form and could not stand, and that the High Court could not take it upon itself to rectify the informality by supplying the necessary particulars. *Held*, also, that the sanction for prosecution against the boy-petitioner was unadvisable in consideration of his youth, and should therefore be revoked. GOBARDHONE CHOWKIDAR *v.* HABIBULLA **3 C. W. N. 35**

16. ——— *Refusal of sanction under mistake or as being unnecessary. Held*, that the declining by a Court of revenue to sanction a prosecution under ss. 468 and 469 of Act X of 1872, under a mistaken view of the law and under the impression that sanction was unnecessary, did not constitute sanction. EMPRESS OF INDIA *v.* SABSUKH . . . **I. L. R. 2 All. 533**

17. ——— *Statement by Collector that he has no objection to give sanction again after sanction by Deputy Collector.* In a suit by *A* for arrears of rent above R100 a decree was passed against *B*, *C*, and *D*, wherein certain documents filed by them were held to be forgeries. *A* applied for and obtained an order from the Deputy Collector who tried the suit for leave to prosecute *B* and *C* in the Criminal Court. *A* afterwards applied to the Collector for leave to prosecute *B*, *C*, and *D*, whereupon the Collector passed the following order: "Sanction has already been given once by the Deputy Collector. I, however, have no objection to give it a second time, as the petitioner desires it." *D* was convicted by the Sessions Judge on a charge under s. 471 of the Penal Code. On appeal by *D*:—*Held*, that no proper leave had been obtained to prosecute *D*, and this defect was not cured by the subsequent proceedings, and the conviction must be quashed. QUEEN *v.* MAHIMA CHANDRA CHUCKERBUTTY **7 B. L. R. 26 : 15 W. R. Cr. 45**

18. ——— *Statement by Munsif that he has no objection to give sanction if evidence is thought sufficient—Sufficiency of sanction.* On an application to a Munsif for sanction to prosecute, the following order was made upon the petition: "If the petitioner thinks there is sufficient evidence against *A*, I have no objection to give such sanction." *Held*, that the order was a sufficient sanction to support a prosecution. *In the matter of* JADU NATH HAZRA *v.* ANNODA PROSAD SIRCAR **11 C. L. R. 53**

19. ——— *Penal Code, s. 193—Sufficiency of sanction.* Sanction for the prosecution of the accused was accorded by an Assistant Sessions Judge in the following terms: "There is no doubt whatever that Tai, Baji and Bala, these three persons, made before me certain statements contradictory of the statements which they had made before the committing Magistrate. Therefore if from such statements of theirs they may be liable to any charge, there is sanction from here" (*i.e.*, I give my sanction) "for their prosecution." *Held*, that this gave sufficient sanction for the prosecution of the accused under s. 193 of the Penal Code, and that it was not necessary that the authority giving the sanction should specify the particular section of the Penal Code under which the accused was permitted to be prosecuted. REG. *v.* TAI . . . . . **8 Bom. Cr. 24**

20. ——— *Issue of warrant—Implied sanction—Criminal Procedure Code, 1861, s. 169.* The object of the sanction required by s. 169, Code of Criminal Procedure, was to ensure that the prosecution should be instituted after due consideration on the part of the Court before whom the false evidence was given, or on the part of a Court to which such Court was subordinate. When a Magistrate perused the papers of a case which had been forwarded to him by a Subordinate Magistrate for consideration, and then sent on the papers to the District Superintendent of Police with an opinion adverse to the prisoner, and the District Superintendent of Police requested the Magistrate to issue a warrant against the prisoner, charging him with giving false evidence, it was *held* that the issue of the warrant was a sufficient sanction under s. 169 on the part of the Magistrate. QUEEN *v.* MAHOMED HOSSAIN . . . . **16 W. R. Cr. 37**

21. ——— *Instruction from Sessions Judge to Magistrate—Criminal Procedure*

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SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

Code, 1872, s. 468—Prosecution for giving false evidence. An instruction to the Magistrate of the district by the Court of Session, contained in the concluding sentence of its judgment in a case tried by it, to prosecute a person for giving false evidence before it in such case, was *held* not to amount to sanction to a prosecution of such person for such offence, within the meaning of s. 468 of Act X of 1872, that section supposing a complaint, or at least an application for sanction for a complaint. EMPRESS *v.* GOBARDHAN DAS **I. L. R. 3 All. 213**

22. _____ *Criminal Procedure Code, 1882, ss. 195 and 476—Nature of sanction—Sanction granted by Court without application being made by the person to whom it is granted.* A sanction to prosecute under s. 195 of the Code of Criminal Procedure presupposes an application for sanction, and where no such application is made, a Court ought not to take upon itself to grant sanction, but should take action in the manner provided by s. 476 of the Code. *Empress of India* v *Gobardhan Das, I. L. R. 3 All. 62*, referred to. *In the matter of the petition of* BANARSI DAS **I. L. R. 18 All. 62**

23. _____ *Order of Munsif directing that Magistrate inquire into a case—Criminal Procedure Code, 1882, ss. 195 and 476—"Sanction"—"Complaint"—Civil Procedure Code, 1882, s. 643.* On the 2nd August 1884 a Munsif, who was of opinion that in the course of a suit which had been tried before him certain persons have committed offences under ss. 193, 463, and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code, and in which he directed that the accused should be sent to the Magistrate, and that the Magistrate should inquire into the matter. In May 1885, upon an application by one of the accused to the District Court to "revoke the sanction for prosecution granted by the Munsif," it was contended that the "sanction" had expired on the 2nd February 1885, and had ceased to have effect. *Held*, by the Full Bench, that the Munsif's order, whether it was or was not a sanction, was a sufficient "complaint" within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case. *Per* PETHERAM, *C.J.*, and STRAIGHT, *J.*—That considering that s. 643 of the Civil Procedure Code was closely similar to s. 476 of the Criminal Procedure Code, the Munsif's order might be taken as having been passed under the latter section. Also *per* PETHERAM, *C. J.*, and STRAIGHT, *J.*—The words in s. 195 of the Criminal Procedure Code, "except with the previous sanction or on the complaint of the public servant concerned," must be read in connection with s. 476, which was enacted with object of avoiding the inconvenience which might be caused if a Munsif, or a Subordinate Judge, or a Judge were obliged to appear before a Magistrate and make a complaint

SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

on oath, like an ordinary complainant, in order to lay the foundation for a prosecution. The language of s. 476 indicates that where a Court is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195. ISHRI PRASAD *v.* SHAM LAL **I. L. R. 7 All. 871**

24. _____ *Report of police or medical officers—Prosecution under Bombay Military Cantonments Act, III of 1867.* Reports of police or medical officers are not a sufficient sanction for prosecution under this Act. A complaint on oath or solemn affirmation is necessary. REG. *v.* LADU . . . . . **7 Bom. Cr. 87**

25. _____ *Implied sanction—Criminal Procedure Code, 1869, s. 168—Penal Code, ss. 177, 193—Framing charge.* The form of an accusation by a District Superintendent of Police under s. 193 of the Penal Code, does not preclude a Magistrate from framing the charge under s. 177; the sanction of the District Superintendent required under s. 168, Code of Criminal Procedure, to give the Magistrate jurisdiction, need not be express, but might be implied. *In the matter of* ASHRUFE HOSSEIN . . **16 W. R. Cr. 67**

26. _____ *Implied sanction—Criminal Procedure Code, 1861, s. 169.* Where the Magistrate before whom a witness gave false evidence himself committed such a witness for trial his sanction of the prosecution, under s. 169 of the Criminal Procedure Code, was *held* to be implied. REG. *v.* MUHAMMAD KHAN VALAD IMAM KHAN **6 Bom. Cr. 54**

27. _____ *Implied sanction—Prosecution for non-attendance in obedience to summons—Criminal Procedure Code, 1861, s. 168.* Prosecution for non-attendance in obedience to a summons was entertained without the sanction required by s. 168 of the Criminal Procedure Code. *Held*, that there was an implied sanction for the prosecution as the conviction was by the same Magistrate whose summons was treated with contempt. REG. *v.* GANU BIN TATIA SELAR **5 Bom. Cr. 38**

28. _____ *Implied sanction—Direction to commit.* When a Sessions Court direct a commitment, it must be taken to sanction the prosecution out of which the commitment arises. QUEEN *v.* LEKHRAJ **2 N. W. 132: Agra, F. B. Ed. 1874, 206**

29. _____ *Letter from Civil Court to Subordinate Magistrate—Specification of sections of Penal Code for which sanction is given—Jurisdiction of Magistrate to commit under other section.* Where a Civil Court, by letter to a Subordinate Magistrate with committing powers gave sanction for the prosecution of the accused under ss. 463 and 471 the Penal Code (making and using

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SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

a false document), and where the Magistrate, in committing the accused for trial, in addition to framing a charge under these sections, added a head of charge under s. 193 (giving false evidence), it was *held* that the Magistrate had no jurisdiction to commit the accused for trial on the last-mentioned head of charge. REG. *v.* SUBI SANI
8 Bom. Cr. 28

30. ——— *Suggestion that person ought to be prosecuted.* When a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court *held* that this did not constitute a sanction to prosecute. *In the matter of the petition of* KHEPU NATH SIKDAR. KHEPU NATH SIKDAR *v.* GRISH CHUNDER MOOKERJEE . . . . **I. L. R. 16 Calc. 730**

31. ——— *Criminal Procedure Code, s. 197—Prosecution of public servants—Indefiniteness of sanction.* An order by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the District for "bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court" is not a legal sanction within the meaning of the Criminal Procedure Code, s. 197, and a commitment on any of such charges should be quashed. QUEEN-Empress *v.* SAMAVIER . . **I. L. R. 16 Mad. 468**

32. ——— *Criminal Procedure Code, ss. 195, 476—Preliminary inquiry—Penal Code (Act XLV of 1860), s. 182—Criminal Procedure Code (Act X of 1872), s. 471.* Where a Deputy Commissioner issued a sanction to prosecute the accused upon an express application made on behalf of a certain person against whom a charge of torture had been made, and which he found, from reasons stated in his judgment, to be false :—*Held*, taking the order to have been one made under s. 195 of the Code of Criminal Procedure, that it was proper sanction, inasmuch as it was given to a contemplated prosecution by a definite person. *Semble :* On the supposition that the order was one under s. 476 of the Criminal Procedure Code, that it was not necessary for the validity of an order under that section that there should be any evidence on the record contradicting the case which was thought to be false, or that there should be a preliminary inquiry. Although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect is neither rendered imperative by the law nor is it desirable. *In the matter of Mutty Lall Ghose, I. L. R. 6 Calc. 308 ; Queen* v. *Baijoo Lall, I. L. R. 1 Calc. 450 ;* and *Khepu Nath Sikdar* v. *Grish Chunder Mukerjee, I. L. R. 16 Calc. 370*, referred to and distinguished. BAPERAM SURMA *v.* GOURI NATH DUTT
I. L. R. 20 Calc. 474

SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

33. ——— *Criminal Procedure Code, ss. 476, 195—Sanction by Magistrate for prosecution—Preliminary inquiry.* When ao Magistrate takes action under s. 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order tha the should hold a preliminary inquiry. *Baperam Surma v. Gouri Nath Dutt, I. L. R. 20 Calc. 474*, followed. QUEEN-EMPRESS *v.* MATABADAL . . **I. L. R. 15 All. 392**

34. ——— *Criminal Procedure Code, 1898, ss. 195, 476—Sanction for prosecution for false statement made in proceedings under Land Acquisition Act (I of 1894).* Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by some person who may desire to complain of the particular offence and whose complaint could not be entertained without such sanction. *In the matter of Banarsi Das, I. L. R. 18 All. 213*, and *Baperam Surma* v. *Gouri Nath Dutt, I. L. R. 20 Calc. 474*, referred to. DURGA DAS RUKHIT *v.* QUEEN-EMPRESS
I. L. R. 27 Calc. 820

35. ——— **Sufficiency of sanction**—*Sanction of official superior—Penal Code, s. 182—Criminal Procedure Code, 1861, s. 168.* Where a prosecution of an offence under Ch. X of the Penal Code was instituted by an inferior ministerial servant under sanction of the authority of his official superior, the provisions of s. 168 of the Code of Criminal Procedure were *held* to have been complied with. QUEEN *v.* RAM GOLAM SINGH
11 W. R. Cr. 22

See In the matter of the petition of ABDOOL LUTEEF . . . . **9 W. R. Cr. 3**

36. ——— *Sanction of official superior—Criminal Procedure Code, 1861, s. 169—Judicial Commissioner sitting as Sessions Judge.* Where the Judicial Commissioner of Assam sitting as Sessions Judge, certified, in his capacity of Judge of the Chief Civil Court in Assam, that a charge of false evidence was entertained with the sanction of the District Court of Assam, to which the Court of the Munsif of Debrooghur, before or against which the offence was committed, was subordinate :—*Held*, that the sanction required by s. 169, Code of Criminal Procedure, had been given. BAPOORAM AHAM *v.* GUNGARAM KACHAREE
17 W. R. Cr. 54

37. ——— *Sanction mentioning wrong section of Code—Criminal Procedure Code, 1861, ss. 169, 170—Prosecution under different section than that for which sanction was obtained.* The prosecutor applied to a Civil Court for leave to prosecute, under s. 170 of the Criminal Procedure Code, a witness who had appeared before the Court. The Court granted the permission as applied for. The prisoner was tried for and convicted of an offence coming under the provisions of s. 169 of the Criminal Procedure Code. *Held*, that the mention of s. 170 in the permission to prosecute granted by

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SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

the Civil Court might be treated as surplusage, and that the prisoner was rightly convicted. REG. *v.* KHUSHAL HIRAMAN . . **4 Bom. Cr. 28**

38. _____ *Sanction by official superior—District Superintendent of Police—"Inferior ministerial officer"—Criminal Procedure Code, 1861, s. 168.* The sanction of a District Superintendent of Police to the prosecution of a charge of giving false information not to such District Superintendent himself, but to an Assistant District Superintendent, was *held* to be no sufficient sanction under s. 168 of the Criminal Procedure Code, 1861. The words "inferior ministerial officer" referred to public servants of a lower grade than an Assistant Superintendent of Police. QUEEN *v.* OOTUM CHUND . **2 N. W. 287**

39. _____ *Criminal Procedure Code, 1861, s. 168—Person charged with giving false information under Penal Code, s. 182.* Where a person was accused under s. 182 of the Penal Code with having given false information to a head constable, it was *held* that the provisions of s. 168 of the Code of Criminal Procedure, 1861, had been sufficiently complied with, inasmuch as the lower Appellate Court stated in its judgment that "the case had been forwarded under s. 182 by the officer in charge of the District Superintendent's office," the District Superintendent being the official superior of the head constable. QUEEN *v.* GRISH CHUNDER SIRCAR . . . **19 W. R. Cr. 33**

40. _____ *Sanction given by Judge who afterwards tried the case—Criminal Procedure Code, 1872, s. 469.* The Court declined in this case to say under s. 469 of the Code of Criminal Procedure, 1872, that a conviction was bad, because the Judge who tried the case and the Judge who sanctioned the criminal proceedings was the same person. QUEEN *v.* SUBAL CHUNDER GANGOOLY . . . . **22 W. R. Cr. 16**

41. _____ *Notice to show cause not a necessary preliminary—Criminal Procedure Code, 1882, s. 195.* An order under s. 195 of the Code of Criminal Procedure sanctioning a prosecution for perjury is not bad by reason of notice to show cause not having been issued previously to the person against whom such order is made. *Krishnanund Das* v. *Hari Bera, I. L. R. 12 Calc. 58*, followed. MANGAR RAM *v.* BEHARI **I. L. R. 18 All. 358**

42. _____ *Criminal Procedure Code (Act X of 1882), ss. 196, 532—Charge under Penal Code (Act XLV of 1860), s. 124A.* The accused, who was the editor, proprietor, and publisher of the *Kesari* newspaper, was charged under s. 124A of the Penal Code with exciting and attempting to excite feelings of disaffection to Government by the publication of certain articles, etc., in the *Kesari* in its issue of the 15th June 1897. At the trial an order for the prosecution given by Government under s. 196 of the Criminal Procedure

SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*contd.*

Code in the following form, dated July 26, 1897, was tendered in evidence: "Under the provisions of s. 196 of the Code of Criminal Procedure, Mirza Abas Ali Baig, Oriental Translator to Government, is hereby ordered by His Excellency the Governor in Council to make a complaint against Mr. Bal Gangadhar Tilak, B.A., LL.B., of Poona, publisher, proprietor, and editor of the *Kesari*, a weekly vernacular newspaper of Poona, and against Mr. Hari Narayan Gokhale, of Poona, printer of the said newspaper, in respect of certain articles appearing in the said newspaper, under s. 124A of the Penal Code and any other section of the said Code which may be found to be applicable to the case." Counsel for the accused objected that the order was too vague, and should have specified the articles with reference to which the accused was to be charged. *Held*, that the order was sufficient and was admissible, but that, if it were not sufficient, the commitment might be accepted and the trial proceeded with under s. 532 of the Code of Criminal Procedure. *Queen-Empress* v. *Morton, I. L. R. 9 Bom. 288*, followed. QUEEN-EMPRESS *v.* BAL GANGADHAR TILAK. **I. L. R. 22 Bom. 112**

43. _____ **Sufficiency of sanction—Letter**—*Public servant—Substantive offence—Abetment—Fresh sanction—Criminal Procedure Code (Act V of 1898), ss. 195, 197, 230—Penal Code (Act XLV of 1860), ss. 109, 468.* The Inspector-General of Registration, Bengal, wrote a letter to the District Registrar of Tippera, directing the prosecution of a Sub-Registrar on charges under ss. 417 and 468 of the Penal Code. The Sub-Registrar was tried and convicted, under ss. 468 and 109, of abetment of forgery for the purpose of cheating. At the trial it was contended on behalf of the accused that there could be no conviction for abetment when sanction had been given for prosecution for the substantive offence only. *Held*, that the letter of the Inspector-General of Registration was a sufficient sanction to justify the conviction, and that no fresh sanction was necessary under s. 230 of the Criminal Procedure Code. PROFULLA CHANDRA SEN *v.* EMPEROR (1903) **I. L. R. 30 Calc. 905 s.c. 7 C. W. N. 494**

44. _____ **Naming of offender**—*Criminal Procedure Code (Act V of 1898), s. 195 (4).* Cl. (4) of s. 195 of the Code of Criminal Procedure applies only to cases in which, at the time of granting sanction to prosecute, the offender is uncertain or unknown. Where there is no doubt as to whom the prosecution is to be directed against, the offender should be named. SEQUEIRA *v.* LUJA BAI (1901) **I. L. R. 25 Mad. 671**

45. _____ **Order in alternative**—*Criminal Procedure Code, ss. 195, 476—Order directing prosecution—Order framed in the alternative held to be bad—Revision.* A District Magistrate, having before him an application for the grant of sanction to prosecute a certain person for perjuries alleged by the applicants to have been committed

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SANCTION FOR PROSECUTION—*contd.*

5. NATURE, FORM, AND SUFFICIENCY OF SANCTION—*concld.*

by that person in the Court of the District Magistrate, passed an order in the following form :—"I. . . District Magistrate, Bulandshahr, hereby charge you . . . that you, on the 21st day of June, 1902, at Bulandshahr, in the course of the hearing of the appeal, *Shib Dayal* v. *King-Emperor*, stated in evidence before this Court," etc., etc. ; "*or* I sanction proceedings against you under s. 182, Indian Penal Code, with giving false information," etc., etc. "I make the case over to B. Dipchand for disposal. B. Hardeo Sahai will furnish P. R. in R500, and one surety in like amount to appear when called on." *Held*, that this order, being framed in the alternative, was a bad order, and could not be acted upon. HASAN SHAH *v.* HARDEO SAHAI (1903) . **I. L. R. 25 All. 234**

46. _____ **Perjury, assignment of**—*Criminal Procedure Code* (*Act V of 1898*) *ss. 195, cl. (4), 234, 350, cl. (1) and 537*—*Penal Code* (*Act XLV of 1860*), *s. 193*—*Oaths Act* (*X of 1873*) *ss. 5 (b), 13.* Although s. 195, cl. (4), does not in express terms render an assignment of perjury necessary, the application for sanction and the order granting it, in respect of statements contained in a lengthy deposition, should specify the particular statements alleged to be false, but the omission to do so is a defect cured by s. 537, unless a failure of justice has in fact been established. Where the alleged false statements were not set out in the order of sanction but were specified in the application for it, and also in the charges subsequently framed :—*Held*, that the accused was not prejudiced by the omission in the sanction. *Balwant Singh* v. *Umed Singh, I. L. R. 18 All. 203, Queen* v. *Kartick Chunder Haldar, 9 W. R. Cr. 58, Queen* v. *Gobind Chunder Ghose, 10 W. R. Cr. 41 ; Queen* v. *Boodhun Ahir, 17 W. R. Cr. 32, In re Jivan Ambaidas, I. L. R. 19 Bom. 362, Goberdhone Chowkidar* v. *Habibullah, 3 C. W. N. 35,* and *Queen* v. *Soonder Mohooree, 9 W. R. Cr. 25,* referred to. RAKHAL CHANDRA LAHA *v.* EMPEROR (1909)
I. L. R. 36 Calc. 808

6. POWER TO GRANT SANCTION.

1. _____ **Implied power**—*Criminal Procedure Code, 1861, s. 167—Prosecution of public servant.* Upon the construction of s. 167 of the Criminal Procedure Code :—*Held*, that the section by implication vested in the Court or authority to whom the Judge or other public servant not removeable, etc., was subordinate, the power of sanctioning or directing such prosecution. It did not say that the Government must give the power, but that it shall exist unless limited or reserved. Every Court or authority therefore has it unless there is a limitation. QUEEN *v.* KRISTNA RAU
7 Mad. 58

2 _____ **Power to sanction where no particular party is accused**—*Sending case for investigation.* A Court had power to send a case for investigation to a Magistrate under s. 171 of the

SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*contd.*

Criminal Procedure Code, 1861, where no particular individual had been accused. ESSAN CHUNDER DUTT *v.* PRANNATH CHOWDHRY : **W. R. F. B. 71**

3. _____ **What Courts can give sanction**—*Criminal Procedure Code, 1862, s. 468—Case settled without evidence.* The Courts that had jurisdiction to grant a sanction to proceedings under s. 468 of Act X of 1872, where the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate. *In the matter of the petition of* KASI CHUNDER MOZUMDAR. JUGGUT CHUNDER MOZUMDAR *v.* KASI CHUNDER MOZUMDAR
I. L. R. 6 Calc. 440

S.C. KAZI CHUNDRA MOZOOMDAR *v.* JUGGUT CHUNDRA MOZUMDAR . . **7 C. L. R. 330**

4. _____ *Criminal Procedure Code, 1882, s. 195—Offence committed in presence of Court—Preliminary inquiry—Case settled without evidence.* It is competent for a Civil Court before which a case may have been settled without any evidence being gone into, and which has grounds for supposing the offence of the nature referred to in s. 195 of the Code of Criminal Procedure has been committed before it during the pendency of such case, to make a preliminary enquiry, and thus satisfy itself whether a *primâ facie* case has been made out for granting sanction, and, if so satisfied, to grant sanction for the prosecution of the person alleged to have committed such offence. A sanction granted after such preliminary enquiry and based thereon is not illegal. *In re Kasi Chunder Mozumdar, I. L. R. 6 Calc. 440,* and *Zamindar of Sivagiri* v. *Queen, I. L. R. 6 Mad. 29,* dissented from on this point. SHASHI KUMAR DEY *v.* SHASHI KUMAR DEY
I. L. R. 19 Calc. 345

5. _____ **Power of Appellate Court to sanction prosecution of abetment**—*Offence committed before lower Court.* Where an offence was committed against a Court of first instance, the Appellate Court to which it was subordinate was competent to sanction a prosecution under Ch. XI of the Criminal Procedure Code, 1861. Sanction to such a prosecution might be given even if the offence was abetment. *In the matter of* ISHAN CHUNDER GHOSE . . **15 W. R. 352**

6. _____ **Power of Civil Court**—*Criminal Procedure Code, 1861, s. 170.* A Civil Court had no power to make an order, under s. 170 of the Criminal Procedure Code, sanctioning a prosecution for an offence committed before the Court of the Principal Sudder Ameen on the Small Cause side, that Court not being subordinate to the Civil Court. *Ex parte* MAHALINGAIYAN . **6 Mad. 191**

7. _____ *Power of Civil Court to commit or forgery or perjury—Criminal Procedure Code, 1882, ss. 195 and 475—Witness of party to proceeding.* The power given to a Civil Court under Ch. XXXV of the Code of Criminal Procedure (Act X of 1882) to take action regarding "any offence referred to in s. 195 " is not ordinarily

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SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*contd.*

restricted, in regard to offences relating to documents, to such offences only when committed by a party to the proceeding in which the document was given in evidence. It extends also to such offences when committed by a witness of the party. *In re* DEVJI VALAD BHAVANI . I. L. R. 18 Bom. 581

8. _____ Power of Mamlatdar—*Sanction of Collector—Prosecution of kulkarni for false report—Criminal Procedure Code, 1861, s. 167.* The sanction for the prosecution of a kulkarni for making a false report as a public servant required by s. 167 of the Code of Criminal Procedure might be given by the Mamlatdar or by the patil to whom such kulkarni was subordinate. The sanction of the Collector was not necessary for that purpose. REG. *v.* MALHAR RAMCHANDRA . 7 Bom. Cr. 64

9. _____ Power of Revenue Court—*—Criminal Procedure Code, 1872, ss. 468, 469, 470—Prosecution for offence against public justice and offence relating to document given in evidence—"Subordination" of Revenue Courts to High Court. Held* (SPANKIE, *J.*, doubting), on a reference to the Full Bench, that a Court of Revenue was a Civil Court within the meaning of ss. 468 and 469 of Act X of 1872. Observations by STUART, *C.J.*, on the "subordination" of Courts of Revenue to the High Court within the meaning of ss. 468 and 469 of Act X of 1872. EMPRESS *v.* SABSUKH I. L. R. 2 All. 533

10. _____ Power of District Magistrate—*Court of Assistant Magistrate—Preliminary inquiry—Criminal Procedure Code, 1882, ss. 195, 476.* The Court of an Assistant Collector is not subordinate to that of the Magistrate of the district within the meaning of s. 195 of the Criminal Procedure Code. EMPRESS *v.* NAROTAM DAS I. L. R. 6 All. 98

11. _____ *Information by accused of offence—Report by a police of falsity of information—Sanction by District Magistrate on police report—Judicial proceeding—Subordination of police officer to District Magistrate—Complaint—Criminal Procedure Code (Act V of 1898), ss. 195 and 537—Penal Code (Act XLV of 1860), s. 182.* The accused gave certain information to the police who after investigating the matter reported that the information given was false and constituted an offence under s. 182 of the Penal Code. The District Magistrate on this sanctioned the prosecution of the accused, who was convicted and sentenced under that section. The accused appealed against the conviction and sentence. His appeal was heard and dismissed by the District Magistrate, who had previously sanctioned his prosecution. On revision the accused contended that the District Magistrate, having sanctioned his prosecution on the police report, was not competent to hear the appeal. *Held*, that, although police officers in a district were generally subordinate to the District Magistrate, the subordination contemplated by s. 195 of the Code of Criminal Procedure was not such subordination.

SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*contd.*

That subordination contemplated some superior officer of police. Nor could the report of the police officer be regarded as a complaint under s. 195 of the Code of Criminal Procedure, and therefore no proper sanction had been obtained. The defect, however, was cured by s. 537 of the Code of Criminal Procedure, as no failure of justice had been occasioned. RAMASORY LALL *v.* QUEEN-EMPRESS I. L. R. 27 Calc. 452 4 C. W. N. 594

12. _____ *Criminal Procedure Code, 1872, s. 468—Relative positions of a Magistrate of the first class, the Magistrate of the district, and the Court of Session. Held* (OLDFIELD, *J.*, dissenting), that, for the purposes of s. 468 of Act X of 1872, a Magistrate of the first class was subordinate to the Magistrate of the district, and consequently application for sanction to prosecute a person for intentionally given false evidence before the former might, where such sanction was refused by the former, be made to the latter, and not to the Court of Session, which had not power to give such sanction. *In the matter of the petition of* GUR DAYAL . . . . I. L. R. 2 All. 205

13. _____ *Criminal Procedure Code, 1872, s. 468—Sessions Court—Magistrate of first class—Magistrate of district.* For the purposes of s. 468 of the Code of Criminal Procedure (Act X of 1872), a Magistrate of the first class was subordinate to the Magistrate of the district: a sanction given by the latter to prosecute a person for intentionally given false evidence before the former was therefore legal and sufficient, notwithstanding the refusal by the former to give such sanction himself. *Semble:* That the Sessions Court had not power to give such sanction. IMPERATRIX *v.* PADMANABH PAI . . . I. L. R. 2 Bom. 384

14. _____ *Criminal Procedure Code, 1872, s. 468—Subordinate Judge—District Judge.* For the purpose of sanctioning a criminal prosecution under s. 468 of the Code of Criminal Procedure, the Court of the Subordinate Judge was subordinate to that of the District Judge, notwithstanding that the subject-matter of the litigation in the former Court involved more than R5,000, and an appeal lay direct to the High Court from the decision of that Court in that matter. IMPERATRIX *v.* LAKSHMAN SAKHARAM I. L. R. 2 Bom. 481

15. _____ Power of second class Magistrate—*Criminal Procedure Code, 1872, s. 467—Sanction for prosecution for giving false information to police officer, given by second class Magistrate of talukh.* A second class Magistrate of a talukh, not being the official superior of a police station-house officer within the meaning of s. 467 of the Code of Criminal Procedure, 1872, could not sanction a prosecution under s. 182 of the Penal Code for giving false information to the station-house officer. QUEEN *v.* VELAYUDAM PILLAI I. L. R. 6 Mad. 146

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SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*contd.*

16. _____ **Power of Sub-divisional Magistrate**—*Criminal Procedure Code, 1882, s. 195—Sanction to prosecute for false evidence granted by Magistrate on revising calendar.* A Sub-divisional Magistrate, after perusing the calendar of a case tried by a Magistrate subordinate to him, sent for the record, and passed an order under s. 195 of the Criminal Procedure Code, sanctioning the prosecution of a witness in the case for perjury. *Held*, that the order was illegal. QUEEN-EMPRESS *v.* KUPPU . . . . **I. L. R. 7 Mad. 560**

17. _____ **Power of Small Cause Court Judge**—*Proceeding before Registrar—Forgery—Criminal Procedure Code (Act XXV of 1861), s. 170.* A specially registered bond was presented before the Small Cause Court Judge for execution, under s. 53, Act XX of 1866, and a decree passed upon it in usual form. Subsequently the Registrar sanctioned the prosecution of the decree-holder, on the ground that the bond was a forgery. The Small Cause Court Judge thereupon, on application made, without taking any evidence or making further inquiry, set aside the decree, and sanctioned the prosecution under s. 170 of the Criminal Procedure Code. *Held*, that he was justified in sanctioning the prosecution, but not in setting aside the decree. QUEEN *v.* NAWAB SINGH . **3 B. L. R. A. Cr. 9**

18. _____ **Power of Civil Judge**—*Criminal Procedure Code, 1861, ss. 170, 171—Power of Judge to make order where application had been made to Sudder Ameen in whose Court offence occurred, and refused.* The Civil Judge made an order, under ss. 170 and 171 of the Penal Code, directing the Magistrate to investigate whether certain documents used before the Sudder Ameen were forged, and, if so, by whom. *Held*, that he had jurisdiction to make the order, notwithstanding the Sudder Ameen had been applied to and had refused to make a similar order. RADHANAUTH BANERJEE *v.* KANGALEE MOLLAH . **Marsh. 407 : 2 Hay 538**

19. _____ *Power of District Judge to order prosecution for forgery committed before Munsif—Witness—Criminal Procedure Code, 1882, ss. 195 and 476.* Where a defendant in a suit in the Court of a Munsif applied to the District Judge for sanction under s. 195 of the Code of Criminal Procedure to prosecute a witness who had given evidence in the Munsif's Court in support of a deed, produced as evidence before that Court, which had been found by the Munsif to be a forgery, and the District Judge refused the application, but, purporting to act under s. 476 of the Code, himself ordered the prosecution of such witness:—*Held*, that the Judge's order was made without jurisdiction, the offence in respect of which the sanction was directed not having been committed before him nor brought to his notice in the course of a judicial proceeding. *In the matter of the petition of* MATHURA DAS . . . . **I. L. R. 16 All. 80**

20. _____ **Power of Sessions Judge**—*Sanction given on inquiry ordered during trial.* Where, during an inquiry into allegations that a confession had been made under such circumstances as to render it inadmissible in evidence, the Sessions Judge accorded his sanction to the prosecution for perjury of some of the witnesses who deposed on behalf of the prisoners, the High Court considered such a proceeding improper and eminently calculated to defeat the object of the inquiry. REG. *v.* KASHINATH DINKAR . . . **8 Bom. Cr. 126**

21. _____ *Criminal Procedure Code, 1882, s. 195—Sanction to prosecute—"Subordinate Court," what is a—Sanction to prosecute refused by Subordinate Judge in suit over ₹5,000—Jurisdiction of District Court to grant sanction in cases to which appeal lies to High Court from Subordinate Judge.* In matters relating to the grant of sanction to prosecute under s. 195 of the Criminal Procedure Code (Act X of 1882), a Court is regarded as "subordinate" to another Court where the latter is the Court to which an appeal from the former ordinarily lies, and an application for such sanction must be made to such superior Court even in those particular cases in which an appeal lies to some other Court, *e.g.*, to the High Court. A decree-holder applied to the first class Subordinate Judge for sanction to prosecute his judgment-debtor under ss. 206 and 424 of the Indian Penal Code for fraudulent concealment of certain moveable property, worth about ₹10,000, awarded by the decree. This application was rejected by the Subordinate Judge. The District Judge declined to interfere on the ground that, the decree being appealable to the High Court, the High Court alone could deal with the application under s. 195 of the Criminal Procedure Code. *Held*, that, though the decree in the present instance was appealable to the High Court, still, as appeals from the Court of the first class Subordinate Judge ordinarily lay to the District Court, the former was subordinate to the latter Court within the meaning of s. 125 of the Criminal Procedure Code. *In re* ANANT RAMCHANDRA LOTLIKAR **I. L. R. 11 Bom. 438**

22. _____ *Criminal Procedure Code, s. 195—Sanction for prosecution of witness for perjury by Village Munsif.* *V* was tried and convicted under s. 193 of the Penal Code for giving false evidence before the Court of a Village Munsif in a suit in which *V* was defendant. The Village Munsif sanctioned the prosecution of *V* under s. 195 of the Code of Criminal Procedure. On appeal the Sessions Judge acquitted *V* on the ground that a Village Munsif had no power to sanction the prosecution because s. 195 of the Code of Criminal Procedure did not apply. *Held*, that the Village Munsif had power to grant the sanction, and that the objection to the conviction was bad in law. QUEEN-EMPRESS *v.* VENKAYYA . . **I. L. R. 11 Mad. 735**

23. _____ *Criminal Procedure Code, s. 195—Sanction for prosecution for giving false evidence in a suit under Act XII of 1881 tried by an Assistant Collector of the second class—Sanction granted by Collector—Jurisdiction of Sessions Judge to entertain application to revoke sanction.*

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SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*contd.*

A suit for arrears of rent under s. 93, cl. (*a*), Act XII of 1881, was heard by a Tahsildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the district, who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division, and that officer holding that he had no jurisdiction in the matter, also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge :—*Held*, that the Court of a Collector, when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the district, was still to be deemed subordinate to it within the meaing of that section, and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie. HARI PRASAD *v.* DEBI DIAL. **I. L. R. 10 All. 582**

24. ——— *Criminal Procedure Code (Act X of 1882), ss. 195, 476—Order sanctioning prosecution—Evidence necessary for such order.* Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted. *Queen* v. *Baijoo Lal*, *I. L. R. 1 Calc. 450*, and *In the matter of the petition of Kali Prosunno Bagchee, 23 W. R. Cr. 23*, followed. *In the matter of the petition of* KHEPU NATH SIKDAR. KHEPU NATH SIKDAR *v.* GRISH CHUNDER MUKERJI **I. L. R 16 Calc. 730**

25. ——— *Criminal Procedure Code, 1882, s. 195—"Subordinate Court"—Jurisdiction of the High Court to revoke or grant sanction in cases in which appeal lies to "Her Majesty in Council" from the Court of the Recorder of Rangoon.* In matters relating to the grant of sanction to prosecute, under s. 195 of the Criminal Procedure Code (Act X of 1882), a Court is regarded as "subordinate" to another Court where the latter is the Court to which appeals from the former ordinarily lie, *i.e.*, lie in the majority of cases. Though the decree in the present instant was appealable to "Her Majesty in Council," still, as appeals from the Court of the Recorder of Rangoon ordinarily lay to the High Court, the former was *held* to be subordinate to the latter Court within the meaning of the section. *In re Anant Ramchandra Lotlikar I. L. R. 11 Bom. 438*, followed. MADURAY PILLAY *v.* ELDERTON . . **I. L. R 22 Calc. 487**

26. ——— *Criminal Procedure Code, 1882, ss. 195, 407, and 476—Application for sanction to prosecute—Offence committed before 2nd class Magistrate—Magistrate, jurisdiction of—Application by letter for sanction to prosecute—District Magistrate's order sanctioning prosecution and prescribing the Court in which the prosecution should take place.* The District Forest Officer applied by letter to the District Magistrate to take such action as he deemed fit against one *S*, who, for reasons stated by the District Forest Officer, was suspected of having abetted the offence of giving false evidence in the course of proceedings instituted on behalf of the Forest Department in the Court of a second class Magistrate. The District Magistrate had previously directed that all appeals from the second class Magistrate should be heard by the Deputy Magistrate, but he passed an order himself, whereby he (1) sanctioned the prosecution of *S*, and (2) directed that it should take place in the Court of the Head Assistant Magistrate. *Held*, (i) that the District Magistrate had no jurisdiction to sanction the prosecution, for the reason that he was not the ordinary appellate authority ; (ii) that the second part of his order was irregular for the reasons that it was not authorized by the Criminal Procedure Code, s. 195, and he had no jurisdiction to act under s. 476, since the alleged offence was not brought to his notice in the course of a judicial proceeding. QUEEN-EMPRESS *v.* SUBBARAYA PILLAI . . . **I. L. R. 18 Mad. 487**

27. ——— *Inquiry preliminary to exercise of power to grant sanction—Offence by definite person or persons—Criminal Procedure Code, 1882, s. 476—Civil Procedure Code, 1882, s. 643.*—The provisions of s. 476 of the Criminal Procedure Code as well as of s. 643 of the Civil Procedure Code clearly indicate that the Court taking action under either section must not only have ground for inquiry into an offence of the description referred to in those sections respectively, but must also be *primâ facie* satisfied that the offence has been committed by some definite person or persons against whom proceedings in the Criminal Court are to be taken. *Khepu Nath Sikdar* v. *Grish Chunder Mukerji, I. L. R. 16 Calc. 730*, and *Chaudhari Mahomed Izarul Huq* v. *Queen-Empress, I. L. R. 20 Calc. 349*, followed. A Division Bench of the High Court taking the civil business of a particular group has jurisdiction to deal with an order under s. 643 of the Civil Procedure Code made by a Civil Court in any of the districts included in the group. MAHOMED BHAKKU *v.* QUEEN-EMPRESS **I. L. R. 23 Calc. 532**

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SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*contd.*

28. ——— *Criminal Procedure Code, 1882, s. 476—Inquiry before issue of an order under s. 144—Criminal Procedure Code—Judicial proceeding—False evidence.* A Magistrate making an inquiry before issue of an order under the Criminal Procedure Code, s. 144, is acting in a stage of a judicial proceeding, and has therefore jurisdiction to take action under s. 476, if he is of opinion that false evidence has been given before him. QUEEN-EMPRESS *v.* TIRUNARASIMHA CHARI **I. L. R. 19 Mad 18**

29. ——— *Criminal Procedure Code, 1882), s. 195—Power of Court to go outside record.* A Magistrate, in deciding whether to sanction under Criminal Procedure Code, s. 195, a prosecution for giving false evidence, has power to hold an inquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed. QUEEN-EMPRESS *v.* MOTHA **I. L. R. 20 Mad. 339**

30. ——— *Criminal Procedure Code, 1882, s. 195—"Court to which appeals ordinarily lie"—Collector—District Judge.* For the purpose of granting or revoking a sanction to prosecute refused or granted under s. 195 of the Code of Criminal Procedure, an Assistant Collector of the first class is subordinate to the District Judge. *Hari Prasad* v. *Debi Dial, I. L. R. 10 All. 582,* followed. *Queen-Empress* v. *Ajudhia Prasad, Weekly Notes. All. (1895), 121,* considered. SHANKAR DIAL *v.* VENABLES **I. L. R. 19 All. 121**

31. ——— *Criminal Procedure Code, 1882, s. 195—Sanction for prosecution—Complaint found to be false on an investigation by the police, but without judicial enquiry.* When a complaint was found to be false on an investigation being made by the police, and thereupon sanction was given under s. 195, Criminal Procedure Code, for prosecuting the complainant for instituting a false complaint:—*Held,* that the sanction was bad in law as it was given without a judicial investigation of the complaint. MUKUNDA BEHARI *v.* BHIKARI CHARAN MAHANTI . **1 C. W. N. 452**

32. ——— *Power of Court to grant sanction with regard to case pending in another Court—Power of Court to dispose of case pending on the file of another Magistrate without withdrawing it. Held,* that the Deputy Commissioner had no power to pass an order of dismissal under s. 203, Criminal Procedure Code, in a case which he had transferred to the First Extra Assistant Commissioner, and which was at the time pending in the Court of the latter, nor to grant sanction under the circumstances. KUTAB ALI *v.* EMPRESS . . . **3 C. W. N. 490**

33. ——— *Penal Code (Act XLV of 1860), s. 182—False information with intent to cause public servant to use his lawful power to the injury of another person—Criminal Procedure Code (Act V of 1898), ss. 195, 476—Judicial proceeding.* A Deputy Commissioner, upon receiving a petition complaining of various acts of misconduct by the Tahsildar and others of the locality, referred the matter to the Sub-Divisional Magistrate for enquiry and report. The Sub-Divisional Magistrate in consequence of an opinion formed by him during the enquiry, proceeded to try the petitioner, who was one of the persons who made the petition originally to the Deputy Commissioner, and convicted him under s. 182, Penal Code. *Held,* that the Sub-Divisional Officer had no jurisdiction to institute the proceedings or to grant sanction, inasmuch as the complaint which led to this trial was not made to him, but was made to the Deputy Commissioner without whose previous sanction or complaint no trial under s. 182, Penal Code, could be held. That s. 476, Criminal Procedure Code, did not apply to the proceedings, as they were not judicial proceedings. ASMUTULLA *v.* EMPRESS . . . . . **4 C. W. N. 366**

34. ——— **What Court**—*Code of Criminal Procedure (V of 1895), s. 195 (b).* The Court which tries the case on its merits, and not the Court before which proceedings were instituted and process is issued, is the proper Court to grant sanction for prosecution under s. 195, Criminal Procedure Code. *Putiram Ruidas* v. *Mahomed Kasem, 3 C. W. N. 33,* followed. JEEBUN KRISTA SHAW *v.* BENOY KRISTA SHAW (1901) **6 C. W. N. 35**

35. ——— *Criminal Procedure Code (Act V of 1898), ss. 195 (7), 407 (2)—Court to which appeals ordinarily lie—Refusal to accord sanction—Appeal to Magistrate who has been directed and empowered to hear appeals under s. 407 (2).* A Magistrate who has been directed and empowered to hear appeals under the provisions of s. 407 (2) of the Code of Criminal Procedure is not the "Court to which appeals ordinarily lie," within the meaning and for the purposes of s. 195 (7) of the Code. (BENSON, *J.*, dissenting.) EROMA VARIAR *v.* EMPEROR (F.B. 1903) . **I. L. R. 26 Mad. 656**

36. ——— **Registrar of Small Cause Court**—*Presidency Small Cause Courts Act (XV of 1882), s. 135.* The Registrar of the Court of Small Causes has authority, under s. 195, cl. (1) (*a*), of the Criminal Procedure Code (Act V of 1898), to grant sanction for the prosecution of an offence under s. 182 of the Indian Penal Code (Act XLV of 1860) as the public officer concerned. *In the matter of* GOVERDHANDAS MEGHJI (1902) **I. L. R. 27 Bom. 130**

37 ——— *Registrar of the Small Cause Court—Judge—Validity of sanction—Power of the High Court on reference by Presidency Magistrate—Criminal Procedure Code (Act V of 1898), ss. 195 (1) cl. (b); 432, 433 (1)—Fraudulent decree not set aside by a Civil Court—Penal Code (Act XLV of 1860), s. 210.* Where a plaintiff instituted a false suit for money, and fraudulently obtained an *ex parte* decree therein, before the Registrar of the Calcutta Small Cause Court, who subsequently

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SANCTION FOR PROSECUTION—*contd.*

6. POWER TO GRANT SANCTION—*concld.*

left the country on furlough, and an application for sanction to prosecute him under ss. 209 and 210 of the Penal Code, in respect of such suit and decree was made to the Officiating Chief Judge of the Court, and granted by him :—*Held*, that the sanction was valid. Ordinarily, as a matter of convenience and expediency, an application for sanction should be made to the Judge, who tried the case, if he be present in the Court ; but if he is not, it is open to the Court, that is, to any other Judge of the Court to grant sanction. *In the matter of Krishna Gobinda Dutt, 9 C. W. N. 89*, distinguished and dissented from. *Ambica Roy* v. *Emperor, 2 C. L. J. 65 n*, referred to. *H. C. Pro. 12th November, 1872, 6 Mad. H. C. Ap. XII*, followed. Upon a Reference under s. 432 of the Criminal Procedure Code the High Court deals only with the particular points of law stated for its opinion, but not with the facts of the case nor any other objection to the validity of the proceedings referred. The offence in s. 120 of the Penal Code is committed, when the decree is fraudulently obtained, and the fact that the decree has not been set aside, though admissible to prove that there was no fraud, is not a bar to a prosecution under the section. EMPEROR *v.* MOLLA FUZLA KARIM (1905) . . **I. L. R. 33 Calc. 193**

38. _____ **Commissioner's power to grant sanction for the prosecution of a witness examined by him**—*Criminal Procedure Code* (*Act V of 1898*), *s. 195, subs-s.* (*1*), *cl.* (*b*), *s. 503—Commission to examine witness—"Court."* During the pendency of a Sessions case a witness was examined on commission under s. 503, Criminal Procedure Code. Subsequently the Deputy Magistrate who examined the witness on commission, being applied to, granted sanction for the prosecution of the witness under s. 193, Indian Penal Code. *Held*, that the proper authority to grant sanction for the prosecution of the witness was the Sessions Court and not the Deputy Magistrate, who acted only as Commissioner. Although a Commissioner for the examination of a witness under s. 503, Criminal Procedure Code, may be a Court within the meaning of that section for the purpose of issuing process against the witness and for recording his evidence, still it is not a "Court" within the meaning of s. 195, sub-s. (1), cl. (*b*). The word "Court" in s. 195, sub-s. (1), cl. (*b*), Criminal Procedure Code, must mean the Court whose duty it is to consider evidence and to decide whether it is true or false. SAADUT ALI KHAN *v.* EMPEROR (1907) **11 C. W. N. 909**

7. DISCRETION IN GRANTING SANCTION.

1. _____ **Exercise of discretion**—*Criminal Procedure Code, 1861, s. 169.* The discretion vested in a Civil Court under s. 169, Code of Criminal Procedure, of sanctioning a criminal charge of perjury was one that should be most carefully exercised. QUEEN *v.* POOSA RAM **6 W. R. Cr. 11**

SANCTION FOR PROSECUTION—*contd.*

7. DISCRETION IN GRANTING SANCTION—*contd.*

2. _____ *Case settled without evidence being gone into—Criminal Procedure Code, 1872, s. 468. Per* GARTH, *C.J.*—Where a case was settled without evidence being gone into, the Court in which the suit was brought, even if it had power to sanction criminal proceedings against any of the parties to such suit under s. 468 of Act X of 1872, was guilty of great impropriety and indiscretion in so doing, inasmuch as it could have had no opportunity of judging of the *bonâ fides* of the claim or defence. *In the matter of the petition of* KASI CHUNDER MAZUMDAR. JUGGUT CHUNDER MOZUMDAR *v.* KASI CHUNDER MOZUMDAR **I. L. R. 6 Calc. 440**

S.C. KAZI CHUNDRA MOZOOMDAR *v.* JUGGUT CHUNDRA MOZOOMDAR . . **7 C. L. R. 330**

3. _____ *Proof before Court of commission of offence—Criminal Procedure Code, 1882, s. 195.* Before granting a sanction to prosecute under s. 195 of the Code of Criminal Procedure, a Court is bound to satisfy itself that an offence has been committed ; but it is not bound to hold any inquiry as to all the persons who may be implicated in such offence. *In the matter of the petition of* GOVINDANNAYAR . **I. L. R. 7 Mad. 224**

4. _____ *Proof before Court of commission of offence—Criminal. Procedure Code, 1882, s. 195—False charge—Penal Code, s. 211—Preliminary inquiry.* A prosecution of a charge under s. 211 of the Penal Code should not be granted under s. 195 of the Criminal Procedure Code as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is a strong *primâ facie* case against the accused. *Held*, therefore, where *S*, who had been tried before the Court of Session for an offence and acquitted, applied to the Court, in respect of the criminal proceedings which had been instituted against him, for sanction to prosecute *G* for abetment of an offence under s. 21 of the Penal Code, and the Sessions Judge granted the sanction, and there was nothing on the record of the criminal case or of the Judge's proceedings to show on what grounds *G* was accused of abetting a false charge, or on what grounds the Judge gave the sanction, that before the Judge gave the sanction he should have satisfied himself, by examination of *S* or other inquiry, whether *S* had sufficient grounds in fact for accusing *G*, and whether there were good *primâ facie* grounds for suspecting *G* of abetting a false charge and permitting a prosecution. *In the matter of the petition of* GOURI SAHAI **I. L. R. 6 All. 114**

5. _____ *Criminal Procedure Code, s. 195—Penal Code* (*Act XLV of 1860*) *ss. 193, 463.* In a case in which the Court of first instance finds an instrument to be genuine and the Judge in appeal happens to take a different view of the matter, it is not desirable to grant a sanction to prosecute under s. 195 of the Criminal Procedure Code. Principle which should guide a Court in

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SANCTION FOR PROSECUTION—*contd.*

7. DISCRETION IN GRANTING SANCTION—*contd.*

sanctioning a prosecution explained. RAM PROSAD ROY *v.* SOOBA ROY . . **1 C. W. N. 400**

6. ——— *Penal Code (Act XLV of 1860), s. 211—Discharge of an accused person—Intentionally bringing a false charge.* Where a Deputy Magistrate refused to grant sanction to prosecute the complainant for bringing a false charge on an application being made to him by the accused persons four months after the date of their discharge, but on an application being made to the Sessions Judge for the purpose, the latter, without giving any notice to the persons against whom the sanction was asked for, made an order sanctioning their prosecution under s. 211 of the Penal Code :—*Held*, that, having regard to the view that the Deputy Magistrate took of the matter when he refused the application for sanction, and having regard also to the great delay in making the application for sanction and to the fact of the Sessions Judge's order being made without any notice to the petitioners, that order is not a proper order and must be set aside. RAM NATH CHAMAR *v.* RAM SARAN LALL **1 C W. N. 529**

7. ——— *Criminal Procedure Code (Act X of 1882), s. 195—Sanction to prosecute for making false affidavit—Application by person not a party to the suit through enmity—Proper grounds of sanction—Stage of proceedings when sanction to be granted.* No Court should entertain an application to prosecute made by persons who are not parties to the suit out of which the proceedings for sanction arise. An order granting sanction ought only to be given after careful consideration, and having in view the ends of justice, and not in order to assist the private ends of individuals. It is desirable in most cases that the Court should conclude and have all the facts before it before giving sanction, and that it should not do so at an early stage of the proceedings. Where an application for sanction, unsigned and unverified, was filed before a Munsif, purporting to be on behalf of the defendant in a civil suit, who deposed that he was not aware of the application or its contents and was not desirous of prosecuting, and the Munsif found that it was filed by one *R* who was not a party to the suit, out of ill-feeling, and thereupon rejected the same : and where the sanction was, on appeal, granted by the Sessions Judge without deciding who the real applicant was, or determining the object of the application, but on the ground that there was evidence forthcoming to prove the falsity of the affidavit to the knowledge of the present petitioner : —*Held*, that, under the circumstances of the case, sanction was improperly granted by the Judge, and must be revoked. *In the matter of the petition of* CHANDRA KANT GHOSE . . **3 C. W. N. 3**

8. ——— *Criminal Procedure Code, 1872, s. 468—Discretion of High Court to grant sanction after refusal by Small Cause Court.* In a case in which the High Court was asked under s. 468, Code of Criminal Procedure, to sanction a prosecution for giving false evidence of a plaintiff in a suit before a Small Cause Court, which Court had refused such leave to the defendant, it was *held* that the High Court would not be justified in exercising the discretion vested in them by s. 468 unless it appeared very clearly that there were strong grounds for granting the sanction. MONEY MOHUN DEY *v.* DINONATH MULLICK . **22 W. R.Cr. 11**

9. ——— *Criminal Procedure Code, 1872, s. 468—Grounds for sanction——Record.* On an application for sanction to prosecute under s. 468 of the Code of Criminal Procedure, 1872, it was not competent to the Court to go beyond the record in determining whether or not sanction should be granted when the record itself discloses no foundation for the charges. *In re Kasi Chunder Mozumdar, I. L. R. 6 Calc. 440*, approved. SANGILI VIRA PANDIA CHINNATAMBIAR *v.* QUEEN. ZAMINDAR OF SIVAGIRI *v.* QUEEN **I. L. R. 6 Mad. 29**

10. ——— *Criminal Procedure Code, ss. 195, 435, 478—Forged documents filed in Court—Prosecution ordered by Court as to documents not on record—Power of High Court in revision.* Certain documents having been put into Court in a suit pending before a District Munsif, but not given in evidence, the District Munsif, made an order for the prosecution of the parties who so put them in, on the ground that the documents were forgeries. *Held*, that the High Court had power to revise the proceedings of the District Munsif ; that the District Munsif was not competent to go beyond the record. *Zamindar of Sivagiri* v. *Queen, I. L. R. 6 Mad. 29*, followed, and that the order was wrong and should be set aside. ABDUL KHADAR *v.* MEERA SAHEB **I. L. R. 15 Mad. 224**

11. ——— *Criminal Procedure Code, 1882, ss. 202, 203, 476—Penal Code, s. 211—Complaint dismissed without preliminary inquiry into the truth of complaint.* A Magistrate of the first class, after considering the result of an investigation by a police officer under s. 202 of the Code of Criminal Procedure, dismissed a complaint as false, and passed an order sanctioning the prosecution of the complainant for an offence punishable under s. 211 of the Penal Code, and directed a third class Magistrate to hold a preliminary inquiry, the offence being cognizable by the Court of Sessions only. *Held*, that, as there was no application before the first class Magistrate for sanction to prosecute, the order must be taken to be a complaint made by the said Magistrate, and therefore, under s. 476 of the Code of Criminal Procedure, the third class Magistrate had no jurisdiction to hold an inquiry. *Held*, also, that the first class Magistrate ought to have held a preliminary inquiry under s. 476, in order that the complainant might have an opportunity of showing the truth or *bonâ fides* of the complaint. QUEEN *v.* YENDAVA CHANDRAMMA **I. L. R. 7 Mad. 189**

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SANCTION FOR PROSECUTION—*contd.*

7. DISCRETION IN GRANTING SANCTION—*contd.*

12. _____ *Forgery—Evidence of charge, necessity for.* Sanction to a prosecution of a witness or of a party to a suit, for the forgery of a document put forward in course of the trial of that suit, should not be given, without all the testimony available at the trial and bearing on the question of forgery having been first received, and it being satisfactorily proved that there is a *primâ facie* case made out for the charge. *Quœre :* Where a document was not put in evidence or dealt with as evidence, but merely had a place on the Judge's file, sanction was necessary. SEETARAM SAHOO *v.* SHEO GOLAM SAHOO . **19 W. R. 183**

13. _____ **Forgery**—*Criminal Procedure Code (Act V of 1898), s. 195, sub-s. (3)—Evidence—Tendering in evidence document alleged to be forged, but not judicially considered, sanction to prosecute for.* An application under s. 195 of the Criminal Procedure Code, for sanction to prosecute for tendering in evidence a document alleged to be forged, should not be refused on the ground that the document was only tendered in evidence and not judicially considered. But where there are no *primâ facie* good grounds for instituting criminal proceedings, such sanction should not be granted. GURU CHARAN SHAHA *v.* GIRIJA SUNDARI DASSI (1902) . . . . **I. L. R. 29 Calc. 887**
s.c. **7 C. W. N. 112**

14. _____ **Reasonable probability of conviction**—*Criminal Procedure Code (Act V of 1898), s. 195—Petition to revoke sanction.* A person whose prosecution had been sanctioned by a Sub-Magistrate petitioned the Special Assistant Magistrate for the revocation of the sanction. The Special Assistant Magistrate declined to interfere, on the ground that, as the Sub-Magistrate had had judicial evidence before him, and had also held the necessary inquiry before granting sanction, the necessary conditions had been fulfilled, and it was not for him, at that stage, to usurp the functions of a Court trying the petitioner for the offence. *Held,* that it is the duty of the authority giving sanction, or upholding it under s. 195, to go into the merits of the application for sanction, with reference to the evidence before it which is relied on as justifying the according of sanction. Unless there is sufficient *primâ facie* evidence and a reasonable probability of conviction, the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law. *In re* PAREE KUNHAMMED (1902). . **I. L. R. 26 Mad. 116**

15. _____ **Sanction by successor in office.**—*Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Delay, ground for refusal.* Application for sanction to prosecute ought to be made promptly or the delay should be satisfactorily accounted for. *Balwant Singh* v. *Umed Singh, I. L. R. 18 All. 203,* followed. Where there was a delay for nearly one year in applying for sanction, and the delay was not accounted for :—*Held,* that the application ought to have been refused. A Munsif has jurisdiction to grant sanction under s. 195, Code of Criminal Procedure, in respect of an offence committed before his predecessor in office. *Krishna Gobinda Dutt, 9 C. W. N. 859,* distinguished and doubted. DHARAMDAS KAMAR *v.* SAGORE SANTRA (1906).
11 C. W. N. 119

SANCTION FOR PROSECUTION—*contd.*

7. DISCRETION IN GRANTING SANCTION—*concld.*

16. _____ **Perjury**—*Discretion of Magistrate in according sanction—Improper exercise—Criminal Procedure Code (Act V of 1898), s. 195—Indian Penal Code (Act XLV of 1860), s. 193.* The primary consideration in a case of perjury under s. 193, Indian Penal Code, is that the false statement should be intentionally made. Where in a case in which sanction was asked for the prosecution of the petitioner under s. 193, Indian Penal Code, for having made false statement in his cross-examination in a Court of justice, there was no finding by the Magistrate who granted the sanction that the false statement was intentionally made and there did not appear any evidence in the case of any such intention :—*Held* that the sanction was bad in law. Where the petitioner who had been convicted and sentenced to imprisonment in a criminal case brought against him by certain Sonthals 17 years ago, having been asked in cross-examination whether he was ever convicted and sentenced to imprisonment in a criminal case brought against him by some Sonthals, denied having been so convicted and sentenced, and the trying Magistrate on being moved refused to grant sanction to prosecute him for perjury :—*Held,* that the District Magistrate did not exercise his discretion properly in sanctioning the prosecution of the petitioner without considering whether the false statement in any way affected his credibility and whether it was not possible for him to forget the circumstances of his previous conviction, and whether the question was at all relevant. AZIBULLA SARCAR *v.* UDOY SONTHAL 1908). . . . . **13 C. W. N. 422**

8. REVOCATION OF SANCTION.

1. _____ **Extent of power of revocation**—*Criminal Procedure Code (Act V of 1898), s. 195.* The power of revoking given under s. 195 (*b*) is only in respect of sanctions, and not of complaints. QUEEN-EMPRESS *v.* ANKANNA
I. L. R. 23 Mad. 205

2. _____ *Power to revoke sanction—Distinction between a sanction granted to a private person and a complaint by a Court—Criminal Procedure Code (Act X of 1882), ss. 195 and 476.* S. 195 of the Criminal Procedure Code (Act X of 1882) distinguishes between the sanction granted by a Court to a prosecution by a private individual and a complaint made by the Court itself. A superior Court to which such Court is subordinate may revoke the sanction granted in the former

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SANCTION FOR PROSECUTION—*contd.*

8. REVOCATION OF SANCTION—*contd.*

case to the private prosecution, but it has no power in the latter case to set aside a complaint duly made by a subordinate Court. *Ishri Prosad* v. *Sham Lal*, *I. L. R. 7 All. 871 ; Queen* v. *Baijoo Lall*, *I. L. R. 1 Calc. 450 ;* and *Gyan Chunder Roy* v. *Protab Chunder Dass*, *I. L. R. 7 Calc. 208*, referred to. QUEEN-EMPRESS *v.* RACHAPPA
I. L. R. 13 Bom. 109

3. ———— *Criminal Procedure Code, 1882, ss. 195, 476—High Court, jurisdiction of.* The High Court has no power on appeal to set aside a complaint duly made by a subordinate Court under s. 476 of the Code of Criminal Procedure. QUEEN-EMPRESS *v.* NARAKKA
I. L. R. 13 Mad. 144

But *see* KHEPU NATH SIKDAR *v.* GRISH CHUNDER MOOKERJEE . . **I. L. R. 16 Calc. 730**

and *In the matter of the petition of* MATHURA DAS
I. L. R. 16 All. 80

where the High Courts of Calcutta and Allahabad respectively, have *held* that the High Court has power to set aside such an order on revision.

4. ———— *Criminal Procedure Code, 1882, s. 195—Revocation of sanction granted in respect of an offence committed in the course of a civil suit of over ₹5,000 in value—Valuation of suit.* Where sanction to prosecute is granted in respect of perjury committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie. GANGA DEI *v.* SHER SINGH . **I. L. R. 17 All. 51**

5. ———— *Criminal Procedure Code (Act X of 1882), ss. 195, 369—Sessions Judge's power to review his order in proceedings taken to revoke sanction.* A Sessions Judge, having once refused to revoke a sanction granted by a subordinate Court under s. 194 of the Criminal Procedure Code (Act X of 1882) has no jurisdiction afterwards to reiew his order and set aside the sanction. An application to a Sessions Judge for revocation of a sanction granted under s. 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be reviewed or revised by him. QUEEN-EMPRESS *v.* GANESH RAMKRISHNA . **I. L. R. 23 Bom. 50**

6. ———— **Chief Judge of Small Cause Court**—*Chief Judge can revoke sanction, as a public officer—Jurisdiction of Small Cause Court to revoke the sanction—Criminal Procedure Code (V of 1898), s. 195.* It is competent to the Chief Judge of the Court of Small Causes, to whom the Registrar of the Court is by law subordinate, acting as a public servant, to revoke sanction granted by the Registrar. But it cannot be revoked by the Small Cause Court composed of one or more Judges. *In the matter of* GOVERDHANDAS MEGHJI (1902)
I. L. R. 27 Bom. 130

SANCTION FOR PROSECUTION—*contd.*

8. REVOCATION OF SANCTION—*contd.*

7. ———— **Commissioner of Bhagalpur**—*Jurisdiction—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), s. 195, sub-ss. (6) and (7)—Subordinate authority—Sonthal Parganas Justice Regulation (V of 1893), s. 15.* For the purposes of s. 195 of the Code of Criminal Procedure, the Court of the Deputy Commissioner of the Sonthal Parganas is to be deemed to be subordinate to the Court of the Commissioner of Bhagalpur. Accordingly, an application against an order of the Deputy Commissioner of the Sonthal Parganas, revoking a sanction given by the Subordinate Judge of Godda under s. 195 of the Code of Criminal Procedure, should be made to the Commissioner of Bhagalpur, and not to the High Court. MUNNA LAL CHOWDHRY *v.* PADMAN MISSER (1903)
I. L. R. 30 Calc. 916

8. ———— **Joint Magistrate**—*Appeal—Revocation of sanction by Joint Magistrate specially authorised to hear appeals, legality of—Jurisdiction—Subordinate Court—Criminal Procedure Code (Act V of 1898), ss. 195 and 407.* Where a Joint Magistrate, who had been authorised by the District Magistrate, to hear appeals under s. 407, cl. (2), of the Criminal Procedure Code, on appeal revoked a sanction to prosecute granted under s. 195 of the Code by an Assistant Magistrate exercising second class powers :—*Held*, that the existence of the special power which was conferred on him by the District Magistrate did not constitute the Joint Magistrate the Court to which appeals ordinarily lay under s. 195, cl. (7), from a Magistrate exercising second class powers, and that his order revoking the sanction must be set aside, as having been made without jurisdiction. SADHU LALL *v.* RAM CHURN PASI (1902). . . . **I. L. R. 30 Calc. 394**
s.c. 7 C. W. N. 114

9. ———— **Indefinite sanction**—*Sanction to prosecute for bringing a false charge—Criminal Procedure Code (Act V of 1898), s. 195—Sanction, general and indefinite.* On information given by the petitioner against certain persons, accusing them of some offences under the Penal Code the Police investigated the matter and declared the charge to be false. On a judicial inquiry, the Deputy Magistrate came to the same conclusion, and gave sanction generally to the accused to prosecute the petitioner. *Held*, that the sanction given for the prosecution of the petitioner under s. 211, Indian Penal Code, was of an indefinite character, and was improper, and should be revoked. *Baperam Surma* v. *Gouri Nath Dutt*, *I. L. R. 20 Calc. 474*, referred to. ABU SARKAR *v.* CHENGU SARKAR (1901) . . . . **6 C. W. N. 37**

10. ———— **Reasonable probability of conviction**—*Criminal Procedure Code (Act V of 1898), s 195—Petition to revoke sanction.* A person whose prosecution had been sanctioned by a Sub-Magistrate petitioned the Special Assistant Magistrate for the revocation of the sanction. The Special Assistant Magistrate declined to interfere on the ground that as the Sub-Magistrate had had

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SANCTION FOR PROSECUTION—*contd.*

8. REVOCATION OF SANCTION—*contd.*

judicial evidence before him, and had also held the necessary inquiry before granting sanction, the necessary conditions had been fulfilled, and it was not for him, at that stage, to usurp the functions of a Court trying the petitioner for the offence. *Held*, that it is the duty of the authority giving sanction, or upholding it, under s. 195, to go into the merits of the application for sanction, with reference to the evidence before it which is relied on as justifying the according of sanction. Unless there is sufficient *primâ facie* evidence and a reasonable probability of conviction, the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law. *In re* PAREE KUNHAMMED (1902) . **I. L. R. 26 Mad. 116**

11. ——— **Requisites of a valid sanction**—*Criminal Procedure Code* (*Act V of 1898*), *s. 195, cls.* (*4*) *and* (*6*)—*Sanction for prosecution by Munsif, affirmed by District Judge—High Court's power to interfere—Questions of guilt to be gone into.* Where sanction to prosecute a person given under s. 195, Code of Criminal Procedure, was couched in such general terms that it was impossible to say exactly what offences were imputed to him and in connection with what deeds he was charged with having committed them :—*Held*, that the sanction was illegal and ought to be set aside. Sanction to institute criminal proceedings should be in express terms and should strictly comply with the provisions of the law. It is not a sufficient compliance with the law, if the necessary elements have to be gathered from the Court's judgment by implication. No sanction should be granted unless the Court has made up its mind that the accused has committed the offences for which he is to be prosecuted. That question ought not to be left over for consideration at the trial. Where sanction to prosecute given by a Munsif was confirmed on appeal by the District Judge :—*Held*, that the High Court has authority to interfere under s. 195 cl. (*6*), Code of Criminal Procedure. HABIBUR RAHMAN *v.* MUNSHI KHODABUX (1906) . **11 C. W. N. 195**

12. ——— **Sanction for prosecution pending appeal**—*Appeal, pendency of—Prejudice to appellant—Doubtful prosecution—Criminal Procedure Code* (*Act V of 1898*), *s. 195—Practice.* Where the prosecution of a person for giving false evidence, forgery, and using as genuine a forged document in a suit, pending an appeal from the judgment passed therein, would delay and possibly defeat the appeal, and where the lower Appellate Court had declared that the evidence on which it was proposed to proceed was unsatisfactory to a great extent :—*Held*, that it was neither necessary nor desirable to grant sanction in such a case pending the appeal; but that the proper course would be to await the conclusion of the litigation and then to move the higher Courts to take action, if necessary, in the ends of public justice ; and that the present sanction should, therefore, be revoked. *In re Shri Nana Maharaj, I. L. R. 16 Bom. 729 ; In re Devji valad Bhabani, I. L. R. 18 Bom. 581 ;*

SANCTION FOR PROSECUTION—*contd.*

8. REVOCATION OF SANCTION—*concld.*

Rex v. *Ashburn, 8 C. & P. 50*, and *In re Muthukudam Pillai, I. L. R. 26 Mad. 190*, referred to. *In the matter of the petition of Ramprashad Hazra, B L. R. Sup. 426*, distinguished. JADU LAL SAHU *v.* LOWIS (1907) . . **I. L. R. 34 Calc. 848**

13. ——— **Revocation of sanction by Appellate Court**— *Criminal Procedure Code, s. 195* (*6*). The revocation by the Appellate Court of a sanction given by the Court of first instance, is a refusal of sanction within the meaning of sub-s. (*6*), and an appeal lies therefrom to the High Court as well as in cases where the sanction refused by the Court of first instance is granted by the Appellate Court. *Palaniappa Chetti* v. *Annamalai Chetti, I. L. R. 27 Mad. 223*, approved. An order revoking a sanction is a refusal of a sanction just as an order confirming a sanction is an order giving a sanction. MUTHUSWAMI MUDALI *v.* VEENI CHETTI (1907) . **I. L. R. 30 Mad. 382**

9. EXPIRY OF SANCTION.

1. ——— **Prosecution commenced more than six months after granting of sanction, the period intervening being close holidays**—*Penal Code, ss. 193 and 471—Criminal Procedure Code, 1882, ss. 195 and 537—Irregularity in criminal proceedings—Magistrate, jurisdiction of—General Causes Consolidation Act* (*I of 1887*). Sanction to prosecute *R* for offences under ss. 193 and 471 of the Penal Code, committed in the course of a judicial proceeding, was granted on the 5th September 1893, and the prosecution was commenced before the Magistrate on the 7th March 1894, the 4th March being a Sunday, and the 5th and 6th Court holidays. *R* was committed to the Sessions. *Held*, that, as s. 7 of Act I of 1887 does not apply to the Code of Criminal Procedure of 1882, and there is no provision of law by which the period provided by s. 195 during which a sanction may remain in force can be extended by reason of the period expiring during Court holidays, the proceedings of the Magistrate were without jurisdiction, and the commitment must be quashed. *Held*, further, that s. 537 of the Code of Criminal Procedure was not intended to override the provisions of s. 195, nor can it be said that there has not been a failure of justice in the prosecution of a person after the period for which the sanction was in force has expired. RAJ CHUNDER MOZUMDAR *v.* GOUR CHUNDER MOZUMDAR . **I. L. R. 22 Calc. 176**

2. ——— **Computation of period**—*Criminal Procedure Code* (*Act V of 1898*), *s. 195—Sanction to prosecute—Computation of the period of six months—Starting point—Date of original sanction and not of appellate order.* The period of six months, during which sanction to prosecute remains in force under s. 195 (*6*) of the Code of Criminal Procedure, is to be computed from the date of the original order granting sanction, and not from that

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SANCTION FOR PROSECUTION—*contd.*

9. EXPIRY OF SANCTION—*concld.*

of a final order of an Appellate Court declining to revoke it. *In re* MUTHUKUDAM PILLAI (1902) **I. L. R. 26 Mad. 190**

3. _____ **Extension of period**—*Criminal Procedure Code (Act V of 1898), s. 195 (b)—Appeal against order according sanction—Disposal of appeal after expiration of six months from order according sanction—Application for extension of time—"Good cause."* Sanction was accorded for a prosecution, and an appeal was preferred against the order, which was not disposed of until after the expiration of six months from the date of the order. Upon an application being made for an extension of time for the prosecution of the accused : *Held*, that good cause had been shown for the extension. KARUPPANA SERVAGARAN *v.* SINNA GOUNDEN (1902) **I. L. R. 26 Mad. 480**

10. FRESH SANCTION.

1. _____ **Necessity for fresh sanction**—*Postponement of case—Expiration of limitation—Criminal Procedure Code, 1882, s. 195.* It is competent for a Court which has granted sanction to a prosecution under s. 195 of the Criminal Procedure Code to give a fresh sanction, if the one previously granted has expired by efflux of time. The limitation of six months mentioned in s. 195 means that a Magistrate shall not take cognizance of a case under a sanction which is more than six months old, not that the whole prosecution must be completed within that period. *Held*, therefore, where sanction to a prosecution had been granted under s. 195, and the prosecution had been instituted, and the Magistrate, in consequence of the evidence of the complainant not being procurable, had ordered "the case to be shelved for the present," and the complainant, after the six months mentioned in s. 195 had expired, applied to the Magistrate to re-open the proceedings, that it was competent for the Magistrate, having once taken cognizance of the case, and it still remaining on his file undetermined, to take up again at any moment, and proceed with the prosecution, without fresh sanction. *In the matter of the petition of* GULAB SINGH. GULAB SINGH *v.* DEBI PROSAD **I. L. R. 6 All. 45**

2. _____ **Power to grant fresh sanction**—*Fresh sanction granted more than six months after expiry of prior sanction—Grounds upon which such fresh sanction should not be granted—Criminal Procedure Code (Act X of 1882), s. 195.* Sanction was granted to prosecute a defendant for forgery and perjury alleged to have been committed by him in a civil suit which was decided against him on the 22nd August 1882. The defendant then preferred an appeal which was dismissed on the 9th August 1883. The plaintiff commenced criminal proceedings against the defendant, under the sanction, on the 23rd July 1884, but such proceedings having been commenced more than six months after the date of the sanction, the charge was

SANCTION FOR PROSECUTION—*contd.*

10. FRESH SANCTION—*concld.*

dismissed. The plaintiff then, on the 20th August 1884, applied for a fresh sanction, which was granted on the 13th April 1885. *Held*, that, assuming that the Munsif who granted the fresh sanction had power to do so, as to which the Court expressed no opinion, such fresh sanction should not have been granted unless some explanation was given for the omission to commence proceedings within six months ; and as no such explanation was given, nor any special grounds shown why a fresh sanction should be given, the Munsif did not exercise a sound discretion in granting such fresh sanction, and consequently his order was set aside. JOYDEO SINGH *v.* HARIHAR PERSHAD SINGH **I. L. R. 11 Calc. 577**

3. _____ **Power to re-try without fresh sanction**—*Conviction quashed for want of jurisdiction.* Where sanction is given for a prosecution for perjury, and the case tried by an incompetent Court and the conviction quashed on appeal, a competent Court may re-try the prisoner upon the subsisting sanction without any order of the Appellate Court by whom the conviction is quashed. *In the matter of the petition of* RAMI REDDI . . . . **I. L. R. 3 Mad. 48**

4. _____ **Fresh sanction, grant of, after expiry of six months from the date of the first sanction**—*Criminal Procedure Code, 1882, s. 195.* If six months expire after the grant of sanction under s. 195 of the Criminal Procedure Code, and no prosecution is commenced under it within that time, it is not open to the prosecutor to procure a fresh sanction and to institute proceedings upon such fresh sanction. The words "six months from the date on which the sanction was given" must be taken to mean six months from the date on which it was given in the first instance, and not from any subsequent date on which the purport of the order might have been repeated. The Munsif who tried the suit out of which the application for sanction arose refused to sanction any prosecution ; the Munsif who originally sanctioned the prosecution was a different officer ; while the Munsif who gave the fresh sanction was neither the Munsif who tried the case nor the Munsif who sanctioned the prosecution originally. *Semble :* Under these circumstances, it is extremely doubtful whether the sanction was such as is contemplated by s. 195 of the Criminal Procedure Code. DARBARI MANDAR *v.* JAGOO LAL . . **I. L. R. 22 Calc. 573**

5. _____ **Sanction not acted upon within six months**—*Criminal Procedure Code, 1882, s. 195—Lapse of sanction.* If an order under s. 195 of the Code of Criminal Procedure lapses, not having been acted upon within six months, that does not bar the granting of fresh sanction on the same grounds if a sufficient reason for the delay be shown. *Darbari Mandar* v. *Jagoo Lal, I. L. R. 22 Calc. 573*, not followed. *Gulab Singh* v. *Debi Prasad, I. L. R. 6 All. 45*, and *Baldeo Singh* v. *Prasadi, All. Weekly Notes (1892) 245*, referred to. MANGAR RAM *v.* BEHARI **I. L. R. 18 All. 358**

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SANCTION FOR PROSECUTION—*contd.*

11. POWER TO QUESTION GRANT OF SANCTION.

1. ——— Power of Deputy Magistrate—*Penal Code, ss. 182 and 211—Sanction granted by superior Court.* A Deputy Magistrate has no power to question an order made by his superior, sanctioning a prosecution under ss. 182 and 211 of the Penal Code. Whether such sanction has been rightly or wrongly given is a question for the accused to raise before a competent Court. EMPRESS *v.* IRAD ALLY . **I. L. R. 4 Calc. 869**

S.C. NUSIBUNNISSA BIBEE *v.* ERAD ALI **4 C. L. R. 413**

2. ——— Power of superior Court—*Criminal Procedure Code of 1872, ss. 468, 469—Finality of order as to sanction. Held,* that the sanction referred to in ss. 468 and 469 of Act X of 1872, when given by any of the Courts empowered under the Act, could not be disturbed by a superior Court. *Per* TURNER, *Offg. C.J.*, and PEARSON, OLDFIELD, and SPANKIE, *JJ.*—When sanction is refused by one of the Courts, the refusal does not deprive the other Courts of the discretion given to them. BARKAT-UL-LAH KHAN *v.* RENNIE **I. L. R. 1 All. 17**

3. ——— Court trying the case—*—Criminal Procedure Code (Act V of 1898), s. 195—Prosecution sanctioned by competent authority—Trial by another Magistrate in pursuance of sanction—Competency of Court to question propriety of sanction.* Where sanction has been accorded under s. 195 of the Criminal Procedure Code by a competent Court, and a prosecution is instituted in pursuance thereof, it is not competent to the Court which is trying the case to question the propriety or legality of sanction in respect of an offence, of the kind mentioned in s. 195, which is alleged to have been committed in any proceeding in the Court by which the sanction was granted. PACHAI AMMAL (1902) . . . **I. L. R. 26 Mad. 189**

4. ——— Superior Magistrate—*Criminal Procedure Code (Act V of 1898), s. 195—Grant of sanction to prosecute—Failure to decide that a primâ facie case has been made out—Legality of sanction.* Application was made to a second class Magistrate for sanction to prosecute a person on a charge of abetment of giving false evidence in a judicial proceeding. The Magistrate held an inquiry and examined three witnesses, and then refused to accord sanction. Application was then made to the Sub-Divisional Magistrate, who granted sanction. In doing so, he did not hold that a *primâ facie* case had been made out, or that there was a probability of securing a conviction. He expressed the view that it was essential that the truth of the matter should be threshed out, and, for that reason, sanctioned the prosecution, as that appeared to be the only course by which it could be decided whether or no the very serious offence charged had been committed. *Held,* that this was no ground for granting sanction, or for setting aside the order of the second class Magistrate refusing sanction. VENKATESA AYYANGAR (1902) **I. L. R. 26 Mad. 193**

SANCTION FOR PROSECUTION—*contd.*

11. POWER TO QUESTION GRANT OF SANCTION—*concld.*

12. WANT OF SANCTION.

1. ——— Objection to want of sanction. *Semble :* The objection to the want of sanction should be taken at the trial. QUEEN *v.* KRISTNA RAU . . . . **7 Mad. 58**

2. ——— Jurisdiction of Court without sanction—*Trial of offence under Criminal Procedure Code, 1872, s. 468.* A complaint of an offence under s. 468 of the Criminal Procedure Code, 1872, unaccompanied by the requisite sanction, could not be entertained at all by the Magistrate even for the examination of the complainant. ANONYMOUS . . . . **8 Mad. Ap. 2**

3. ——— Institution of case without sanction—*Discretion of High Court to interfere—Trial finished without sanction.* Where a charge was instituted without the necessary sanction, and the accused was tried and committed, the High Court refused to interfere, being of opinion that there was nothing to entitle the accused to the benefit of the exceptions in s. 426 of the Criminal Procedure Code, 1861. KIRTI OJHA *v.* RAJKUMAR **7 B. L. R. 29 note**

4. ——— Trial without sanction—*Criminal Procedure Code, 1882, s. 197—Effect of subsequent sanction.* Where, after a magisterial inquiry, a European British subject, being a public servant within the meaning of s. 197 of the Criminal Procedure Code (Act X of 1882), was committed for trial to the High Court of Bombay by the Judicial Superintendent of Railways in His Highness the Nizam's Dominions, without any previous sanction having been obtained as required by that section :—*Held,* that the proceedings were illegal and without jurisdiction, and that a sanction subsequently obtained was of no effect. QUEEN-EMPRESS *v.* MORTON . . . **I. L. R. 9 Bom. 288**

5. ——— *Criminal Procedure Code, 1882, s. 195.* Where a witness was prosecuted for disobedience to a summons without sanction previously obtained under s. 195 of the Criminal Procedure Code, the High Court refused to interfere, there being no evidence that the want of sanction had occasioned a failure of justice. KALLY MOHUN MOOKERJEE *v.* EMPRESS . **13 C. L. R. 117**

6. ——— *Ground for quashing proceedings—Criminal Procedure Code, 1872, ss. 468, 469. Held,* by the Judge making the reference (STRAIGHT, *J.*), on the case being returned to him, that the accused persons having been prosecuted without the sanction required by ss. 468 and 469 of Act X of 1872, all the proceedings were invalid, and must be quashed, and the accused must be re-tried, sanction to their prosecution having been obtained. EMPRESS *v.* SABSUKH **I. L. R. 2 All. 533**

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SANCTION FOR PROSECUTION—*contd.*

12. WANT OF SANCTION—*concld.*

7. _____ Inquiry and commitment without sanction—*Insufficient sanction—Criminal Procedure Code, 1882, ss. 195, 476.* Where sanction to the prosecution of a person for the offence of using certain evidence known to be false was granted by a Court to which the Court in which such evidence was used was not subordinate, and such sanction did not specify the place in which, and the occasion on which, such offence was committed, and the Court granting the sanction did not make any preliminary inquiry, although such an inquiry was "necessary" in the sense of s. 476 of the Criminal Procedure Code:—*Held*, that, the indispensable preliminary conditions of s. 195 of the Code being wanting to the prosecution, the committing Magistrate was incompetent to entertain the case, and the commitment was illegal and should be quashed. EMPRESS *v.* NAROTAM DAS . . . **I. L. R. 6 All. 98**

8. _____ Commitment without sanction as to one prisoner—*Ground for quashing commitment.* Where the sanction to the prosecution accorded under s. 169, Code of Criminal Procedure, 1861, extended only to one of the persons charged, the High Court quashed the commitment, and directed the discharge of the persons to whom the sanction did not apply. QUEEN *v.* WOODURNULL SINGH . . . . . **10 W. R. Cr. 24**

QUEEN *v.* RAJKISHORE ROY . **15 W. R. Cr. 55**

9. _____ Proceedings without sanction—*Extortion—Public servant—Criminal Procedure Code, 1861, s. 167.* Where a complaint charged a person, who was one of the public servants mentioned in s. 167 of the Criminal Procedure Code, with committing acts which, if committed by a private individual, would have constituted the offence of extortion, it was *held* that it was not illegal to treat the charge as a charge of extortion, and to proceed with the trial without sanction for the prosecution. REG. *v.* PARSHRAM KESHAV **7 Bom. Cr. 61**

13. NON-COMPLIANCE WITH SANCTION.

1. _____ Departure from terms of sanction—*Power of Local Government—Prosecution of Judge or public servant—Criminal Procedure Code, 1861, s. 167.* The Local Government, in sanctioning or directing (under s. 167 of the Criminal Procedure Code) a charge against a public servant of an offence as such public servant, had power to limit its sanction, by giving directions as to the person by whom, and the manner in which, the prosecution was to be preferred and conducted, and a Court had no jurisdiction to entertain a charge against such public servant if preferred otherwise than in accordance with such directions. *Semble*: The Local Government had power in the like case to direct that the accused public servant should be tried before a specified tribunal, being one having jurisdiction in that behalf. Therefore, where the sanction directed that the accused public servant should be prosecuted upon such charges as *Mr. C* might be prepared to prefer against him, and there was nothing on the record to show, nor did it otherwise appear, that *Mr. C* had preferred any charge against, or taken any part in the prosecution of, the accused public servant, the High Court quashed the conviction of the accused, as having been without jurisdiction. REG. *v.* VINAYAK DIVAKAR **8 Bom. Cr. 32**

SANCTION FOR PROSECUTION—*concld.*

13. NON-COMPLIANCE WITH SANCTION—*concld.*

2. _____ Non-prosecution under sanction—*Criminal Procedure Code, 1872, s. 468 and s. 142—Power of District Magistrate to proceed without complaint.* Where sanction had been given under s. 468 of Act X of 1872 by a Deputy Magistrate to a person to prosecute another for bringing a false charge, and such sanction was not proceeded under, it was open to the District Magistrate to take up the case under s. 142 without complaint. EMPRESS *v.* NIPCHA **I. L. R. 4 Calc. 712**

3. _____ Effect on sanction of death of grantee—*Criminal Procedure Code, s. 195.* A Civil Court granted sanction under s. 195 of the Code of Criminal Procedure to the defendant in a suit to prosecute certain witnesses for perjury. The defendant died without having preferred a complaint. His brother thereupon preferred a complaint, and the Magistrate dismissed it under s. 253 of the Code of Criminal Procedure, on the ground that the sanction died with the defendant. The Sessions Judge held that the sanction was alive, and directed the District Magistrate to make further inquiry under s. 437. *Held*, that the Sessions Judge was right. *In re* THATHAYYA **I. L. R. 12 Mad. 47**

SAPINDAS.

See CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT, S. 144. **10 C. W. N. 284**

See HINDU LAW—

ADOPTION—REQUISITES FOR ADOPTION—AUTHORITY. **I. L. R. 26 Mad. 627; 681 I. L. R. 30 Mad. 50**

See HINDU LAW—INHERITANCE—GENERAL HEIRS—SAPINDAS.

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—GRAND-DAUGHTER. **I. L. R. 20 Bom. 173**

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—STEP-MOTHER. **I. L. R. 5 Mad. 29 I. L. R. 8 Mad. 132 I. L. R. 11 Bom. 47**

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SAPINDAS—*concld.*

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I. L. R. 2 Bom. 388
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I. L. R. 18 Mad. 168

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See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—COUSIN.
I. L. R. 17 Calc. 518
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See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—HALF-BLOOD RELATIVES . I. L. R. 19 All. 215

See HINDU LAW—STRIDHAN—DESCRIPTION AND DEVOLUTION OF STRIDHAN.
I. L. R. 12 Bom. 505
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I. L. R. 26 Calc. 874

——— s. 6, rules under—"*Hearing the appeal,*" *meaning of—Rule 8, power of the High Court under.* Rule 6 of the rules framed under s. 6 of the Scheduled Districts Act provides that, in appeals from Munsifs' or Assistants' decisions, it shall not be necessary to summon the respondents in the first instance, but the original records shall be called for "and if" after perusing the records, etc., the officer "hearing the appeal" shall see no reason to alter the decision appealed from, he may dismiss the same. Where the Government Agent, to whom the appeal was preferred, sent for and perused the appeal petition and dismissed the same endorsing the order of dismissal on the petition, without fixing a day and hearing the appellant. *Held,* by the High Court on revision under rule 8, that the words "hearing the appeal" necessarily imply that the appellant must be given an opportunity of being heard in support of his appeal and that he has a right to be so heard, if he appears, and that the Agent's order of dismissal must be set aside. YANDAMURI JAGANNADHAM *v.* YANDAMURI SESHACHELAM (1905)
I. L. R. 28 Mad. 404

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——— **Suit upon writ**—*Non-joinder of plaintiff—Parties.* Where a *scire facias* was issued under the old Supreme Court procedure at the suit of two, and one of them only sued upon it:—*Held*, that the non-joinder of the other was a ground of non-suit, and that the objection might be taken at any stage. ISSUR CHUNDER MUNDUL *v.* HEIRS OF GOLAM ALI . . . **1 Ind. Jur. N. S. 249**

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See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION—OFFENCE COMMITTED ON THE HIGH SEAS.

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——— **ss. 18, 1—**

See DETENTION OF GOODS. **I. L. R. 34 Calc. 511**

——— **s. 19—**

See BOMBAY ABKARI ACT (V OF 1878), ss. 3 (*10*), 9, 43 . **I. L. R. 33 Bom. 380**

——— **s. 128**—*Trans-shipment—Permit—Lien on goods mentioned in permit.* A trans-shipment permit issued under s. 128 of the Sea Customs Act (VIII of 1878) does not, like a bill of lading, represent the goods mentioned in it, or give any lien upon or control over them. PREMJI TRIKAMDAS *v.* MADHOWJI MUNJI . **I. L. R. 4 Bom. 447**

——— **s. 197 and s. 8**—*Duty and liability of Customs Collector—Negligence of Superintendent of Customs.* By the negligence of the Superintendent of Sea Customs at the port of C in removing goods to a sea custom warehouse and in keeping them in the warehouse, which, owing to its leaky roof, was utterly unfit for such purpose, the goods were damaged. The owner of the goods sued the Collector of the district, who, under s. 8 of the Sea Customs Act, 1878, has to perform all duties imposed by the Act on a Customs Collector for damages. It was not proved that the Collector was aware of the condition of the warehouse, which had been repaired by the Public Works Department less than a year before. *Held*, that the loss was not caused by the neglect or wilful act of the Collector within the meaning of s. 197 of the Sea Customs Act, 1878, and that the Collector was not responsible for the acts of the Superintendent of Sea Customs. COLLECTOR OF GODAVARI *v.* ISUF KASIM NANA **I. L. R. 7 Mad. 42**

SEAL.

See REGISTRATION ACT, s. 60. **6 C. W. N. 528**

SEAL WARRANT.

See LIMITATION ACT, 1877, SCH. II, ART. 179—STEP IN AID OF EXECUTION—MISCELLANEOUS ACTS OF DECREE-HOLDER . **I. L. R. 29 Calc. 580**

SEAMAN, DISCHARGE OF.

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SEARCH BY POLICE.

See CRIMINAL PROCEDURE CODE, S. 103.

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See OPIUM ACT, S. 9. **I. L. R. 24 Calc. 691**

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——— **house search—**

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SEARCH FOR ARMS.

See TRESPASS . **I. L. R. 36 Calc. 433**

SEARCH-WARRANT.

See ARMS ACT, 1878, S. 19. **I. L. R. 15 All. 129**

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See ESCAPE FROM CUSTODY. **I. L. R. 19 Mad. 310**

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——— **disposal of property—**

See CRIMINAL PROCEEDINGS. **I. L. R. 26 Bom. 552**

——— *Information—Absence of pending proceedings at the time of issue—Validation of illegal warrant—Re-issue of search warrant on judicial cognizance taken—Taking cognizance on information duly recorded—Nature of information—Sufficiency of information to justify initiation of proceedings—Bonâ fides of proceedings—Transfer—Criminal Procedure Code (Act V of 1898), ss. 96, 98, 100 (1) (c), 526 and 537.* The issue of a search warrant under s. 96 of the Criminal Procedure Code, when there is no investigation, inquiry, trial or other proceeding under the Code, as is mentioned in s. 94, pending at the time, is illegal, though the Magistrate had received information of the commission of an offence, but had not acted judicially on it, when he issued such warrant. If, however,

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SEARCH-WARRANT—*concld.*

he subsequently takes cognizance under s. 190 (*1*) (*c*) and then re-issue the warrant, it is legal. *In re Harilal Buch, I. L. R. 22 Bom. 949*, followed. A warrant illegally issued under s. 96 cannot be treated as valid under s. 98 by the operation of s. 537 of the Code. S. 537 does not give legal effect to a defective warrant, but only validates a finding, sentence or order, defective in procedure. The information, on which a Magistrate takes cognizance under s. 190 (*1*) (*c*), must be recorded. *Thakur Pershad Singh* v. *Emperor, 10 C. W. N. 775*, followed. It is nowhere laid down how much of such information the accused is entitled to have recorded, but, though all the allegations necessary to prove the offence have not been made out, if enough has been laid before the Magistrate to make out a *primâ facie* case, he is justified in initiating proceedings, and the High Court will not interfere. Proceedings instituted on statements which, though alleging no specific dates, are not vague or indefinite as to the facts mentioned therein, are not bad. If proceedings were instituted by a Magistrate from personal feelings of enmity derived from a long past dispute between one of his subordinates and the accused, and he was consciously straining the law to injure the latter, it would be the duty of the High Court to set them aside, but the Court would not do so, if the Magistrate was only acting mistakenly. Case transferred on the facts. RASH BEHARY LAL MANDAL *v.* EMPEROR (1908)
I. L. R. 35 Calc. 1076

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———— lien of—

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SECRETARY OF CHARITABLE INSTITUTION.

———— suit by, against subscriber—

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———— liability of—

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I. L. R. 36 Calc. 647

— — — — liability of, for wrongful attachment—

See MESNE PROFITS—ASSESSMENT IN EXECUTION, AND SUITS FOR MESNE PROFITS . **I. L. R. 28 Calc. 540**

———— power of—

See CESSION OF BRITISH TERRITORY IN INDIA . . . **10 Bom. 37**
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———— privilege of, as to debts—

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I. L. R. 15 Mad. 405
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SECRETARY OF STATE FOR INDIA —*contd.*

——— suit against—*concld.*

See JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.
1 Hyde 37
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——— suit by, or on behalf of—

See LIMITATION ACT, 1877, Sch. II, ART. 149 . . **I. L. R. 19 Mad. 165**

1. **——— Liability of Secretary of State for acts of public servants**—*Acts done within scope of his authority.* The Secretary of State is only responsible for the acts of public servants done within the scope of his authority. SETH DHUNRAJ *v.* SECRETARY OF STATE FOR INDIA
1. N. W. 118 : Ed. 1873, 204

2. **——— Liability of Secretary of State for damages occasioned by negligence of Government servants**—*Negligence which would render ordinary employer liable.* The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. *v.* SECRETARY OF STATE FOR INDIA
Bourke A. O. C. 166 : 5 Bom. Ap. 1

3. **——— Suit against**—*Jurisdiction—Defamation in Government Resolution—Secretary of State, liability of, to be sued—Governor and Members of Council, liability of—Act of State—Government servants, powers of Government over—Liability to be dismissed or censured—Discovery—Privilege—Privileged document—Official communication absolutely privileged—Notice of suit, what is sufficient—Civil Procedure Code (Act XIV of 1882), ss. 416 and 424.* The plaintiff, who was Huzur Deputy Collector of Poona, and as such exercised magisterial and revenue functions, sued the Secretary of State for India in Council for defamation. The alleged defamation was contained in a Resolution of the Bombay Government, dated the 6th November, 1899, which after reciting the substance of certain papers which had been laid before the Government, stated that, after careful consideration of the facts disclosed in those papers and of the explanation tendered by the plaintiff, the Governor in Council had come to the conclusion that the plaintiff had been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness. The Resolution then set forth the penalties inflicted in respect of the said misconduct. The defendant contended, *inter alia*, that the suit was not maintainable. *Held*, that the Court had no jurisdiction, and that the suit was not maintainable, on the following grounds : (i) The Governor of Bombay and Members of Council are by Statute exempt from

SECRETARY OF STATE FOR INDIA —*contd.*

the jurisdiction of the High Court, so far as acts done in their public capacity are concerned : that being so, no action lies against the Secretary of State for India in Council in respect of such acts of the Governor and Members of Council ; (ii) The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, *viz.*, matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there is express statutory provision. No suit would lie against the East India Company in respect of acts of State or acts of Sovereignty, and therefore no suit in respect of such acts lies against the Secretary of State in Council. (iii) The plaintiff was a public officer, whose employment was one which could only be given to him by the Sovereign or the agents of the Sovereign. Such public servants hold their offices at the pleasure of the Sovereign and are liable to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision. The power of dismissal includes all other powers (*e.g.*, of reduction of censure). It is open to the Government, by Resolution or otherwise, to censure or reprimand an officer. (iv) The Resolution complained of by plaintiff, being an official communication, was absolutely privileged. It could not be put in evidence or produced in Court, and no secondary evidence of it could be given. In respect of such official communications, no allegation of malice is allowed, and no proof of malice takes away the privilege. No action, therefore, could be based on any libel, however malicious, contained in the Resolution. It was contended for the defendant that the notice of action given by the plaintiff under s. 424 of the Civil Procedure Code (Act XIV of 1882) was insufficient, inasmuch as it did not allege malice, while in his plaint the plaintiff charged malice against the officers of the Government who were parties to the issue of the Resolution. *Held*, that the notice was sufficient. Such a notice is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. JEHANGIR M. CURSETJI *v.* SECRETARY OF STATE FOR INDIA (1902) . . . **I. L. R. 27 Bom. 189**

4. **———** *Illegal detention of property by Village officer—Detention under orders of his superiors—Liability of Village officer—Madras Act II of 1864.* A Village officer, who had attached plaintiff's crops for arrears of *cist*, refused to deliver the crops to plaintiff after receiving payment of the arrears. On a suit being brought by plaintiff for the illegal detention by the Village officer of plaintiff's property, the Village officer pleaded that he had acted under the orders of a *Tahsildar*, and that the suit should have been brought against the Secretary of State, and not against the Village officer. *Held*, that the suit was maintainable against the Village officer. SUBBARAYA REDDI *v.* JAGANNATHA REDDI (1902)
I. L. R. 26 Mad. 263

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SECRETARY OF STATE FOR INDIA —*contd.*

5. ———— *Suit against Government on account of any act or omission of any Revenue officer—Title of suit.* The Court directed the suit to be amended by substituting for the present description of the defendant, the title "The Secretary of State for India in Council." SAKHARAM *v.* THE SECRETARY OF STATE FOR INDIA (1904) . . . . **I. L. R. 28 Bom. 332**

6. ———— *Suit against Government—Stat. 21 & 22 Vict., c. 106, ss. 41, 42 and 65—Negligence of chief constable—Suit to recover damages—"Liabilities lawfully contracted and incurred"—Construction.* In a suit instituted against the Secretary of State in Council to recover damages on account of the negligence of a chief constable with respect to goods seized, it was contended that the liability of the Secretary of State in Council is to be determined with reference to what would have been the liability of the East India Company, were it still in existence. *Held,* that the suit was not maintainable, inasmuch as the Chief Constable seized the goods not in obedience to an order of the executive Government, but in performance of a statutory power vested in him by the Legislature, for the appointment of the chief constable was not made by the Bombay Government, but by an officer clothed by the Legislature with power in that behalf; the seizure of the goods was not in any sense productive of benefit to the Revenues of the Bombay Government nor was it a transaction out of which profit could be derived and there had been no ratification or adoption of the Act. The term "Government of India" in s. 42 of the Statute points to its bearing the meaning not of the Governor General in Council, but of the superintendence, direction and control of the country. The words of ss. 42 and 65 are capable of the construction that the reference in them to the East India Company is in case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the later section to indicate the mode in which the liability may be enforced, and not the circumstances under which it may be incurred. In order that a suit should lie against the Secretary of State in Council, it must be one in which the East India Company might have been made liable and the liability alleged must be one incurred on account of the Government of India. In such a suit the plaintiff must, in order that he should succeed, establish that the liability was incurred on account of the Government of India, so that he must show that it was incurred by some one competent for that purpose. Before it can be said that a liability on account of the Government of India had been incurred by the Bombay Government as the result of the act or omission of the chief constable, so as to be chargeable on the revenues, it would be necessary to exclude those conditions which afford a principal exemption from liability for the act of an agent. But it is settled law that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. SHIVABHAJAN *v.* SECRETARY OF STATE FOR INDIA (1904). **I. L. R. 28 Bom. 314**

7. ———— **Power of Government to dismiss its servants**—*Government servant, suit by—Cause of action—Plaint.* The Crown has power to dismiss its servants at will and no authority representing the Crown is able in the employment of persons in the service of the Crown to contract with them so as to deprive the Crown of the enjoyment of that power. Such power can only be excluded and restricted by an Act of the Legislature. *Dunn* v. *The Queen,* [*1896*] *1 Q. B. 116,* relied on. *Gould* v. *Stuart,* [*1896*] *App. Cas. 575,* distinguished. *Held,* that the plaint did not disclose a cause of action enforceable at law, because it did not allege that any statutory enactment existed, which had the effect of exempting the plaintiff from the liability, which the law imposed on those, who were engaged in the service of the crown. VOSS *v.* SECRETARY OF STATE FOR INDIA (1906) **I. L. R. 33 Calc. 669**

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See SECURITY FOR COSTS—SUITS. **I. L. R. 21 Calc. 177**

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See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 545. **I. L. R. 81 Mad. 330**

See CRIMINAL PROCEDURE CODE, 1898, s. 106 (*3*) . **I. L. R. 33 Calc. 33**

See PROBATE AND ADMINISTRATION ACT, s. 78 . . **I. L. R. 31 Calc. 688**

See PRODUCTION OF PROPERTY. **7 C. W. N. 522**

———— **for costs of respondent—**

See PRIVY COUNCIL APPEAL. **I. L. R. 36 Calc. 653**

———— **to appear—**

See FALSE EVIDENCE—GENERAL CASES. **5 C. W. N. 630**

See RECOGNIZANCE TO APPEAR.

———— **to keep the peace—**

See RECOGNIZANCE TO KEEP PEACE.

SECURITY BOND.

See PROBATE AND ADMINISTRATION ACT, s. 78 . **I. L. R. 31 Calc. 688**

1. ———— **Assignment of security bond**—*Assignee of security bond, rights of—Suit on security bond—Civil Procedure Code (Act XIV of 1882), s. 349.* The assignee of a security bond, which was given to a District Judge under s. 349 of the Code of Civil Procedure for the production of a judgment-debtor, when called upon to appear, is entitled to maintain an action

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SECURITY BOND—*concld.*

upon that bond. *Mingle Antone Kane* v. *Ramchandra Baje, I. L. R. 19 Bom. 694*, referred to. GOPI NATH CHOWDHRY *v.* BENODE LAL ROY CHOWDHRY (1904) . **I. L. R. 31 Calc. 162**

2. _____ **Registration**—*Transfer of Property Act (IV of 1882), ss. 58, 59—S. 545 of the Civil Procedure Code, mortgaging immoveable property of above R100 in value requires registration under ss. 58, 59 of the Transfer of Property Act—Registration Act (III of 1877), s. 17, exception (i) does not apply to the case.* A security bond given to the Court under s. 545 of the Civil Procedure Code was in the following terms: "Until the disposal of my appeal in the District Court I pledge my immoveable property, which is described in the schedule annexed and which is free from all encumbrances, such as mortgage, etc., to others, to the Court, for R1,382-4-9 which is the amount of the decree due to the plaintiff. If the result of the appeal be against me I hereby bind myself to allow the plaintiff to recover the whole amount of the said decree, which I should pay, by my immoveable property, and, if the said property be insufficient, from me. Until the whole decretal amount is discharged I will not sell or make a gift of the said property to others. I thus execute this security bond." The bond was attested by two witnesses, but was not registered. The order of Court "Security accepted" was endorsed on it. *Held*, that the security bond amounted to a mortgage within the meaning of s. 58 of the Transfer of Property Act and not being registered was invalid under s. 59 of the Act as a mortgage and did not affect the property. The bond was also compulsorily registrable under s. 17 of the Indian Registration Act. The words "Security accepted" hereby showed that the Court thought the security sufficient. The bond does not derive its validity from these words, and it cannot therefore be brought within s. 17, exception (*i*) of the Registration Act. *Tokhan Singh* v. *Girwar Singh, I. L. R. 32 Calc. 494*, followed. NAGARURU SAMBAYYA *v.* TANGATUR SUBBAYA (1908) . **I. L. R. 31 Mad. 330**

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1. SUITS.

1. _____ **Security by plaintiff**—"*Immoveable property*"—*Leasehold.* Leasehold property is "immoveable property" within the meaning of s. 34, Act VIII of 1859. ULLMAN *v.* JUSTICES OF THE PEACE FOR CALCUTTA
7 B. L. R. Ap. 60

2. _____ **Suit by female**—*Civil Procedure Code (Act XIV of 1882), s. 380.* The Court has a discretion in exercising the powers conferred by s. 380, Civil Procedure Code, and it will not order the plaintiff to give security unless grounds are shown tending to show that the defence is true. SHAMA SUNDARY DASSEE *v.* RASH BEHARY DHUR
3 C. W. N. 753

3. _____ *Infant female plaintiff or next friend—Civil Procedure Code Act XIV of 1882), s. 380—Practice.* Unless in exceptional cases, neither an infant female plaintiff

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SECURITY FOR COSTS—*contd.*

1. SUITS—*contd.*

nor her next friend ought to be required to give security for costs. BAI POREBAI *v.* DEVJI MEGHJI **I. L. R. 23 Bom. 100**

4. ——— **Suit for money**—*Practice—Civil Procedure Code* (*Act XIV of 1882*), *s. 380 ; (Act VI of 1888), s. 5.* A suit to recover certain specified articles and money alleged to have been wrongfully seized and taken possession of by the defendant, or to recover the value thereof, is a suit for money within the terms of the second paragraph of s. 380 of the Civil Procedure Code, the term " suit for money " as there used being wider than a suit for debts. Circumstances under which the Court will order security for costs to be given by a female plaintiff in such a suit. DEGUMBARI DEVI *v.* AUSHOOTOSH BANERJEE **I. L. R. 17 Calc. 610**

5. ——— **Suit for amount of legacy under will**—*Civil Procedure Code, 1882, s. 380—Suit in nature of administration suit—Discretion of Court—Construction of Statutes—" May "—" Shall."* The power given to the Court under s. 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought, or ought not, to exercise according to the circumstances of each case ; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. *Degumbari Dabi* v. *Aushootosh Banerjee, I. L. R. 17 Calc. 613*, approved of. Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's cost:—*Held*, that the Court would not order the plaintiff, although she was not in possession of any immoveable property within British India, to give security for the costs of the suit. A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property does not become thereby " possessed of immoveable property " within the meaning of s. 380. *In the goods of* PREMCHAND MOONSHEE. BIDHATREE DASSEE *v.* MUTTY LALL GHOSE . **I. L. R. 21 Calc. 832**

6. ——— **Plaintiff in another Presidency.** The Court was held to have no power to order a plaintiff resident in another presidency to give security for costs. GAHAN *v.* OWEN **Cor. 11**

7. ——— **Inhabitant of foreign territory.** When an inhabitant of foreign territory sues within British territory, it is imperative on the Court to demand security from him for the payment of all costs that may be incurred by the defendant in the suit, even though the defendant also is a resident of foreign territory. KOROONAMOYEE DEBIA *v.* OOMA CHURN DEB **12 W. R. 465**

8. ——— *Civil Procedure Code* (*Act XIV of 1882*), *s. 380—Cantonment of Secunderabad.* For the purposes of s. 380 of the Code of Civil Procedure, the British Cantonment of Secunderabad is a place out of British India. HOSSAIN ALI MIRZA *v.* ABID ALI MIRZA **I. L. R. 21 Calc. 177**

9. ——— *Plaintiff residing out of jurisdiction—Suit for administration.* The provisions of s. 34, Act VIII of 1859, were not intended to apply to a case where the plaintiffs brought a suit for administration and partition of property in which they were entitled to a share, the extent of the share being in dispute. RUSSICK LALL DAY *v.* JADUBRAM DAY . **10 B. L. R. Ap. 25**

10. ——— **" Residence "**—*Civil Procedure Code, 1877, s. 380.* The meaning to be given to the word " residence " in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used. The " residence " intended in s. 380 of the Civil Procedure Code (Act X of 1877) is residence under such circumstance as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. MAHOMED SHUFFLI *v.* LALDIN ABDULA **I. L. R. 3 Bom. 227**

11. ——— *Civil Procedure Code* (*Act XIV of 1882*), *s. 380—Wadhwan—British India—Residence. Held*, that a plaintiff, being a resident in Wadhwan in Kathiawar and possessed of immoveable property there, could not be required to give security for costs under s. 380 of the Civil Procedure Code (Act XIV of 1882), Wadhwan being within the limits of British India. TRICCAN PANACHAND *v.* BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY **I. L. R. 9 Bom. 244**

12. ——— *Security where plaintiff has left the country.* Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided, and if no security be furnished, the Court will pass judgment against the plaintiff by default. But if the defendant allows the case to go to judgment, the Court on appeal cannot pass any order calling for security for the costs of the lower Court, which must be left to be realized in execution. *In the matter of the petition of* CALCUTTA AND SOUTH-EASTERN RAILWAY COMPANY . **8 W. R. 217**

13. ——— **Suit to enforce trust under a will**—*Want of personal interest.* In a suit by the representatives of a testator to enforce the due performance of charitable and religious tusts in which they are not personally interested, the plaintiffs ought to be required to give security for costs. BROJOMOHUN DOSS *v.* HURROLOLL DOSS **6 C. L. R. 58**

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SECURITY FOR COSTS—*contd.*

1. SUITS—*concld.*

14. ——— **Poverty**—*Speculative suit.* The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required of him ; it is otherwise where he is, not the real litigant, but a mere puppet in the hands of others. KHAJAH ASSENOOLLAJOO *v.* SOLOMON **I. L. R. 14 Calc. 533**

15. ——— **Suit for damages for breach of promise to marry**—*Practice—Civil Procedure Code (XIV of 1882), s. 380—Two plaintiffs, father and daughter.* A Parsi father and daughter (plaintiffs 1 and 2) sued for R10,000 as damages for the defendant's breach of his promise to marry the daughter (plaintiff 2). The defendant alleged that the suit was really a suit for the benefit of the father who sought to make money out of his daughter's betrothal ; that he (the father) was an undischarged insolvent and not in a position to pay costs if he lost the suit ; and that the second plaintiff (the daughter) had no property in India. The defendant took out a summons under s. 380 of the Civil Procedure Code, requiring the plaintiffs to give security for costs. The Court ordered that security for costs should be given. BOMANJI JAMSETJI MISTRI *v.* NUSSERWANJI RUSTOMJI MISTRI (1902) . **I. L. R. 27 Bom. 100**

2. APPEALS.

1. ——— **Security by appellant**—*Power of single Judge of High Court to make order for security.* A single Judge has full power to make an order for security for the costs of an appeal. MUZHUR HOSSAIN *v.* DENOBUNDOO SEN **Bourke O. C. 119**

Affirmed on appeal . **Bourke A. O. C. 40**

2. ——— **Power of single Judge of High Court to make order for security.** On a rule *nisi* for security for the costs of an appeal to be given by a defendant, five-twenty-fourths of the property in dispute having been decreed to him, but subsequently attached under a prohibitory order, cause was shown that the Court had not jurisdiction, and that no reason for the application had been given. *Held*, that a single Judge is vested with all the powers of an Appellate Court with reference to the costs of an appeal ; that when an appellant resides within the jurisdiction of the Court, he is amenable to its orders as to the costs of an appeal ; and that an appellant who has no available property must, if required, give security for the costs of an appeal before proceeding with it. MONOHUR DOSS *v.* KHODRUM BEGUM **Bourke O. C. 110**

3. ——— **Appeal from order of Commissioner of Insolvency Court**—*Civil Procedure Code, 1859, s. 342.* S. 342 of Act VIII of 1859 did not apply to appeal from the orders of a Judge sitting as a Commissioner of the Insolvent Court. *In the matter of* RAMSEBAK MISSER **5 B. L. R. 179**

SECURITY FOR COSTS—*contd.*

2. APPEALS—*contd.*

4. ——— **Discretion of Judge**—*Notice to party affected—Civil Procedure Code, 1882, s. 549.* The discretion conferred on an Appellate Court by s. 549, Civil Procedure Code, 1882, to demand security for costs, must be properly exercised ; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made. No order affecting a party should be made without notice to him calling upon him to show cause why the order should not be made. SIRAJ-UL-HAQ *v.* KHADIM HUSAIN **I. L. R. 5 All. 380**

5. ——— **Notice of order for security.** The issue of a preliminary notice to show cause why an appellant should not furnish security for the costs of appeal is not equivalent to a demand, and, if the order to furnish security is made in the absence of the appellant, the order must be communicated to him before he can be held to have disobeyed it. TIMMU *v.* DEVA RAI **I. L. R. 5 Mad. 265**

6. ——— *Civil Procedure Code, 1859, s. 342.* Circumstances under which an order may be made requiring security for costs of appeal to be deposited under s. 342 of Act VIII of 1859. BAMASUNDARI DASI *v.* RAMNARAYAN MITTER . . . . **7 B. L. R. Ap. 59**

7. ——— **Pauper appellant**—*Civil Procedure Code, 1859, ss. 342, 345, 346.* By the words " before the appellant is called upon to appear and answer " in s. 342, as compared with similar words used in subsequent sections, especially ss. 345 and 346, is meant, not the date mentioned in the notice, but the date on which the appeal is called on to be heard ; and the Court has a discretion at any time before the hearing of the appeal to make an order demanding security for costs from the appellant. Where the appellant was, according to his own statement, a pauper, and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one in which security should be given. JOGENDRO DEB ROYKUT *v.* FUNINDRO DEB ROYKUT . . . . **18 W. R. 102**

8. ——— *Grounds for order for security—Poverty of appellant—Civil Procedure Code, 1882, s. 549.* S. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. *Maneckji Liurji Mancherji* v. *Goolbai, I. L. R. 3 Bom. 241,* followed. *Ross* v. *Jaques, 8 M. & W. 13 ; Seshay*

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SECURITY FOR COSTS—*contd.*

2. APPEALS—*contd.*

yangar v. *Jainulavadin, I. L. R. 3 Mad. 66;* and *Jogendro Deb Roykut* v. *Funindro Deb Roykut, 18 W. R. 102,* referred to. LAKHMI CHAND *v.* GATTO BAI . . . I. L. R. 7 All. 542

9. ——— *Grounds for order for security—Civil Procedure Code, 1882, s. 549—Poverty of appellant. Held,* by the Full Bench (TYRRELL, *J., dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs. JIWAN ALI BEG *v.* BASA MAL I. L. R. 8 All. 203

10. ——— *Civil Procedure Code (Act XIV of 1882), s. 549—Poverty of appellant—Ground for ordering security for costs of appeal.* Under the circumstances of this case, the Court refused an application that the appellant, on the ground that he was a person without means, should give security for the costs of the appeal. HEWETSON *v.* DEAS . . . I. L. R. 21 Calc. 526

11. ——— *Civil Procedure Code, 1882, s. 549—Poverty of appellant—Vexatious conduct—Ground for requiring security.* An appellant (residing within the jurisdiction) who has been ordered to pay the costs of the original hearing and has not done so cannot be required to furnish security for such costs before he is allowed to prosecute his appeal, unless his conduct be shown to be vexatious—that is, such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious. AHMED BIN ESSA KALIFFA *v.* ESSA BIN KALIFFA I. L. R. 13 Bom. 458

12. ——— Appeal by defendant against the order under s. 244, granting execution—*Civil Procedure Code (Act XIV of 1882), ss. 549 and 647, explanation—Appellant required to give security for the costs of the appeal and of the original suit.* The Court can require an appellant from an order made under s. 244 of the Civil Procedure Code (Act XIV of 1882) in execution of a decree to give security for the costs of the appeal and of the original suit. DAGDU JAITRAM *v.* CHANDRABHAN . . . I. L. R. 24 Bom. 314

13. ——— Civil Procedure Code, 1859, ss. 106, 342—*Assignee substituted for plaintiff.* Under s. 342, Act VIII of 1859, the High Court had discretion to demand security for costs from an appellant, if it saw fit to do so, at any time before the hearing of the appeal. Where an assignee who had been substituted for the plaintiff under s. 106 declined to furnish security for the costs within such reasonable time as the Court ordered, it was *held* that the defendant might within eight days after such neglect or refusal plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit. HEERALALL SEAL *v.* CARAPIET . . . . . 13 W. R. 431

14. ——— Appellant out of jurisdiction. *Quære:* Whether in a case in which the appellant is not residing out of the British territories in India, the High Court has authority to demand security for costs from the appellant after the issue of summons, *i.e.*, notice of the appeal. HUFAZUTTOOLAH CHOWDRY *v.* HUMEEDHUR ROHMAN . . . . 6 W. R. Mis. 123

15. ——— *Beng. Reg. XIV of 1829, s. 2, cl. 1—Inhabitant of foreign territory.* Bengal Regulation XIV of 1829, s. 2, cl. 1, enacted that every person being an inhabitant of a foreign territory should be required to furnish security for costs; such security to be furnished by a plaintiff or appellant within six weeks of the date on which his plaint or appeal was filed; and that, unless such security be so furnished, the suit of such person, if plaintiff, should not be proceeded with or appeal admitted unless he had furnished the necessary security to cover costs in the appeal. In an appeal to the Sudder Court from a decree of the Zillah Court by a party then temporarily absent in England, but having real estates and factories within the jurisdiction of the Court, no security was furnished by the appellant's vakil within six weeks after lodging the appeal. The respondent in the first instance put in an answer to the grounds of appeal filed by the appellant, but afterwards filed a petition for dismissal for non-compliance with the requirements of Bengal Regulation XIV of 1829, s. 2, cl. 1, contending that the appellant was a resident of a foreign territory, and had not furnished security within six weeks as required by that regulation. The Sudder Court held that such security ought to have been furnished by the appellant, who, residing in England *pendente lite*, was to be considered as resident in a foreign territory within the meaning of the regulation, and dismissed the appeal. *Held,* by the Judicial Committee (remitting the suit to India for trial), that the Sudder Court had not, by Regulation XIV of 1829, any power *ex mero motu* to dismiss the appeal, (i) as the appellant was guilty of no default under that regulation, not having been called upon by the respondent or the Court to furnish security for costs; (ii) as the appellant was not guilty of laches in not voluntarily offering security, the regulation providing only that a suit or appeal should not be proceeded with until security was furnished. *Semble:* The putting in an answer to the appeal before objecting to the want of security for costs operated as a waiver by the respondent of the want of security for costs required for Bengal Regulation XIV of 1829, s. 2, cl. 1. *Quære:* Whether Act III of 1845 repealed Bengal Regulation XIV of 1829, s. 2, cl. 1. WISE *v.* JUGBUNDOO BOSE 7 Moo. I. A. 431

16. ——— Grounds for ordering security. Cause being shown on a rule *nisi* for an order for security to be given by the appellant

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SECURITY FOR COSTS—*contd.*

2. APPEALS—*contd.*

for the costs of an appeal (similar orders having been previously made on the application of other defendants), it appeared that an unusual number of defendants had been joined in the suit, which had been withdrawn on a previous occasion when nearly tried out; and that the plaintiff, who sued as a relator, was poor and resided out of the jurisdiction, and had not paid interlocutory costs, for which an attachment had issued. *Held*, that an appellant will not be ordered to give security for costs previously incurred; that the fact of similar applications having been granted in the suit, the poverty of the appellant, and the fact of his dwelling out of the jurisdiction, as well as the peculiar circumstances of the case, non-payment of interlocutory costs, a former withdrawal of the suit, and the joining of an unusual number of defendants, are grounds for granting an order for security to be given by an appellant for the costs of an appeal: that a relator suing to enforce a public right must give security for the costs of those against whom he proceeds. MUZHUR HOSSAIN *v.* DINOBUNDOO SEIN
Bourke A. O. C. 40

Confirming the judgment in the same case in
Bourke O. C. 119

17. ——— *Continuation of order made against plaintiff for security—Civil Procedure Code, 1859, s. 34.* A plaintiff who resided out of India paid a sum of money into Court as security for costs under s. 34 of Act VIII of 1859. He subsequently obtained a decree against the defendant, and the defendant appealed against that decree. *Held*, that the defendant was not entitled to an order detaining in Court, pending the appeal, the money which had been paid in under s. 34. FLEMING *v.* SHEARMAN . **4 B. L. R. O. C. 92**

See In re DITTA HARAKMAN SINGH.
3 B. L. R. F. B. 45

S.C. DITTIA HURRUCKMAN SINGH *v.* MODHOOSOODUN PYNE . . . **12 B. L. R. F. B. 16**

18. ——— **Discretion of Court to refuse security**—*Civil Procedure Code (Act XIV of 1882), s. 549.* An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under s. 549, Civil Procedure Code, and refused to receive other security offered in lieu after the time fixed by the order had expired. This was affirmed by the High Court. *Held*, that, as the High Court had a discretion to enlarge the time allowed for finding security and to accept other security in lieu of that rejected or to refuse to do either, it had, under these circumstances, judicially exercised that discretion in refusing. RAJAB ALI *v.* AMIR HOSSEIN . . **I. L. R. 17 Calc. 1**

19. ——— **Extension of time for giving security**—*Civil Procedure Code, 1877, s. 549—Procedure.* Where the Appellate Court demands from an appellant security for costs, the Court may extend the time within which it orders such security to be furnished; but if no application is made for such extension of time, and such security is not furnished within the time ordered, it is inoperative on the Court to reject the appeal. HAIDRI BAI *v.* EAST INDIAN RAILWAY COMPANY
I. L. R. 1 All. 687

20. ——— *Civil Procedure Code, 1882, s. 549—Application for extension of period for finding security for costs of appeal after default.* S. 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal. *Haidri Bai* v. *East Indian Railway Company, I. L. R. 1 All. 687*, followed. SHRAJUDIN *v.* KRISHNA
I. L. R. 11 Mad. 190

21. ——— *Civil Procedure Code (Act XIV of 1882), s. 491—Appeal rejected for want of security—Extension of time for giving security—Discretion of Court.* The proper construction of s. 549 of the Civil Procedure Code is that, where an appellant has been ordered to furnish security within a certain time, and that order has not been complied with, and no application has been made to extend the time within the period allowed, the Court is bound to reject the appeal. BUDRI NARAIN *v.* SHEO KOER
I. L. R. 11 Calc. 716

In the same case on appeal to the Privy Council, it was *held* that, where the High Court, under s. 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired, and may nevertheless reject the appeal, under that section, if the security is not in the end furnished. *Haidri Bai* v. *East Indian Railway Company, I. L. R. 1 All. 687*, overruled. In this case, the Registrar was directed to allow only the costs applicable to the question argued and decided. BADRI NARAIN *v.* SHEO KOER
I. L. R. 17 Calc. 512
L. R. 17 I. A. 1

22. ——— *Civil Procedure Code (Act XIV of 1882), s. 549—Rejection of appeal—Discretion of Appellate Court to extend time for furnishing security.* The security for the respondents' costs which the High Court had demanded under s. 549 not having been furnished within the time fixed, and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected under that section. *Held*, that this was not a case for interference. MODHUSUDAN DAS *v.* ADHIKARI PRAPANNA
I. L. R. 17 Calc. 516

S.C. MODHUSUDAN DOSS *v.* KRISHNA PRAPANNA RAMANUJ DOSS . . . **L. R. 17 I. A. 9**

23. ——— *Extension of time for furnishing security—Exceptional circumstances—Civil Procedure Code, 1882, s. 549.* The appellant applied for an extension of the time for

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SECURITY FOR COSTS—*contd.*

2. APPEALS—*contd.*

giving security for the costs of the appeal on the ground that, in the exceptional state of things in Bombay caused by the prevalence of the plague, she had been unable to raise the money required. *Held*, that under the circumstances the application should be granted. S. 549 of the Civil Procedure Code (Act XIV of 1882) does not absolutely preclude such an order if the circumstances render it just to make it. The Court cannot lay down a hard-and-fast rule that in no case after the time for giving security has expired can an appellant be allowed further time. JUMNABAI *v.* VISSONDAS RUTTONCHUND . . . . I. L. R. 21 Bom. 576

24. ———— **Agreement to deposit security**—*Failure to make deposit.* An order was made by the Court (pursuant to an agreement between the parties after a decree for the plaintiff) that the defendant who had appealed should pay into Court, to the credit of the cause, a certain sum of money for decree, costs, etc., including a sum of money for costs to be incurred on appeal. On an application by the plaintiff that the case be struck off for default of deposit, and that the defendant pay costs already incurred at the time of the application, it was ordered that the defendant should deposit a sum to cover costs of the future appeal, and in default that the case should be struck off, although the summons to show cause was not in point of form to that effect. ELIAS *v.* CHUCKERBUTTY . . 1 Ind. Jur. N. S. 223

25. ———— **Amount of security not fixed**—*Civil Procedure Code, s. 549—Security for costs—Dismissal of appeal—Practice.* S. 549 of the Civil Procedure Code contemplates an order by which some ascertained amount of security is required. The last paragraph of the section seems to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security. Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge such security at any time before the hearing. This order purported to be made under s. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing of the appeal, no security having been lodged, the respondent objected that, with reference to the terms of s. 549, the Court had no option but to dismiss the appeal. *Held*, that the objection had no force, no such order as was contemplated by s. 549 having been made. *Held*, also, that the proper course was to have applied to the Judge who passed the order for security, at any time before the case came on for hearing, for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal. THAKUR DAS *v.* KISHORI LAL I. L. R. 9 All. 164

26. ———— **Form and contents of order for security for costs**—*Omission to state amount*

SECURITY FOR COSTS—*concld.*

2. APPEALS—*concld.*

—Practice—Civil Procedure Code, 1882, s. 549. Where a Court acting under s. 549 of the Code orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit," or "for the costs of the appeal and of the original suit." *Thakur Das* v. *Kishori, I. L. R. 9 All. 164*, overruled on this point. LEKHA *v.* BHAUNA I. L. R. 18 All. 101

SECURITY FOR GOOD BEHAVIOUR.

See APPEAL IN CRIMINAL CASES—CRIMINAL PROCEDURE CODES.
I. L. R. 9 Calc. 878
22 W. R. Cr. 68

See ARREST . I. L. R. 31 Calc. 557

See CRIMINAL PROCEDURE CODE, SS. 110, 112, 190, 191 AND 526.
I. L. R. 27 All. 172; 262; 293
I. L. R. 28 All. 306; 629

See CRIMINAL PROCEDURE CODE, S. 122.
I. L. R. 26 All. 189; 371

See REFERENCE TO HIGH COURT—CRIMINAL CASES—SECURITY FOR GOOD BEHAVIOUR.

See SENTENCE—IMPRISONMENT—IMPRISONMENT GENERALLY . 3 N. W. 126
I. L. R. 1 All. 666
I. L. R. 23 All. 422

1. ———— **Transfer of proceedings**—*Criminal Procedure Code, 1882, ss. 110 and 526.* Proceedings under s. 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. *In the matter of the petition of* AMAR SINGH . I. L. R. 16 All. 9

2. ———— **Discretion of Court, exercise of**—*Criminal Procedure Code, 1872, ss. 505, 506—Deposit of cash in lieu of security bond for good behaviour.* The powers given by ss. 505 and 506 of Act X of 1872 should be exercised with extreme discretion: the former of those sections was not intended to apply to persons of "by no means a reputable character." EMPRESS *v.* KALA CHAND DASS . I. L. R. 6 Calc. 14: 6 C. L. R. 128

3. ———— **Person of violent or turbulent character**—*Criminal Procedure Code, 1861, s. 297.* S. 297 of the Code of Criminal Procedure, 1861, did not refer to persons of a violent or turbulent character. *In re* NARAIN SOOBOODHI 6 W. R. Cr. 6

4. ———— **Person convicted of theft**—*Criminal Procedure Code, 1861, s. 295—Theft.* S. 295 did not apply to persons convicted and punished for theft. QUEEN *v.* KUNEE SONAR 7 W. R. Cr. 57

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SECURITY FOR GOOD BEHAVIOUR —*contd.*

5. ——— **Habitual offenders**—*Acts committed by persons in performance of duties as burkandazes in zamindari—Habitual association—Joint trial—Code of Criminal Procedure (Act V of 1898), ss. 110, 112, 117, 118, and 537.* Certain burkandazes employed at the kutchery of the Bijni estate, who were alleged to have committed acts of extortion and other acts of oppression in the performance of their duties, were called upon to execute bonds for their good behaviour on the grounds (i) that they habitually commit extortion ; (ii) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace ; (iii) that they are dangerous persons so as to render their being at large without security hazardous to the community. They were tried jointly by the Magistrate under s. 117 of the Code of Criminal Procedure, and each of them was ordered to execute a bond with sureties for his good behaviour for three years. *Held*, that, even supposing the Magistrate was right in considering that there was habitual association between these persons in regard to the first and second grounds, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons and thus to render their being at large without security hazardous to the community, and that proceedings should have been separately taken against each of them. S. 110 of the Code of Criminal Procedure is not applicable where certain acts amounting to extortion are committed by certain persons in the performance of their duties as burkandazes in a zamindari, as it cannot be said that these persons are in the habit of committing extortion as individual members of the community, because if they were discharged by the zamindar or ceased to be in his employ, the acts would no longer be committed, it being no longer to their interests to do such acts in the interest of their employer, and they certainly would not be likely to commit them in their own private capacities. The object of enabling a Magistrate to take security for good behaviour is for the prevention and not for the punishment of offences. HARI TELANG *v.* QUEEN-EMPRESS . . . . **I. L. R. 27 Calc. 781**
HARI TELANG *v.* EMPRESS . **4 C. W. N. 531**

6. ——— **Jurisdiction of Magistrate**—*Person not residing within his jurisdiction—Reputation—Code of Criminal Procedure (Act V of 1898), s. 110.* It is only when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of a description given in s. 110 of the Code of Criminal Procedure, that the Magistrate can take action under that section, and it is not contemplated that the Magistrate in such a case should issue a warrant so as to pursue the person concerned into another jurisdiction. Under the terms of s. 110 of the Criminal Procedure Code, the reputation which the person is found to have means the reputation of that person in the neighbourhood in which he resides. KETABOI *v.* QUEEN-EMPRESS **I. L. R. 27 Calc. 993**

SECURITY FOR GOOD BEHAVIOUR —*contd.*

7. ——— **Persons not proved to have committed crime**—*Criminal Procedure Code, 1872, s. 505.* The exercise of the power given by s. 505 of the Criminal Procedure Code was not confined to cases in which positive evidence of the commission of crime is forthcoming against the persons charged. *In re* PEDDA SIVA REDDI **I. L. R. 3 Mad. 238**

8. ——— **Absconded offender arrested without summons**—*Criminal Procedure Code, 1861, s. 306.* Where an accused person was arrested as an absconded offender, and, without evidence being gone into on that charge, an inquiry was made into his mode of livelihood, without any summons being issued under s. 306 of the Criminal Procedure Code, such proceedings were held to be irregular. QUEEN *v.* HUTTOOA . **3 N. W. 2**

9. ——— **Opportunity to make defence**—*Information of accusation to accused—Criminal Procedure Code (Act X of 1882), ss. 109, 110, 112.* Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet. QUEEN-EMPRESS *v.* ISWAR CHANDAR SUR **I. L. R. 11 Calc. 13**

10. ——— **Right to be heard by pleader**—*Accused person liable to imprisonment in default of giving security—Notice—Code of Criminal Procedure (Act V of 1898), ss. 110, 123, and 340.* Where a reference is made to the Sessions Judge under s. 123 of the Code of Criminal Procedure, he is bound to give notice to the person concerned and also to hear his pleader, if he should be so represented. The term "accused" in s. 340 of the Code of Criminal Procedure applies to a person who is liable under s. 123 of that Code to imprisonment in default of giving security. NAKHI LAL JHA *v.* QUEEN-EMPRESS . **I. L. R. 27 Calc. 656**

11. ——— **Requisites for order**—*Evidence satisfying Magistrate of bad character of accused—Criminal Procedure Code, 1861, s. 296.* To justify a Magistrate in taking action under s. 296 of the Criminal Procedure Code, it was held that there must be evidence before him legally sufficient to establish the fact that the person charged is a person of the character described in the section. QUEEN *v.* BUDLA . . . **2 N. W. 455**

12. ——— **Information on which Magistrate may act**—*Information showing that a breach of the peace is imminent—Order to furnish security for good behaviour for three years—Arrest of accused—Inquiry as to truth of information—Proof of information—Statements of persons not called as witnesses—Criminal Procedure Code, 1882, ss. 112, 114, 117.* Conversations out of Court with persons, however respectable, are not legal or proper material upon which Magistrate should adopt proceedings under s. 107 or s. 110 of the Criminal Procedure Code. The information to be

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required by a Magistrate, before issuing an order under s. 112, may to some extent be of a hearsay and general description; but when the party to whom the order is directed appears in Court in obedience thereto, the inquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character that he is therefore necessarily liable to be called upon for sureties of the peace or for good behaviour. There must be satisfactory evidence in the one case that he has done something, or taken some step, that indicates an intention to break the peace or that is likely to occasion a breach of the peace; and in the other, that he is within the category of persons mentioned in s. 110, the determination of which question must always be guided by the considerations pointed out in *Empress* v. *Nawab*, *I. L. R. 2 All. 835*. A Magistrate is not competent, upon information that suggests the likelihood of a breach of the peace, to resort to s. 110 of the Criminal Procedure Code, and it is altogether *ultra vires* for him to demand security for three years in such a case. In ordering the arrest of a person under s. 114 of the Criminal Procedure Code, the Magistrate must act on recorded information; it is not enough for him to express a belief that such a course is necessary. Not only must he have "reason to fear the commission of a breach of the peace," but "that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person." EMPRESS *v.* BABUA . . . . **I. L. R. 6 All. 132**

13. ——— *Criminal Procedure Code, 1861, s. 306—Information of police.* In an inquiry under s. 306 of the Code of Criminal Procedure as to proceedings against persons required to give securiy for good behaviour, a Magistrate had no power to use the information which the police may have obtained as evidence in the case. QUEEN *v.* KOMUL KISHEN . . **11 W. R. Cr. 35**

14. ——— **"Show cause"**—*Criminal Procedure Code, ss. 107, 112, 117, 118, 239—Burden of proof—Joint inquiry—Opposing factions dealt with in one proceeding—Nature and quantum of evidence necessary before passing order for security.* Upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified, to insist that his case shall be tried separately from the cases of other persons similarly circumstanced. Where an order has been passed under s. 107 of the Criminal Procedure Code requiring more persons than one to show cause why they should not severally furnish security for keeping the peace, the provisions of s. 239 read with s. 117 are applicable, subject to such modifications as the latter section indicates, and to such procedure as the exigencies of each individual case may render advisable in the interests of justice. A joint inquiry in the case of such persons is therefore not *ipso facto* illegal; and even in cases where one and the same proceedings taken by the Magistrate under ss. 107, 112, 117, and 118 improperly deals with more persons than one, the matter must

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be considered upon the individual merits of the particular case, and would at most amount to an irregularity which, according to the particular circumstances, might or might not be covered by the provisions of s. 537. *Queen-Empress* v. *Nathu*, *I. L. R. 6 All. 214*, and *Empress* v. *Batuk*, *All. Weekly Notes (1884) 54*, referred to. An order passed by a Magistrate under ss. 107 and 112 of the Criminal Procedure Code, requiring any person to "show cause" why he should not be ordered to furnish security for keeping the peace, is not in the nature of a rule *nisi* implying that the burden of proving innocence is upon such person. The onus of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security. *Dunne* v. *Hem Chunder Chowdhry*, *4 B. L. R. F. B. 46*, and *Queen* v. *Nirrunjun Singh*, *3 N. W. 431*, referred to. Where, according to the nature of the information received by the Magistrate, there were two opposing parties inclined to commit a breach of the peace:—*Held*, applying by analogy the principles relating to the trial of members of opposing factions engaged in a riot, that the Magistrate acted irregularly in taking steps against both parties jointly and in holding the inquiry in a single proceeding. Such a procedure is not *ipso facto* null and void, but only where the accused have been prejudiced by it. *Empress* v. *Lachan*, *All. Weekly Notes (1881) 28*, and *Hossein Buksh* v. *Empress*, *I. L. R. 6 Calc. 96*, referred to. In proceedings instituted under s. 107 of the Criminal Procedure Code against more persons than one, it is essential for the prosecution to establish what each individual so implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. In holding such an inquiry it is improper to treat what is evidence against one of such persons as evidence against all, without discriminating between the cases of the various persons implicated. *Queen-Empress* v. *Nathu*, *I. L. R. 6 All. 214*, referred to. Although in an inquiry under s. 117 the nature or quantum of evidence need not be so conclusive as is necessary in trials for offences, the Magistrate should not proceed purely upon an apprehension of a breach of peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated, which would lead to the conclusion that an order for furnishing security is necessary. What the nature of the facts should be depends upon the circumstances of each case, but where the nature of the Magistrate's information requires it, overt acts must be proved before an order under s. 118 can be made, and such an order cannot be passed against any person simply on the ground that another is likely to commit a breach of the peace. *Queen* v. *Abdool Huq*, *20 W. R. Cr. 57*; *Goshain Luchman Pershad Pooree* v. *Pohoop Narain Pooree*, *24 W. R. Cr. 30*; *Rajah Run Bahadoor* v. *Ranee Tillessuree Koer*, *22 W. R. Cr. 79*; and *In the matter of Kashi Chunder Doss*, *10 B. L. R. 441*: *9 W. R. Cr. 47*, referred to. QUEEN-EMPRESS *v.* ABDUL KADIR **I. L. R. 9 All. 452**

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SECURITY FOR GOOD BEHAVIOUR —contd.

15. ——— Ground for ordering security—*Criminal Procedure Code, 1872, s. 505—Evidence of character.* Act X of 1872, s. 505, enabled the Magistrate to require security for good behaviour, whenever it appeared to him, from the evidence as to general character adduced before him that any person was by repute a robber, housebreaker or thief, or a receiver of stolen property, knowing the same to have been stolen, or of notoriously bad livelihood or was a dangerous character. But when the evidence was entirely in a person's favour, and showed him to be of excellent character and in every respect contrary to the sort of person against whom the section was directed, to apply its provisions to him on a week and unsupported charge of mischief by fire was foreign to the intentions of the Legislature, and not only illegal but oppressive. *In the matter of the petition of* HAMIDOODEEN AHMED . . **24 W. R. Cr. 37**

16. ——— Evidence of general bad character—*Criminal Procedure Code, 1872, s. 505.* *P* was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. *Held*, with some hesitation, that there was evidence as to general character adduced before the Magistrate which justified him in dealing with *P* under s. 505 of Act X of 1872. EMPRESS *v.* PARTAB . **I. L. R. 1 All. 666**

17. ——— Evidence of bad character—*Criminal Procedure Code, 1861, ss. 296, 297.* Previous convictions for a simple breach of the peace were not sufficient to justify a Magistrate in demanding security under s. 296 of Act XXV of 1861. Nor was repute that a person was one of the leaders of a gang of petty bullies and extortioners sufficient to justify a conviction under s. 297 of the same Act, unless in addition it was shown that he was of a character so desperate and dangerous as to render his release, without security for one year, hazardous to the community. QUEEN *v.* MISREE LALL **4 N. W. 117**

18. ——— Record of previous convictions—*Criminal Procedure Code, 1882, ss. 110, 117, and 118.* The object of taking security for good behaviour from a person is solely to secure his good behaviour in future. The mere record of previous convictions, on account of which the person has undergone punishment, does not satisfy the requirements of ss. 110, 117, and 118 of the Code of Criminal Procedure (Act X of 1882), and it is wrong to use those provisions so as to add to the punishment for past offences. *In re* RAJA VALAD HUSSEIN SAHEB . . . . **I. L. R. 10 Bom. 174**

19. ——— *Criminal Procedure Code (Act X of 1882), ss. 110, 112.* The mere fact that a person from whom security is required has been previously convicted of offences against property, is not sufficient to justify proceedings under s. 110 of the Code of Criminal Procedure, unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life. *In the matter of the petition of* HAIDAR ALI **I. L. R. 12 Calc. 520**

20. ——— Person guilty only of acts of violence—*Criminal Procedure Code, 1872, s. 506. Held*, that s. 506 of Act X of 1872 solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised. Where, therefore, the evidence adduced before the Magistrate did not show that a person was "by habit a robber, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen," but showed only that he had been guilty of acts of violence:—*Held*, that the Magistrate could not, under s. 506 of Act X of 1872, order such person to furnish security. Observations regarding the evidence on which the procedure of s. 506 should be enforced. EMPRESS *v.* NAWAB **I. L. R. 2 All. 835**

21. ——— Person convicted and punished for theft—*Form of order—Code of Criminal Procedure (Act X of 1872), ss. 504, 505.* An accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizance for R50 and find two sureties, each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year. *Held*, that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2, of the Code of Criminal Procedure. *Empress* v. *Partab, 1. L. R. 1 All. 666*, followed. TAMIZ MANDAL *v.* UMID KARIGAR **I. L. R. 9 Calc. 215**

22. ——— Inquiry as to necessity for security—*Criminal Procedure Code, 1872, s. 504—Power of Sessions Judge—Jurisdiction of Magistrate.* A Sessions Judge had no power under Act X of 1872, s. 504, or any of the preceding sections, to decide as to the necessity for taking security for good behaviour, or, without inquiry to pass orders as to the nature of the security to be furnished, or as to the time it is to remain in force. The jurisdiction as to the necessity was in the Magistrate, and after sending the accused to the Magistrate under s. 504 the Sessions Judge was *functus officio*. QUEEN *v.* GUNGARAM POTDAR . **24 W. R. Cr. 10**

23. ——— Form of order— *Criminal Procedure Code, 1872, s. 297—Sureties—Order for deposit in cash.* Where a person, under s. 297 of the Crimnal Procedure Code, is ordered to provide security for his good behaviour, the order should, under s. 300, state the number of sureties required from the defendant. The object of the law as to security for good behaviour is that sureties shall be responsible for the good behaviour of the person

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called upon to provide security, not that a deposit be made in cash. QUEEN *v.* SHEO BUKSH
2 N. W. 295

24. ——— *Order for deposit in cash—Security-bond.* An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour is bad in law. EMPRESS *v.* KALA CHAND DASS
I. L. R. 6 Calc. 14 : 6 C. L. R. 128

(*Contra*) QUEEN *v.* KRISTENDRO ROY
7 W. R. Cr. 30

25. ——— Statement of grounds for order—*Opportunity to comply with order—Criminal Procedure Code, 1872, s. 505.* On a requisition from the High Court, a Magistrate is bound to state the grounds upon which he fixed the amount of security. A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security. EMPRESS *v.* DEDAR SIRCAR
I. L. R. 2 Calc. 384 : 1 C. L. R. 95

26. ——— Order for surety to pledge rights in land—*Illegal order.* An order by a Magistrate requiring security for good behaviour which directed that the surety should pledge all his proprietary rights in land worth R200 was *held* to be illegal. QUEEN *v.* GANNI . 7 N. W. 249

27. ——— Reference to Sessions Judge for confirmation of order when person is unable to give security—*Criminal Procedure Code (Act V of 1898), ss. 110, 123—Statement of grounds for order.* The Sessions Judge, in confirming the order of a Magistrate under s. 123 of the Code of Criminal Procedure in regard to the imprisonment of a person in consequence of his being unable to furnish the necessary security, is bound to find a special ground on which the order is passed, having special reference to s. 110 of that Code. It is not sufficient where he only finds in general terms that it is for the interests of the community at large that such person should be bound once to be of good behaviour. NAKHI LAL JHA *v.* QUEEN-EMPRESS I. L. R. 27 Calc. 656

28. ——— Order with arbitrary condition imposed—*Criminal Procedure Code, 1872, ss. 505, 516,—Sureties.* In making an order for security to keep the peace under s. 505, Criminal Procedure Code, 1872, a Magistrate had no right to impose an arbitrary condition not essential to restrain a party from the infringement of the law, *e.g.*, a condition requiring the accused to furnish two sureties, being persons of respectability and substance, not related to him, and residing within one mile of his house. The ground on which a Magistrate has power to refuse to accept any surety under s. 516 must be a valid and reasonable ground. *In the matter of the petition of* NARAIN SOOBODDHEE
22 W. R. 37

29. ——— No conditions and limitations can be imposed upon persons ordered to

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give security under s. 118 of the Code. *In the matter of* JHOJHA SINGH *v.* QUEEN-EMPRESS
I. L. R. 24 Calc. 155

30. ——— Ground for refusing surety —*Criminal Procedure Code (Act V of 1898), s. 123, cl. (2)—Pleader, whether he may be heard in a reference under that section.* A Sessions Judge is bound to hear a pleader who may appeal on behalf of a person in a case referred to him under s. 123, cl. (2), of the Criminal Procedure Code. *Jhoja Singh* v. *Queen-Empress, I. L. R. 23 Calc. 493,* referred to. A Magistrate cannot refuse to accept a surety on the ground that he lives at a distance from the accused. ABINASH MALAKAR *v.* EMPRESS
4 C. W. N. 797

31. ——— Object of demanding security—*Criminal Procedure Code (Act X of 1882), ss. 110, et seq.—Discretion of Magistrate in accepting or refusing sureties tendered.* The object of requiring securities to be of good behaviour is not to obtain money for the Crown by the forfeiture of recognizances, but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they would exercise any control over the man for whom they were willing to stand surety. *In the matter of the petition of Narain Sooboddhee, 22 W. R. Cr. 37,* not followed. QUEEN-EMPRESS *v.* ROHIM BAKHSH
I. L. R. 20 All. 206

32. ——— Order for security and imprisonment in default—*Illegal order—Criminal Procedure Code, 1861, ss. 296, 301.* Where a Magistrate required security from persons for their good behaviour, under s. 296 of the Criminal Procedure Code, and in default sentenced them to six months' rigorous imprisonment :—*Held*, that the order was illegal, s. 301 requiring that they should be committed to prison until they furnish the security demanded. In fixing the amount of security, the Magistrate should not go beyond a sum for which there is a fair probability of the defendants being able to find security. ANONYMOUS
4 Mad. Ap. 47

33. ——— *Criminal Procedure Code (Act X of 1882), s. 118—High Court's power of interference when the amount of security is excessive—Magistrate's discretion, exercise of.* A Magistrate ordered the accused to execute a bond for R500 for his good behaviour for one year and to furnish two sureties for the like amount. The accused failed to furnish the required security, and was sent to prison. The High Court, being of opinion that the amount of the required security was excessive and that the Magistrate had not exercised a proper discretion in the matter, interferred in the exercise of its revisional jurisdiction, and reduced the amount. QUEEN-EMPRESS *v.* RAMA . . . I. L. R. 16 Bom. 372

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34. ——— **Power of Magistrate to cancel security-bond once accepted**—*Criminal Procedure Code (Act X of 1882), ss. 109, 122, 125.* When a surety offered by a person for good behaviour has once been accepted, a Magistrate has no power subsequently to cancel the security-bond, though he might be of opinion that such surety is an unfit person. EMPRESS *v.* RAM LALL ACHARJEA **1 C. W. N. 394**

35. ——— **Second order for security without further proof**—*Criminal Procedure Code, 1861, Ch. XIX.* Where a person is confined, in default of giving security for his good behaviour under Ch. XIX of the Code of Criminal Procedure, a second security cannot be demanded after the expiration of the first term of confinement, except on some new proof of bad livelihood, or that the person is not capable of following an honest calling. *In re* JUSWUNT SINGH **1 Ind. Jur. N. S. 301 : 6 W. R. Cr. 18**

See MAHOMED ABDUL BARI *v.* EMPRESS **4 C. W. N. 121**

36. ——— **Further proceedings under s. 110 of Code of Criminal Procedure**—*Fresh information—Accused person—"Discharge"—Criminal Procedure Code, s. 437.* A further inquiry cannot be made into the case of a person against whom proceedings under s. 110 of the Code of Criminal Procedure have been taken and who has been discharged. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law on fresh information received. Proceedings under s. 110 cannot be regarded as on a complaint, nor can they be regarded as a case in which any "accused" person has been discharged; for the terms "accused person" and "discharge" in s. 437 of the Code clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of Ch. XIX of the Code. QUEEN-EMPRESS *v.* IMAN MUNDAL **I. L. R. 27 Calc. 662**

37. ——— **Form of security-bond**—*Criminal Procedure Code, 861, ss. 305, 306—Forfeiture of bond.* Where sureties who were required to show cause, under s. 305 of the Code of Criminal Procedure, why the bond executed by them should not be put in force, failed to establish by evidence the statements which they made, it was *held* that the order putting the bond in force was a proper one. *Per* PHEAR, *J.*—Although the form of security-bond given in form (F) of the appendix combines two bonds,—namely, one for the principal and one on the part of the sureties, the provisions even of s. 300 would be complied with if these two bonds were upon two pieces of paper instead of one. *In the matter of the petition of* BRINDABUN CHUNDER DASS. *In the matter of the petition of* TARINEE CHURN MOZOOMDAR . . **19 W. R. Cr. 29**

38. ——— **Procedure**—*Power of Sessions Judge after acquittal—Information to Magistrate as to taking security from accused.* If a Sessions Judge be of opinion that a person acquitted by him ought to give security for future good behaviour, he should discharge him, and inform the Magistrate of his opinion that security should be taken, leaving the Magistrate to take the necessary steps for that purpose, and the Sessions Judge should not send the party in custody to the Magistrate. REG. *v.* BYHA VALAD SURJIM . . **1 Bom. 91**

39. ——— *Suspicion—Production of witnesses—Bail.* A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion. He should be asked to produce his witnesses or offered assistance to procure their attendance. He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal. *In the matter of* KOOKOR SINGH . **1 C. L. R. 130**

40. ——— *Criminal Procedure Code, 1861, s. 296—Examination of witnesses.* In proceedings taken against a person to obtain security for good behaviour under s. 296 of the Criminal Procedure Code, the examination of the witness must be taken in the presence of the accused person, who should be permitted to cross-examine them. QUEEN *v.* SHUNKUR . **2 N. W. 406**

QUEEN *v.* NURSINGH NARAIN **2 B. L. R. A. Cr. 7 note 10 W. R. Cr. 1**

MAGHAN MIRA *v.* CHAMMAN TELI **2 B. L. R. A. Cr. 7 : 10 W. R. 46**

41. ——— *Opportunity to accused of cross-examining witnesses and calling witnesses.* In an inquiry under Ch. XIX of the Criminal Procedure Code, 1861, it was *held* that the defendant should have an opportunity of cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses on his own behalf. ANONYMOUS **4 Mad. Ap. 23**

42. ——— *Evidence—Previous trial for dacoity—Criminal Procedure Code, 1861, s. 296.* Where a person was adjudicated to be a person of notorious bad character, under s. 296, Code of Criminal Procedure, after having been tried for dacoity, it was *held* that the evidence taken in the trial for dacoity should not be used against the accused with reference to the accusation under s. 296, which evidence should be taken immediately. *In the matter of* ROJONI KANT BHOOMICK **13 W. R. Cr. 24**

43. ——— *Criminal Procedure Code, 1882, ss. 118 and 123—Power of Sessions Judge to remand—Taking further evidence—Conditions and limitations imposed upon persons required to give security.* Under s. 123 of the Criminal Procedure Code, a Sessions Judge is not competent to remand a case for further inquiry. Such evidence as he may require he must take himself. *In the matter of* JHOJHA SINGH *v.* QUEEN-EMPRESS . . . **I. L. R. 24 Calc. 155**

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44. ——————— *Criminal Procedure Code, 1882, ss. 110 and 117—Transfer of criminal case—Criminal Procedure Code, s. 526.* Where a Magistrate instituting proceedings against a person under s. 110 of the Code of Criminal Procedure has "acted" within the meaning of s. 117 of the Code, no order can be made subsequently under s. 526 of the Code transferring the case from his Court. *In the matter of the petition of* GURDAR SINGH . . . . . **I. L. R. 19 All. 291**

45. ——————— *Sentence of imprisonment—Criminal Procedure Code, 1861, s. 296—Illegal direction.* A direction annexed to a sentence of imprisonment, under s. 448 of the Penal Code, that the convict be brought up at the expiration of the sentence, in order that he may give security for good behaviour for the period of one year, reversed, as not being authorised by s. 296 of the Criminal Procedure Code. REG. *v.* KRISHNAJI BAPUJI GAIKAVAD . . **3 Bom. Cr. 39**

46. ——————— *Criminal Procedure Code, 1882, ss. 118, 126, 514, Sch. V, form No. XLVI—Security for good behaviour—Conviction of principal—Forefeiture of bond—Mode of proving conviction.* Where a person has given a security-bond under s. 118 of the Code of Criminal Procedure for the good behaviour of another, and the principal during the term of which the bond is in force is convicted of an offence punishable with imprisonment, the production of the conviction, and, if necessary, of proof of identity of the principle is sufficient evidence upon which the Magistrate is authorized to issue notice to the surety under s. 514 of the Code to show cause why the penalty of the bond should not be paid. In such a case it is for the surety to show what cause he can. It is not incumbent on the Magistrate to re-summon the witnesses on whose evidence the principal was convicted and practically to re-try the case against the principal. QUEEN-EMPRESS *v.* MAN MOHAN LAL **I. L. R. 21 All. 86**

47. ——— **Bad livelihood**—*Code of Criminal Procedure (Act V of 1898), s. 109—"Ostensible means of subsistence," proof of—"Doing no work," if sufficient—"Previous conviction" how far relevant—Procedure.* The fact that a man does no work, or that he was once before convicted for bad livelihood, does not justify a Magistrate, without being satisfied from evidence that since his release the accused has no ostensible means of livelihood, in ordering him to furnish security for good behaviour. QUEEN-EMPRESS *v.* POORAN AGARWALLA (1900) **5 C. W. N. 28**

48. ——————— *Criminal Procedure Code (Act V of 1898), ss. 1 (2) (a), 4 (p), (s), 55 (b), 109 (b)—Arrest by Inspector of Police in Calcutta, if legal—Applicability of the Criminal Procedure Code to Police in Calcutta—Police-station—Magistrates' duty to go on with case, although arrest illegal.* Inspector Hamilton of the Colootolah *Thana* in Calcutta, arrested the accused under s. 55 (*b*) of the Criminal Procedure Code, and placed him on his

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trial, on a charge under s. 109 (*b*), before a Bench of Honorary Magistrates. The bench discharged the accused on the ground that the Inspector, not being an "officer in charge of a police-station," within the meaning of cls. (*p*) and (*s*) of s. 4, Code of Criminal Procedure, had no authority to arrest him. *Held*, that, whether the arrest was illegal or not, the Bench ought not to have discharged the accused, but should have gone on with the case. The Magistrates were empowered to put in force the provisions of s. 109 of the Code whenever they had credible information that the accused had no ostensible means of livelihood or was unable to give a satisfactory account of himself and was within the limits of their jurisdiction, how he came before them being immaterial. *Emperor* v. *Ravalu Kesigadu, I. L. R. 26 Mad. 124*, approved. *Held*, also, that, s. 55 having been expressly made applicable to the police in Calcutta, the arrest of the accused by the Inspector was legal. The Criminal Procedure Code does not apply to the Police in Calcutta unless expressly made applicable to them [s. 1, sub-s. (2)]. Cls. (*p*) and (*s*) of s. 4, Code of Criminal Procedure, do not apply to the Police in Calcutta. SOLICITOR TO THE GOVERNMENT OF INDIA *v.* MADHO DHOBI (1903) **7 C. W. N. 661**

49. ——— **Character of proceedings**—*Discharge of persons called upon to furnish security for good behaviour.* Proceedings under s. 110 of the Code of Criminal Procedure cannot be regarded as on a complaint, nor can they be regarded as a case in which any accused person has been discharged. IMAN MANDAL *v.* EMPRESS (1900) **6 C. W. N. 163**

50. ——— **Delegation of inquiry**—*Criminal Procedure Code, ss. 110, 118—Inquiry into sufficiency of security delegated to Tahsildar—Practice. Held*, that it is not competent to a Magistrate who has passed an order under s. 118 of the Code of Criminal Procedure, to delegate to another officer the inquiry into the sufficiency of the security tendered, but such inquiry must be made by the Court by which the original order was passed. *Queen-Empress* v. *Pirthi Pal Singh, All. Weekly Notes (1898) 154*, followed. EMPEROR *v.* TOTA (1903) **I. L. R. 25 All. 272**

51. ——— **Evidence of repute**—*Criminal Procedure Code (Act V of 1898), ss. 110, cl. (f), 117—Repute, admissibility of evidence of—Evidence of repute is not admissible in cases coming under cl. (f) of s. 110 of the Code of Criminal Procedure.* Where the imputations were that the petitioners had for some time past made themselves very objectionable in the neighbourhood, and that they had been annoying the villagers in various ways, by kicking at their doors at night or throwing brick-bats on the roof and annoying respectable women: *Held*, that these imputations, even if proved, do not constitute conduct so as to render the petitioners liable to give security for good behaviour by reason of their being so desperate and dangerous as to render their being at large without security hazardous

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to the community. AKHOY KUMAR CHATTERJEE *v.* QUEEN-EMPRESS (1900) . **5 C. W. N. 249**

52. ——— Grounds for refusing to accept surety—*Criminal Procedure Code (Act V of 1898), ss. 110, 122—Tender of surety—Consideration of a question by High Court outside rule.* Case in which the High Court pointed out to the Magistrate below what are not valid grounds for refusing a surety under s. 122, Criminal Procedure Code, although no rule was issued on the subject. Where a Magistrate refused to accept sureties tendered by a person bound to be of good behaviour, on such grounds as that they were unfit to control the defendant, that they were not residents of the village, and in one case that two persons were members of the same firm :—*Held*, that these were not valid grounds for refusing to accept a surety under s. 122, Criminal Procedure Code. The question is not whether a surety can supervise a person for whom he stands surety, but whether he is a person of sufficient substance to warrant his being accepted. *Abinash Malakar* v. *The Empress, 4 C. W. N. 797*, approved. RAM PERSHAD *v.* KING-EMPEROR (1902) . . . **6 C. W. N. 593**

53. ——— ——— *Criminal Procedure Code, s. 122—Sureties offered refused on the ground of their relationship to the person required to find security.* Where, on an order to find security for good behaviour, the Magistrate refused to accept the sureties tendered, on the sole ground that they were relations of the person against whom the order had been passed, it was *held* that relationship to the person called upon to find security was, so far from being an objection, a most useful qualification in the persons tendered as sureties. EMPEROR *v.* SHIB SINGH (1902) . **I. L. R. 25 All. 131**

54. ——— Habitual offenders—*Thief—Habitual thieves and dacoits—Desperate and dangerous characters—Evidence—Specific acts—General repute—Criminal Procedure Code (Act V of 1898), ss. 110 and 117.* A charge under cl. (*f*), s. 110 of the Criminal Procedure Code, cannot be proved by general reputation, but must be proved by definite evidence. To prove a charge under s. 110, that a person is by habit a thief and a dacoit, or that he is so desperate and dangerous as to render his being at large without security hazardous to the community, there should be proof of specific acts showing that he, to the knowledge of some particular individual, is a dangerous or desperate character. It is not sufficient that persons, however respectable, should come forward and depose that they have heard that such person is a thief and a dangerous character, when they themselves have no personal knowledge of or acquaintance with him. Such evidence is not only such as could not safely be acted upon, but is also likely to work serious prejudice. KALAI HALDAR *v.* EMPEROR (1901) **I. L. R. 29 Calc. 779**

55. ——— *Proceedings instituted by Magistrate on his own knowledge or suspicion—Transfer, right of accused to a—Criminal Procedure Code (Act V of 1898), ss. 110, 117 and 191.* Where a Magistrate has framed a proceeding under s. 110 of the Criminal Procedure Code against a party, and has proceeded in some measure, if not mainly, on his own knowledge of the character of that party, such Magistrate is not a proper person to proceed with the trial under s. 117 of the Code and inquire into the truth of the information upon which action has been taken. ALIMUDDIN HOWLADAR *v.* EMPEROR (1902) . **I. L. R. 29 Calc. 392 s.c. 6 C. W. N. 595**

56. ——— Jurisdiction of Magistrate—*Criminal Procedure Code (Act V of 1898), s. 110—Magistrate, jurisdiction of, to require security for good behaviour—Residence outside his jurisdiction.* A Magistrate has no jurisdiction to require security for good behaviour under s. 110, Criminal Procedure Code, from persons who do not reside within his local jurisdiction, but who, it was alleged, habitually committed theft, robbery and house-breaking within such limits. It is only when a person residing within such limits is of such bad repute that a Magistrate is competent to take action under that section. KITABDI *v.* QUEEN-EMPRESS (1900) **5 C. W. N. 29**

57. ——— *Surety bond—Acceptance by Subordinate Magistrate of bond—Cancellation of such bond by District Magistrate—Jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 110 and 125.* Where the security bond of the petitioner, who had been bound over to be of good behaviour, and the surety bonds of his sureties, had been accepted by the Sub-divisional Magistrate, and the District Magistrate, on receiving a police report stating that one of the sureties "was not at all a man of substance to stand surety for R100—he cannot be entrusted to stand surety of a bad character," cancelled the security bond of the petitioner under s. 125 of the Code of Criminal Procedure : *Held*, that the order of the District Magistrate was made without jurisdiction. PANCHOO GAZI *v.* EMPEROR (1901) . **I. L. R. 29 Calc. 455 s.c. 6 C. W. N. 291**

58. ——— "Offences involving a breach of the peace," meaning of—*Immoral and indecent acts—Criminal Procedure Code (Act V of 1898), ss. 106 and 110, cl. (e).* The words "offences involving a breach of the peace," in s. 110, cl. (*e*), of the Criminal Procedure Code, mean offences in which a breach of the peace is an ingredient, and not offences provoking or likely to lead to a breach of the peace. Where a person, who was found by the Magistrate to be addicted to acts of immorality in attempting to seduce women and behaving indecently and immodestly towards them, was bound over to give security for good behaviour under s. 110, cl. (*e*), of the Code : *Held*, that the order for security should be set aside, as the offences were not such as involved a breach of the peace, within the meaning of that clause. ARUN SAMANTA *v.* EMPEROR (1902) . . **I. L. R. 30 Calc. 366**

59. ——— Reference to Sessions Judge—*Criminal Procedure Code, ss. 123 and 340—*

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Reference to the Sessions Judge—Notice to be given of proceedings before the Judge to the persons required to find security. Where, under s. 123 of the Code of Criminal Procedure, reference is made to the Sessions Judge, in the case of a person called upon by a Magistrate to find security for a term exceeding one year, it is expedient, and highly desirable for the ends of justice, that a date should be fixed for the hearing of such reference, and that notice of such date should be given to the person concerned. *Jhoja Singh* v. *Queen-Empress, I. L. R. 23 Calc. 493,* and *Nakhi Lal Jha* v. *Queen-Empress, I. L. R. 27 Calc. 656,* followed. *Queen-Empress* v. *Ajudhia, All. Weekly Notes (1898) 60,* and *Queen-Empress* v. *Mutasaddi Lal, I. L. R. 21 All. 107,* referred to. EMPEROR *v.* GIRAND (1903) **I. L. R. 25 All. 375**

60. ——— Residence of sureties—*Criminal Procedure Code, ss. 110, et seq.—Power of Court to assign geographical limits within which the sureties required must reside. Held,* that a Court, in ordering security for good behaviour to be given with sureties, is competent to assign some geographical limits within which the sureties required must reside. *Queen-Empress* v. *Rahim Bakhsh, I. L. R. 20 All. 206,* referred to. EMPEROR *v.* NABBU KHAN (1902) . **I. L. R. 24 All. 471**

61. ——— Revival of proceedings—*Criminal Procedure Code, ss. 110, et seq., and 437—Power of District Magistrate to re-open proceedings on the same record, after the discharge of the person called upon to show cause by a Magistrate of the first class. Held,* that it is competent to the Magistrate of the District, in the case of a person who has been called upon, under s. 110 of the Code of Criminal Procedure, by a Magistrate of the first class, to show cause why he should not furnish security for good behaviour, and has been discharged by such Magistrate under s. 119 of the Code, to institute fresh proceedings against such person upon the basis of the record that was before the first class Magistrate. *Queen-Empress* v. *Mutasaddi Lal, I. L. R. 21 All. 107 ; Queen-Empress* v. *Ratti, All. Weekly Notes (1899) 203 ; Queen-Empress* v. *Ahmad Khan, All. Weekly Notes (1900) 206,* and *Queen-Empress* v. *Iman Mondal, I. L. R. 27 Calc. 662,* referred to. KING-EMPEROR *v.* FYAZ-UD-DIN (1901) **I. L. R. 24 All. 148**

62. ——— Term—*Criminal Procedure Code (Act V of 1898), ss. 112, 118, 144, 145—Notice to give security for three months—Order to give security for twelve months—Validity—Discretion to proceed under s. 107 or ss. 144 and 145.* Where a notice is issued under s. 112 of the Code of Criminal Procedure to a defendant, to show cause why he should not give security to be of good behaviour for three months, the Magistrate has no power to order security to be given for a longer period. Where a defendant is found by the Magistrate to be in possession of land about which a dispute occurs, the Magistrate is not bound to act under ss. 144 and 145, but has a discretion to proceed either under s. 107 or under ss. 144 and 145 of the Code. *Dolegobind Chowdry* v. *Dhanu Khan, I. L. R. 25 Calc. 559,* distinguished. BELAGAL RAMACHARLU *v.* EMPEROR (1902) **I. L. R. 26 Mad. 471**

63. ——— Previous acquittal for dacoity—*Criminal Procedure Code (Act V of 1898), s. 110—Proceeding to bind down on failure of prosecution, if legal.* Where a person has been tried for dacoity and acquitted, he ought not to be proceeded against under s. 110, Code of Criminal Procedure, on matters deposed to and disbelieved at the trial for dacoity. A person acquitted of dacoity cannot be bound over under s. 110, Code of Criminal Procedure, on the evidence merely of persons stating that they began to suspect him since the dacoity case. KISMAT AKANDA *v.* EMPEROR (1906) . . . **11 C. W. N. 129**

64. ——— Indefinite charge—*Criminal Procedure Code (Act V of 1898), s. 110—Proceeding to bind down for good behaviour upon failure of prosecution for offences under ss. 380, 412 and 457, Penal Code (Act XLV of 1860)—Evidence of repute.* Proceedings under s. 110, Code of Criminal Procedure, ought not to be instituted with a view to bind down persons on an indefinite charge, after prosecutions against them on definite charges under the Penal Code have failed. Persons ought not to be bound down under s. 110, Code of Criminal Procedure, upon the mere statements of witnesses that they suspect or are under the impression that the persons proceeded against are thieves or dacoits, when no fact is mentioned to indicate that there was sufficient reason for their suspicion. ALEP PRAMANIK *v.* KING-EMPEROR (1906) **11 C. W. N. 413**

65. ——— General repute, evidence of, admissibility of—*Criminal Procedure Code (Act V of 1898), s. 110, cls. (d) and (f)—Evidence if must be of neighbours—Evidence of misconduct committed long ago, value of—Joinder of charges in a proceeding under s. 110—S. 257 (1), Criminal Procedure Code, sufficient compliance with.* In s. 110, cl. (*f*), Criminal Procedure Code, a man of desperate and dangerous character means a man who has a reckless disregard of the safety of the person or the property of his neighbours, and under that clause evidence of general repute is not admissible in evidence. Evidence of acts of extortion committed by a person, unless those acts were accompanied by acts causing danger to the person and properties of other persons, is not sufficient to bring his case within cl. (*f*) of s. 110, Criminal Procedure Code. The law as to the joinder of charges against a person accused of definite offences has no application to an inquiry under s. 110, cl. (*d*). *Subramania Ayyer* v. *King-Emperor, I. L. R. 25 Mad. 61,* referred to and distinguished. On an enquiry whether the defendant is a habitual offender, evidence of acts of misconduct committed by him years ago is admissible in evidence as indicating the formation of the habit, but such evidence unless supplemented by evidence of misconduct by

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the defendant within a year or so before the institution of the proceeding under s. 110, Criminal Procedure Code, cannot justify the making of the order under s. 118, Criminal Procedure Code. When the persons against whom proceeding under s. 110, Criminal Procedure Code, is instituted for being a habitual offender is a well-known resident of a city, his fellow citizens though not living in his immediate neighbourhood are competent witnesses to prove his general repute. It is a sufficient compliance with the requirements of s. 257 (*1*), Criminal Procedure Code, if a Magistrate while rejecting an application for summoning further defence witness states facts which have led him irresistibly to the conclusion that the application was for no other purpose than that of vexation or delay or defeating the ends of justice, although he does not say expressly that the application was for that purpose. WAHID ALI KHAN *v.* THE EMPEROR (1907)

11 C. W. N. 789

66. ——— ——— *Order embodying substance of information—Transfer—Refusal to recall prosecution witnesses for cross-examination—Limitation of time for examination of defence witnesses—Restriction of counsel's address—Right to cross-examine witnesses called by the Court—Evidence of general repute—Association with bad characters—Criminal Procedure Code (Act V of 1898), ss. 110, 112, 117, 192, 256, 257, 528, 529 (f), 540.* The setting forth of the information received from a police officer in the Order under s. 112 of the Criminal Procedure Code in terms of cls. (*a*) to (*f*) of s. 110 is a sufficient statement of the substance of the information as required by the former section. It is not necessary to give a list of the prosecution witnesses in such order. S. 192, cl. (*1*), is not restricted to cases of offences only, but is wide enough to include cases under Chapter VIII of the Code. Even if there was no power under the section to transfer such cases the whole proceedings would not, by reason of s. 529 (*f*), be void. *Akbar Ali Khan* v. *Domilal, 4 C. W. N. 821,* followed. S. 256 of the Code does not apply to an enquiry under s. 117. The prosecutor and the accused are both equally entitled to a full cross-examination of witnesses called by the Court under s. 540 on matters relevant to the enquiry. The Court cannot restrict the cross-examination of such witnesses by either party to the subjects on which it had examined them. Where an attempt was being made to protract the examination-in-chief of the defence witnesses to a most unnecessary extent so as to delay, if not to prevent, the final termination of the case, and the address of counsel had proceeded for fifteen days, it was *held* that the Magistrate was not unreasonable in fixing a time limit for the examination-in-chief of the remaining witnesses, and for the close of the address. In dealing with cases under Chapter VIII of the Code the Magistrate ought, especially where no previous conviction is proved, to test the prosecution evidence with great care. Evidence of association with bad characters, who were always suspected of being concerned in dacoities and many

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of whom were during the period of association bound down under s. 110 of the Code or convicted of dacoty and theft at various times and especially in most cases shortly before, and near the place of, a dacoity, is a sufficient basis for an order under s. 110. Evidence of witnesses from villages where dacoities had occurred, but which were at some distance from the village where a person resided, as to his character in connection with the dacoities, is admissible as evidence of general repute under s. 117 of the Code. *Rai Isri Pershad* v. *Queen-Empress, I. L. R. 23 Calc. 621,* distinguished. CHINTAMON SINGH *v.* EMPEROR (1907)

I. L. R. 35 Calc. 243

67. ——— **Imprisonment on failure to find security**—*Act IX of 1894, s. 3 (3)—Security for good behaviour—"Sentence."* *Held,* that where a person is ordered by a Magistrate to be "detained in prison" pending the orders of the Sessions Judge under s. 123 of the Code of Criminal Procedure, such person must be considered as a person undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained in custody. *Held,* also, that an order for imprison ment on failure to furnish security for good behaviour is a "sentence" within the meaning of s. 397 of the Code of Criminal Procedure. *Queen-Empress* v. *Diwan Chand, Punjab Rec. 1895, Cr. J. 45,* referred to. EMPEROR *v.* TULA KHAN (1908)

I. L. R. 30 All. 334

68. ——— **Fitness of surety**—*Criminal Procedure Code, ss. 122 and 513—Discretion of Magistrate.* GEIDT, *J.*—The unfitness of a surety for good behaviour referred to in s. 122, Criminal Procedure Code, though it may not exclude the idea of pecuniary unfitness, is more concerned with the idea of moral unfitness. WOODROFFE, *J.*—Under s. 122, Criminal Procedure Code, the Magistrate has to determine whether a person offered as surety is a fit or unfit person. As the Legislature has not particularised any kind of unfitness, the matter is left to the discretion of the Magistrate subject to the High Court's power of declaring in each case according to its own circumstances whether the order passed by the Magistrate is reasonable or not. *Ram Pershad* v. *The King-Emperor, 6 C. W. N. 593, Abinash Malakar* v. *The Emperor, 4 C. W. N. 797,* referred to and distinguished. JALIL *v.* EMPEROR.

13 C. W. N. 80

SECURITY FOR KEEPING THE PEACE.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 106, 107, 125.

See CRIMINAL PROCEDURE CODE, SS. 107, 118 AND 406 . **I. L. R. 26 All. 623**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 125 . **I. L. R. 34 Calc. 1**

See UNLAWFUL ASSEMBLY.

11 C. W. N. 176

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SECURITY FOR KEEPING THE PEACE—*contd.*

1. ——— **Appellate jurisdiction**—*Bond, cancellation of, before actual execution—Criminal Procedure Code (Act V of 1898), ss. 107, 125—Appeal—Revision.* S. 125 of the Criminal Procedure Code does not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders binding down persons to keep the peace made by Courts subordinate to his own, but it confers only an original jurisdiction. After a bond to keep the peace has been executed, a District Magistrate may hold, for sufficient reasons, that it is no longer necessary and cancel it; but he has no power to declare that it was never necessary. There is no appeal from an order requiring security to keep the peace. BARKA CHANDRA DEY *v.* JANMEJOY DUTT (1905)
I. L. R. 32 Calc. 948

2. ——— **Discretion of Magistrates**—*Dispute relating to possession of land—Institution of proceedings—Criminal Procedure Code (Act V of 1898), ss. 107, 144, 145.* Where a dispute relating to possession of land is likely to cause a breach of the peace, a Magistrate has a discretion to proceed either under s. 107 or under ss. 144 and 145 of the Criminal Procedure Code. *Saroda Prosad Singh* v. *Emperor, 7 C. W. N. 142*, not followed. *King-Emperor* v. *Basiruddin Mollah, 7 C. W. N. 716*, and *Belagal Ramacharlu* v. *Emperor, I. L. R. 26 Mad. 471*, followed. SHEORAJ ROY *v.* CHATTER ROY (1905)
I. L. R. 32 Calc. 966

3. ——— **Sanction for prosecution**—*Whether a sanction granted to a particular person could be availed of by some other person—Criminal Procedure Code (Act V of 1898), s. 195.* A sanction for prosecution expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority. *Giridhari Mondul* v. *Uchit Jha, I. L. R. 8 Calc. 435; Baperam Surma* v. *Gouri Nath Dutt, I. L. R. 20 Calc. 474; In re Banarsi Das, I. L. R. 18 All. 213; Kali Kinkar Sett* v. *Nritya Gopal Roy, 8 C. W. N. 883*, and *Durga Das Rukhit* v. *Queen-Empress, I. L. R. 27 Calc. 820*, referred to. JOGENDRA NATH MOOKERJEE *v.* SARAT CHANDRA BANERJEE (1905).
I. L. R. 32 Calc. 351

4. ——— **Sentence, enhancement of, on appeal**—*Criminal Procedure Code, s. 106—Maintaining a sentence in its entirety though acquitting on some of several charges is enhancement—Appellate Court cannot make an order for security when original conviction not by one of the Courts specified in s. 106.* Where the Magistrate convicted the accused of two distinct offences and passed only a single sentence for both, and the Appellate Court acquitting the accused of one of the offences maintained the sentence in its entirety:—*Held*, that this amounted to an enhancement of the sentence passed for the offence, the conviction for which alone was maintained. An order for security under s. 106 of the Code of Criminal Procedure cannot be made by the Appellate Court unless the conviction appealed against was by a Court of the description specified in the first paragraph of the section. PARAMASIVA PILLAI *v.* EMPEROR (1906)
I. L. R. 30 Mad. 48

5. ——— **Which party should be bound down**—*Security to keep the peace—Wrongful act—Ascertainment of the rights of the parties—Criminal Procedure Code (Act V of 1898), s. 107—Riparian right—Right to khuntagari.* The preventive jurisdiction of a Magistrate under s. 107 of the Criminal Procedure Code must be exercised with caution. If the existence of a right claimed by one party in a proceeding under the section is denied by the opposite party, and is not quite patent, the Magistrate should always endeavour to ascertain for the purposes of the proceeding their respective rights and liabilities, and not in all cases treat them as matters proper for the Civil Court exclusively. Where a doubt exists as to the existence of the rights and obligations, respectively, of the parties, the Magistrate should bind both parties down. Where, however, there is no doubt, the party in the wrong should be bound down, and not the one who has the legal right. No order of the Magistracy should in any way encourage the infringement of a legal right, or prevent the exercise of such right in a legal way, or do away with, even temporarily, the performance of an obligation. The right to the foreshore is a riparian right and ordinarily goes with the land above, and the proprietor has *primâ facie* the right of *khuntagari* or tolls. *Dhunput Singh* v. *Denobundhu Saha, 9 C. L. R. 279*, followed. DINDAYAL MOZUMDAR *v.* EMPEROR (1907) . **I. L. R. 34 Calc. 935**

6. ——— **Order binding down persons convicted of rioting**—*Criminal Procedure Code (Act V of 1898), s. 106—Land dispute—Propriety—Indian Penal Code (Act XLV of 1860), s. 147.* Where on the complainant trying to take possession of land in the occupation of the accused, the accused used more force than was necessary to prevent the complainant's party doing so:—*Held*, that, although the accused were rightly convicted of the offence of rioting under s. 147, Indian Penal Code, they should not be bound down under s. 106, Criminal Procedure Code, to keep the peace, as that would have the effect of preventing the accused from resisting any further attempt by the complainant to take possession of the land. NAHAR KHAN *v.* EMPEROR (1907) . . **11 C. W. N. 840**

7. ——— **Initiation of proceeding, under s. 107, ground for**—*Criminal Procedure Code (Act V of 1898), ss. 107, 112, 144, 526—Dispute regarding property—Bonâ fide dispute—Order requiring security from one party if proper—Special constables, appointment of defendants as—Reasonable apprehension of failure of justice—Transfer—Indefinite order under s. 144.* Where two parties had both applied to the Land Registration Court for registration of their names as proprietor

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of an estate, and pending these proceedings, a Magistrate instituted proceeding under s. 107, Code of Criminal Procedure, against one of the disputing parties and it was contended on their behalf that there being a *bonâ fide* dispute between the parties as to title and possession, the proceeding under s. 107, Code of Criminal Procedure, taken against one party alone to the exclusion of the other would prejudice the former in the land registration proceedings :—*Held*, that such a consideration was foreign to the matter under enquiry in the proceeding under s. 107, Code of Criminal Procedure. *Held*, further, that the question whether the one party or the other were in peaceful possession would have to be decided in the proceeding, but no objection could on that account be taken to the initiation of proceeding under s. 107, Code of Criminal Procedure, against one or the other party, if on the facts presented before the Magistrate at the time of its initiation it appeared that such party were out of possession and were seeking to obtain possession by unlawful means which were likely to cause a breach of the peace. Where some of the party against whom proceeding under s. 107, Code of Criminal Procedure, was instituted were further appointed special constables although the latter order was in abeyance at the time they moved the High Court : *Held*, that in consequence of the order the petitioners might have a reasonable apprehension that they would not have a fair and impartial trial. The High Court, therefore, transferred the case from the Magistrate's file. The Magistrate having allowed bail to the petitioners on condition of their undertaking that no attempt would be made by them or their agents to realise rent by force, and nothing would be done to induce a breach of the peace. *Held*, that the condition could not be imposed under s. 112, Code of Criminal Procedure, and should be struck out of the bail bond. Where an order purporting to be made under s. 144, Code of Criminal Procedure, directed the petitioners "not to commit any act that may likely induce a breach of the peace and not to take forcible possession of the village which is not in their possession." *Held*, that the order was indefinite and not in accordance with the terms of the section. BIBEE KULSUM *v.* UMATUL MEHDI (1906) . **11 C. W. N. 121**

8. ——— Order for security cannot be made by Appellate Court when original conviction not by one of the Courts specified in the section.—*Criminal Procedure Code* (*Act V of 1898*), *s. 106* (*3*). An order for security cannot be made under s. 106 (*3*) of the Code of Criminal Procedure by a Court of appeal or revision which is one of the Courts specified in the section, when confirming the original conviction of a Court which is not one of those specified therein. *Muthia Chetty* v. *Emperor*, *I. L. R. 29 Mad. 190*, referred to and doubted. DORASAMI NAIDU *v.* EMPEROR (1906) . . . **I. L. R. 30 Mad. 182**

9. ——— Order passed on consent of a party to be bound down without evidence taken—*Criminal Procedure Code* (*Act V of 1898*), *ss. 107, 117.* The proceeding under s. 107 of the Criminal Procedure Code is a precautionary measure and not a trial for an offence, and in such a proceeding no one should be bound down, unless it is shown that he is about to commit a breach of the peace. Where, therefore, a person, called upon to show cause why he should not be bound down under the section, appeared before the Magistrate and agreed to be bound down, whereupon the Magistrate directed him to execute a bond without taking any evidence at all :—*Held*, that the order was illegal. RAM CHANDRA HALDAR *v.* EMPEROR (1908) **I. L. R. 35 Calc. 674**

10. ——— Joint inquiry against several persons—*Necessity of specific findings against each—Criminal Procedure Code* (*Act V of 1898*), *ss. 107, 118.* Where a joint inquiry has been held against several persons, who were called upon to furnish security to keep the peace under s. 107 of the Criminal Procedure Code, there must be a specific finding against each person of acts rendering him individually liable under the section before an order can be passed binding him down. AJODHYA PRASAD SINGH *v.* EMPEROR (1908) **I. L. R. 35 Calc. 929**

11. ——— Unlawful assembly—*Criminal Procedure Code* (*Act V of 1898*), *s. 106—Penal Code* (*Act XLV of 1860*), *s. 143.* An order under s. 106 of the Criminal Procedure Code upon a conviction under s. 142 of the Penal Code is illegal. RAJ NARAIN ROY *v.* BHAGABAT CHUNDER NANDI (1908) . . . . **I. L. R. 35 Calc. 315**

SECURITY FOR PAST LOAN.

See BANK OF BENGAL . **7 B. L. R. 653**

SEDITION.

See CONFISCATION.
I. L. R. 34 Calc. 986

See CRIMINAL PROCEDURE CODE, 1898, SS. 225, 233 TO 237.
I. L. R. 33 Bom. 77

See PENAL CODE, SS. 124A, 153A.
I. L. R. 33 Bom. 77

1. ——— "Swaraj"—*Incitment to secure "swaraj"—Security for good behaviour—Seditious language at a public meeting—Criminal Procedure Code* (*Act V of 1898*), *s. 108—Indian Penal Code* (*Act XLV of 1860*), *s. 124A.* The term "*swaraj*" does not necessarily mean government of the country to the exclusion of the present Government, but its ordinary acceptance is "home rule" under the Government. The incitement of the members of a public meeting to exert themselves to secure "*swaraj*" does not amount to the offence of sedition under s. 124A of the Penal Code, and is consequently not within the purview of s. 108 of the Criminal Procedure Code. BENI BHUSHAN ROY *v.* EMPEROR (1907) **I. L. R. 34 Calc. 991**

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SEDITION—*contd.*

2. _____ **Government authority for prosecution—Sufficiency of authority**—*Complaint—Regularity of proceedings—Criminal Procedure Code (Act V of 1898), ss. 4 (h), 196, 200—Presumption of regularity of official acts—Evidence Act (I of 1872), s. 114—Re-publication of seditious articles—Penal Code (Act XLV of 1860), ss. 124A, 499, Exception (4)—Printer, liability of—Act XXV of 1869, s. 7.* Orders under s. 196 of the Criminal Procedure Code should be expressed with sufficient particularity and with strict adherence to the language of the section. But the real question in such cases is whether the prosecution was instituted under the authority of Government. An order purported to accord sanction to prosecute the editor, manager and the printer of a newspaper under s. 124A of the Indian Penal Code without specifying their names, and containing a misdescription of the seditious article. A police officer received it from the Commissioner of Police, and under his directions applied for and obtained warrants from the Chief Presidency Magistrate against the accused. He was examined by the Magistrate, but not on oath, and his deposition was not recorded. On the day of the trial the same police officer filed an amended order under s. 196 of the Criminal Procedure Code correcting the error in the name of the article in the previous orders. *Held* (i) that the prosecution was regularly instituted. *Queen-Empress* v. *Bal Gangadhar Tilak, I. L. R. 22 Bom. 112*, referred to. *Kali Kinkur Sett* v. *Nritya Gopal Roy, I. L. R. 32 Calc. 469*, and *Reg.* v. *Judd, 37 W. R. 143*, distinguished. (ii) That the order under s. 196 of the Criminal Procedure Code was not a " complaint " within s. 4 (*h*), but that the application of the police officer for warrant in respect of an offence under s. 124A of the Indian Penal Code, coupled with his oral allegations, though not made on oath nor recorded, amounted to a " complaint." *Queen-Empress* v. *Sham Lall, I. L. R. 14 Calc. 707*, followed. (iii) That the presumption under s. 114 of the Evidence Act supplied any omissions either as to the method of the communication of the order to the prosecuting officer, or in the order-sheet of the Magistrate. (iv) That the article in question was incompatible with the continuance of the Government established by law and was seditious. It is the duty of every citizen to support the Government established by law and to express with moderation any disapprobation he may feel of its acts and measures. (v) That the re-publication of seditious articles from another newspaper, one of which only was filed as an exhibit by the prosecution and used and the case against the editor of that paper on his trial for sedition, was not a report of the proceedings of a Court of Justice, and was not justifiable under the circumstances. (vi) That the presumption contained in s. 7 of Act XXV of 1867, in the absence of evidence to the contrary, rendered the printer liable for seditious matters published in his paper. APURBA KRISHNA BOSE *v.* EMPEROR (1907) **I. L. R. 35 Calc. 141**

3. _____ **Reasonable criticism of Government**—*Incitement to insurrection—Penal Code (Act XLV of 1860), s. 124A—Admissibility of seditious articles not forming the subject of the charge—Liability of printer for seditious matter in a newspaper—Act XXV of 1867, s. 7.* A reasonable criticism of the action of Government in a particular matter without any attempt to create hatred or contempt against it is not sedition, but an incitement to insurrection falls within the scope of s. 124A of the Penal Code. Seditious articles published in the same newspaper, not forming the subject of the charges, on which the prisoner is being tried at the time, are admissible to show the intention of the person, who printed or published the latter. S. 7 of Act XXV of 1867 makes the printer or publisher responsible for everything appearing in the newspaper, whoever the author of the seditious articles may be, unless he can prove absence from the office of the paper in good faith and without knowledge that during his absence seditious matter would be published. It is not absence in good faith for the printer to go away, but with the full knowledge of what is going to happen in his absence and for the purpose of shirking his liability. *Queen-Empress* v. *Bal Gangadhar Tilak, I. L. R. 22 Bom. 112*, dissented from. *Ramasami* v. *Lokunada, I. L. R. 9 Mad. 387*, approved of. EMPEROR *v.* PHANENDRA NATH MITTER (1908) . . **I. L. R. 35 Calc. 945**

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SENTENCE—*contd.*

1. GENERAL CASES.

1. ——— **Obligation to pass sentence on conviction**—*Duty of Magistrate.* Where a Magistrate convicts a person of an offence, he is bound to pass some sentence, if only a nominal one. ANONYMOUS . . . **4 Mad. Ap. 66**

2. ——— The law gives no discretion to a Court which convicts of an offence to award or not the punishment provided for that offence in the Penal Code. DEWAN SINGH *v.* QUEEN-EMPRESS . . **I. L. R. 22 Calc. 805**

3. ——— **Principals and abettors**—*Abetment of same offence committed as principal.* Persons punished as principals cannot also be punished for abetment of the same offence. QUEEN *v.* JEETOO CHOWDRY . . **4 W. R. Cr. 23**

QUEEN *v.* RAMNARAIN JOSH . **4 W. R. Cr. 37**

4. ——— *Registration Act, 1866, s. 94, Abetment of offence under.* Under s. 94, Act XX of 1866, an abettor could be punished more severely than his principal could be. QUEEN *v.* GOPAL PROSAUD SEIN . . **8 W. R. Cr. 16**

5. ——— **Ground for passing lighter sentence**—*Difference between opinions of Judge and jury.* A difference of opinion between the Judge and the jury is no ground for the Judge passing a lighter sentence than he would otherwise have done. *Per* JACKSON, *J.* QUEEN *v.* GHOLAM MUSTUFFA . . . . **3 W. R. Cr. 29**

6. ——— **Ground for mitigation of sentence**—*False evidence.* Discussion as to the extent of punishment to be passed on certain raiyats who, in a case of criminal trespass brought by an indigo planter, falsely swore that cotton, and not indigo, had been raised on the land in question during the past year. Punishment reduced. SETON-KARR, *J.*, would have reduced the punishment still more for reasons given. QUEEN *v.* DHURRANI DUTT RAI . . **8 W. R. Cr. 7**

7. ——— **Punishment for escape from custody**—*Penal Code, s. 224—Additional punishment.* The punishment for escape from lawful custody (s. 224) in a case in which that is one of the offences of which the prisoner is convicted, must be "in addition" to any punishment awarded for the substantive offence. QUEEN *v.* DHOONDA BHOOYA **8 W. R. Cr. 85**

8. ——— **False evidence**—*Simple misstatement.* A deliberate misstatement made in a Court of Justice, whether it tends to endanger the life and property of others or to defeat and impede the progress of justice, is not an offence which should be lightly passed over; but for a simple misstatement from which no such inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty, and throws himself on the mercy of the Court. QUEEN *v.* GURJOON AHEER . . **7 W. R. Cr. 37**

9. ——— **Voluntarily causing hurt**—*Sentence by Subordinate Magistrate—Causing grievous hurt.* Where a District Magistrate annulled a conviction passed by a Subordinate Magistrate (first class) of voluntarily causing hurt by means of an instrument for stabbing, cutting, etc., under s. 324 of the Penal Code (an offence cognizable by the Subordinate Magistrate), and directed the Subordinate Magistrate to commit the accused to the Court of Session for trial on the charge of voluntarily causing grievous hurt by means, etc. (a charge cognizable by the Court of Session), the High Court annulled the order of the District Magistrate, and restored the conviction and sentence of the Subordinate Magistrate. REG. *v.* HANMAPA BIN MALAPA . . . . **7 Bom. Cr. 37**

10. ——— **Taking illegal gratification**—*Order to refund money.* In a conviction of taking illegal gratification, a simple order to refund the money taken is not a sufficient punishment. *In the matter of* MUTTY LALL CHUTTOPADHYA **16 W. R. Cr. 74**

11. ——— **Kidnapping**—*Maximum sentence.* The maximum sentence prescribed for the offence of kidnapping should only be awarded in a case of the most aggravated nature. QUEEN *v.* BHOODEEA . . . . **8 W. R. Cr. 3**

12. ——— **Measure of punishment**—*Murder—Severity of sentence, mitigation of.* Where a prisoner convicted of murder against the opinion of the assessors was sentenced to transportation for life, the High Court reduced the sentence to ten years' rigorous imprisonment, remarking on the severity of the Penal Code and on the necessity of administering it so as to make it apply to the various gradations and decrees of crime in this country. QUEEN *v.* HOSSEIN ALLY **7 W. R. Cr. 47**

13. ——— *Rape—Circumstances for consideration.* The measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime, the conduct of the criminal, and the defenceless and unprotected state of the injured females. QUEEN *v.* JHANTAH NOSHYO . . . . **6 W. R. Cr. 59**

14. ——— *Rioting with deadly weapons.* In a case of rioting with deadly weapons, the one side found guilty of using them and causing grievous hurt are properly punishable more severely than the men of the other side. QUEEN *v.* MOORUT MAHTON . **8 W. R. Cr. 3**

15. ——— *Rioting and unlawful assembly—Affray.* Where the evidence in a case failed to establish anything like an unlawful assembly, the conviction was reduced from rioting and being members of an unlawful assembly to one for affray, although grievous hurt from which death resulted was caused to one of the persons. The insufficiency of the punishment allowed by the law in cases of affray pointed out. QUEEN *v.* PHOOLLEE MISSER . . . . **12 W. R. Cr. 72**

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SENTENCE—*contd.*

1. GENERAL CASES—*contd.*

16. ——— Sentence on alternative finding—*Penal Code, s. 72.* An alternative finding is perfectly legal. The sentence should be as provided by s. 72, Penal Code. QUEEN *v.* TARINEE MYTEE . . . . . **7 W. R. Cr. 13**

17. ——— Contemporaneous sentences. Contemporaneous sentences are not justified by the Penal Code. QUEEN *v.* MOHESH CHUNDER SIRCAR . . . . . **3 W. R. Cr. 13**

18. ——— *Sentence under Penal Code and under special law.* A sentence under the Penal Code and also under a special law in respect of one and the same offence is illegal. QUEEN *v.* HUSSUN ALI . . **5 N. W. 49**

19. ——— *Simultaneous conviction for offence, and order for security for good behaviour.* When a conviction of an offence is contemporaneous with an order for taking security for good behaviour, the sentence for the substantive offence is to be first carried out, and the person to be bound then brought up for the purpose of being bound. QUEEN *v.* SHONA DAGEE **24 W. R. Cr. 13**

20. ——— Sentence running from period prior to conviction—*Illegal sentence.* A Sessions Judge has no power to declare that a sentence shall run from a period prior to the conviction. QUEEN *v.* BUL SINGH . . . **4 N. W. 8**

21. ——— Commencement of sentence where appeal is brought—*Date of committal to jail.* Where on the appeal of Government an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to jail, and not from the date of their arrest or of the sentence on the appeal. EMPRESS *v.* MAHUDDI . **6 C. L. R. 349**

22. ——— Sentence to commence at future date—*Conviction, and admission to bail to give means of appeal.* Where a Magistrate, after sentencing two prisoners to separate terms of imprisonment, admitted them to bail, in order that they might have the means of appealing:—*Held*, that such admission to bail did not make the previous sentence one to commence at a future time, and consequently illegal. The case of *Kishen Chunder Bhuttacharjee, 3 B. L. R. A. Cr. 50 : 12 W. R. Cr. 47*, distinguished. *In the matter of* OKHOY KUMAR . . . . . **7 C. L. R. 393**

23. ——— Sentence imposed in British India postponed till expiry of a sentence imposed in Mysore—*Criminal Procedure Code, 1882, s. 11—Power of Magistrate.* It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore. QUEEN-EMPRESS *v.* VENKATARAM JETTI . **I. L. R. 20 Mad. 444**

24. ——— Order for punishment on contingent failure to perform work—*Act XIII of 1859, s. 2.* An order of a Magistrate passed under s. 2 of Act XIII of 1859, "that the prisoner should work for a certain period, and in case he failed to do so should suffer rigorous imprisonment for one month," annulled as to the latter part, the Magistrate having no power to make such an order until the failure had occurred and been proved before him. REG. *v.* JOMA BIN BALU **4 Bom. Cr. 37**

SENTENCE—*contd.*

1. GENERAL CASES—*concld.*

25. ——— Sentence under repealed Act—*Cattle Trespass Acts, III of 1857 and I of 1871.—Conviction under wrong Act.* Where a prisoner was properly convicted on the evidence of illegally seizing cattle, but was sentenced under the old law (Act III of 1857), when the Act had been repealed by Act I of 1871, the High Court declined to interfere with the sentence, as the latter Act was in force at the time of the conviction and sentence, and no injustice had been done. MOHESH NATH *v.* HURRO MOHUN GHOSAL . **16 W. R. Cr. 12**

26. ——— Sentence of penal servitude. The punishment of penal servitude is only applicable to Europeans and Americans. QUEEN-EMPRESS *v.* DUMA BAIDYA **I. L. R. 19 Mad. 483**

27. ——— Passing sentence before judgment—*Criminal Procedure Code (Act X of 1882), ss. 366, 367.* A sentence which has been passed or a direction that an accused be set at liberty which has been given at a sessions trial before the judgment required by s. 367 of the Code of Criminal Procedure, 1882, has been written, is illegal. QUEEN-EMPRESS *v.* HARGOBIND SINGH **I. L. R. 14 All. 242**

28. ——— Imposition of non-appealable sentences. The imposition by Magistrates of non-appealable sentences in cases in which the facts are such as to render it very desirable that an appealable sentence should be passed, disapproved of. JATRA SHEKH *v.* REAZAT SHEKH **I. L. R. 20 Calc. 483**

2. CAPITAL SENTENCE.

1. ——— Sentence on conviction of murder—*Sentence of death or transportation.* On a conviction for murder, the only punishments that can legally be awarded are death or transportation for life. QUEEN *v.* BANI DOSS **14 W. R. Cr. 2**

QUEEN *v.* JAMAL . . **16 W. R. Cr. 75**

2. ——— *Discretion of Court as to punishment after conviction of murder.* The law gives no discretion to a Court which convicts of an offence to award or not the punishment provided for that offence in the Penal Code. When convicting of murder the only discretion which the law allows to the Court is to determine which of the two punishments prescribed should be awarded, regard being had to the circumstances of the particular case. DEWAN SINGH *v.* QUEEN-EMPRESS **I. L. R. 22 Calc. 805**

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SENTENCE—*contd.*

2. CAPITAL SENTENCE—*concld.*

3. ——— *Duty of Magistrates.* Judges must not shrink from doing their duty, and they are bound to pass a capital sentence in a case of murder when they believe the evidence. QUEEN *v.* SHIB NARAIN PALODHEE **7 W. R. Cr. 33**

4. ——— **Justification for sentence of death**—*Convict undergoing transportation.* The fact that except death no punishment more severe than that which the prisoner is undergoing at the time of the commission of the offence can be inflicted, is not of itself sufficient to justify the Court in condemning the convict to death. QUEEN *v.* NGA SHOAY-DE . . . **19 W. R. Cr. 68**

5. ——— **Conviction of person under transportation of murder**—*Penal Code, s. 303.* Where a person under sentence of transportation for life on a conviction for murder is found guilty of murder on a subsequent and different charge, the only sentence that can be passed on him under s. 303 of the Penal Code is death. QUEEN *v.* DOORJODHUN SHAMONTO *alias* DEEJOBOR **19 W. R. Cr. 45**

6. ——— **Pregnancy of accused convicted of murder**—*Suspension of sentence.* Capital sentence should be pronounced on a conviction for murder even if the accused be pregnant, although the execution of the sentence should be deferred till after delivery. QUEEN *v.* PANHEE AURUT . . . . **15 W. R. Cr. 66**

7. ——— *Suspension of sentence.* When a prisoner was pregnant, the sentence of death passed upon her was ordered not to be carried out until after her delivery. QUEEN *v.* GHURBHURNEE . . . **W. R. 1864, Cr. 1**

QUEEN *v.* TEPOO . . . **3 W. R. Cr. 15**

Since expressly provided for by s. 306, Criminal Procedure Code, 1872, and s. 382 of Act X of 1882.

3. CUMULATIVE SENTENCES.

1. ——— **Sentencing twice for same offence**—*Conviction for two offences, one of which is integral portion of another.* The conviction of prisoners for two offences, when the one offence formed an integral portion of the other, *held* to be in effect punishing twice for the same offence, and therefore illegal. GOVERNMENT *v.* LALAWUN SINGH **1 Agra Cr. 31**

2. ——— **Cases where same acts are the basis of two charges and convictions**—*Sentence on each charge.* Where substantially only one offence has been committed, and the acts which are the basis of a prisoner's conviction on one charge are the same as the acts which are the basis of his conviction on another charge, cumulative sentences on each charge should not be passed. QUEEN *v.* RADHAKANTH PAUL . **9 W. R. Cr. 12**

QUEEN *v.* CHUNDER KANT LAHOREE **12 W. R. Cr. 2**

SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

3. ——— **Conviction on several charges forming substantially one offence**—*Criminal Procedure Code, 1861, s. 46.* Where a person, though charged under different sections of the Penal Code, was convicted of what was substantially but a single offence:—*Held*, that it was not lawful for the Magistrate who tried him to pass a sentence of imprisonment as for separate offences, under s. 46 of the Code of Criminal Procedure, exceeding in the aggregate the punishment which it was competent for the Court to inflict on conviction of a single offence. REG. *v.* GANU LADU **2 Bom. 132 : 2nd Ed. 126**

4. ——— *Improper sentence.* Where a person, though charged under two heads, was found guilty of what was substantially but one offence:—*Held*, that it was improper for the Sessions Judge to record a conviction under two sections of the Penal Code, and thereupon to award a punishment of two years' imprisonment in excess of what the law prescribed for the offence committed. REG. *v.* ZORA KARUBEG . **4 Bom. Cr. 12**

5. ——— **Acts constituting offence founded on one continuous transaction**—*Sentence for principal offence.* Where the acts constituting the offence are founded on one single continuous transaction, sentence should only be passed for the principal offence. ANONYMOUS **6 Mad. Ap. 47**

6. ——— **Act coupled with intention**—*Same act constituting a less grave offence.* Where the act of an accused person, coupled with his intention or knowledge, constitutes a graver offence, the circumstance that the same act also answers to the definition of another less grave offence does not render him liable to a cumulative punishment. Case where different statutes provide separate punishments for the same act, distinguished. REG. *v.* DOD BASAYA . . . . **11 Bom. 13**

7. ——— **Conviction of separate offences**—*Criminal Procedure Code, 1861, s. 46*—*Separate sentences to take effect successively.* Where prisoners are convicted of separate offences, a separate sentence should be passed in each case, with a direction that the imprisonment in the second case should commence on the expiration of that in the first and so on. ANONYMOUS **4 Mad. Ap. 27**

8. ——— *Separate sentence to take effect successively.* In a case of several offences under one section of the Penal Code, the proper way is to try the accused (under separate charges) for each of the several distinct offences under the section, which have been clearly proved against them. On conviction on each of these separate charges, a separate sentence on each conviction should be passed, with a direction (under s. 317 of the Criminal Procedure Code, 1872) that each should take effect on the expiry of the next prior sentence. QUEEN *v.* SOBRAI GOWALAH **20 W. R. Cr. 70**

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SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

9. ——— *Maximum term of punishment—Joinder of charges.* Where a person who is accused of several offences of the same kind is tried for each of such offences separately by a Magistrate, the aggregate punishment which such Magistrate can inflict on him in respect of such offences is not limited to twice the amount which he is by his ordinary jurisdiction competent to inflict, but such Magistrate can inflict on him for each offence the punishment which he is by his ordinary jurisdiction competent to inflict. *In the matter of* DAULATIA . . . **I. L. R. 3 All. 305**

10. ——— **Conviction of several instances of same offence**—*Aggregate sentence for purpose of appeal—Separate sentence on each offence.* For purposes of appeal, the whole punishment awarded to one person on one trial for several instances of the same offence is to be regarded as one sentence. *Semble:* That where a person is tried at the same time for several instances of the same offence, it is not necessary that more than a single sentence should be passed. But if a separate sentence be passed on each head:—*Held,* that an appeal brings the aggregate of those sentences, as together constituting the punishment awarded in a single trial, within the jurisdiction of the Appellate Court. REG. *v.* GULAM ABAS . . **12 Bom. 147**

11. ——— **Simultaneous convictions**—*Sentence for purposes of appeal—Criminal Procedure Code, 1872, s. 314.* The aggregate of the sentences passed under s. 314 of the Code of Criminal Procedure in a case of simultaneous convictions for several offences must be considered a single sentence for the purposes of confirmation or appeal. REG. *v.* RAMA BHIVGOWDA **I. L. R. 1 Bom. 223**

12. ——— **Separate sentences**—*Abetment of abduction and wrongful confinement—Penal Code, ss. 343, 498.* The prisoners having been sentenced for abetment of abduction of a woman under ss. 109 and 498 of the Penal Code, and for wrongful confinement of her under s. 343:—*Held,* that both sentences could not stand, and that, as the essence of the case was abduction, the prisoners, as abettors therein, should be punished for it alone. QUEEN *v.* ISHWAR CHANDRA JOGEE **W. R. 1864 Cr. 21**

13. ——— *Abduction of child to get property from its person—Theft after preparation to cause death—Penal Code, ss. 369, 382.* Separate sentences cannot be awarded in one case for abducting a child in order to take property from its person (s. 369), and theft after preparation to cause death, etc. (s. 382), where the evidence shows that the act is one and the same. The sentence under the latter section was cancelled, there being no evidence of any preparation having been made to cause death, etc., within the meaning of that section. QUEEN *v.* KASHEE NATH CHUNGO **8 W. R. Cr. 84**

SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

14. ——— *Penal Code, s. 369—Abduction with intent to take moveable property—Second punishment for theft.* A prisoner tried, convicted, and punished under s. 369 of the Penal Code of abducting a child with intent dishonestly to take moveable property, cannot also be punished for the theft of a part of the moveable property which he intended dishonestly to take through means of the abduction; and the second punishment for a theft is by the present Code of Criminal Procedure illegal. QUEEN *v.* NOUJAN. NOUJAN *v.* QUEEN . . . . . **7 Mad. 375**

15. ——— *Penal Code, ss. 71, 183 and 353—Resisting taking of property by public servant—Using criminal force to deter public servant from doing his duty. Held,* on the facts of this case, that a party (*A*) who objected to accompany a constable who had been directed to produce him before the Court, and also seized the constable by the arm, and resisted his carrying away a pony which *A* was charged with having misappropriated, was guilty of separate offences under ss. 353 and 183 of the Penal Code, and the infliction of separate sentences for each offence was not prevented by s. 71 of that Code. QUEEN *v.* JOYAH MOHUN CHUNDER **14 W. R. Cr. 19**

16. ——— *Threatening witnesses—Sentence for each offence.* An accused who threatened three witnesses was convicted and sentenced to four months' imprisonment for the threat to each witness, in all to one year. It was held that, if a person at one time criminally intimidates three different persons, and each of those persons brings a separate charge against him, the accused may be convicted for an offence as against each person, and be punished separately for each offence. The facts and evidence in this case, however, were considered insufficient to support the sentence, which was reversed as extremely harsh and unjust. *In the matter of* GOOLZAR KHAN . **9 W. R. Cr. 30**

17. ——— *Culpable homicide and being member of unlawful assembly.* The prisoner was convicted and sentenced separately for culpable homicide not amounting to murder and for being a member of an unlawful assembly. The two offences, however, being held to be one (the latter being only part of the evidence of the former), the conviction and sentence for the second offence were quashed. QUEEN *v.* RUBBEEOOLAH **7 W. R. Cr. 13**

18. ——— *Dacoity with murder—Penal Code, s. 396.* If a person concerned in a dacoity unintentionally commits murder, he is liable to punishment under s. 396 of the Penal Code. But he cannot be separately convicted of murder under s. 302 and of committing dacoity under s. 395. QUEEN *v.* RUGHOO **W. R. 1864, Cr. 30**

19. ——— *Dacoity and receiving stolen property.* A person convicted of and sentenced for dacoity cannot also be convicted of

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SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

and sentenced for receiving or retaining the stolen property thereby acquired (*dissentiente* LOCH, *J.*). BHYRUB SEAL *v.* QUEEN. QUEEN *v.* BHYRUB SEAL
W. R. 1864, Cr. 27

QUEEN *v.* ABOOL HOSSEIN . **1 W. R. Cr. 48**

20. ——— *Rescuing from lawful custody and using criminal force—Penal Code, ss. 224, 225, and 353.* Where substantially but one offence has been committed, and the acts which are the basis of one charge are the same which form the basis of another charge on which the prisoner has also been convicted, cumulative sentences on each charge should not be passed. Where prisoners were convicted under s. 224 for escape, s. 225 for rescuing from lawful custody, and under s. 353 for using criminal force in so doing, and sentenced to separate punishments under each section: —*Held*, that the prisoners had only done one act and were guilty of only one offence, and should have been found guilty under ss. 224 and 225 of "escape" and "rescuing" respectively, and sentenced accordingly. QUEEN *v.* KALISANKAR SANDYAL . . . **3 B. L. R. A. Cr. 14**

QUEEN *v.* DINA SHEIKH.
3 B. L. R. A. Cr. 15 note: 10 W. R. Cr. 63

So where prisoners were accused of rioting and using criminal force, it was *held* only one offence. *In the matter of* NILRUTTON SEIN
16 W. R. Cr. 45

21. ——— *Making false charge—Giving false evidence—Separate offences.* The offence of making a false charge and the offence of intentionally giving false evidence are not cognate offences or parts of the same offence, but may be punished separately. QUEEN *v.* ABDOOL AZEEZ
7 W. R. Cr. 59

22. ——— *Penal Code, ss. 71, 193, 211—Concurrent sentences—Criminal Procedure Code (Act X of 1882), s. 35. Enhancement of sentence.* Where the accused, who was a head constable, was found guilty of making a false charge under s. 211, and of giving false evidence under s. 193 of the Penal Code (Act XLV of 1860), and the Sessions Judge passed sentences of three months' simple imprisonment for each offence, and, taking into consideration the accused's past conduct, directed that the sentences should run concurrently: —*Held*, that the sentences were inadequate and illegal. Accordingly the sentences were enhanced to three months' rigorous imprisonment for each offence; and as the two offences were distinct, the High Court directed, under s. 35 of the Criminal Procedure Code (Act X of 1882), one sentence to commence after the expiration of the other. *Queen v. Abdul Azeez, 7 W. R. Cr. 59*, followed. QUEEN-EMPRESS *v.* PIR MAHOMED
I. L. R. 10 Bom. 254

23. ——— *Conviction of several offences.* Two prisoners, having been convicted of forgery and other offences, were sentenced

SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

each to an aggregate amount of punishment. *Held*, that it was an irregularity not to pass a separate sentence under each independent head of the charge. REG. *v.* VINAYAK TRIMBAK
2 Bom. 414: 2nd Ed. 391

REG. *v.* MURAR TRIKAM . **5 Bom. Cr. 3**

24. ——— *Distinct offences—Simultaneous sentence.* Three prisoners were charged with five distinct offences of house-breaking by night, and were sentenced to two years' rigorous imprisonment in each case. *Held*, that the Magistrate had power only to pass sentence of four years' imprisonment upon each prisoner, but according to the sentence all the punishments inflicted would be going on simultaneously. ANONYMOUS . . . . **5 Mad. Ap. 42**

25. ——— *Criminal Procedure Code, s. 35—"Distinct offences"—Penal Code, ss. 75, 411.* A person convicted under ss. 75 and 411 of the Penal Code is not convicted of "distinct offences" within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Empress* v. *Zor Singh, I. L. R. 10 All. 146*, explained. Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session. QUEEN-EMPRESS *v.* KHALAK . **I. L. R. 11 All. 393**

26. ——— *House-breaking and theft.* If a man break into a dwelling-house at night and steal property therefrom, the crime is in its nature one single and entire offence, and should be treated accordingly. QUEEN *v.* TONAOKOCH
2 W. R. Cr. 63

Under s. 457 of the Penal Code. QUEEN *v.* CHYTUN BOWRA . . **5 W. R. Cr. 49**

JOGEEN PULLEE *v.* NOBO PULLEE
6 W. R. Cr. 49

In re MUSSAHUR DAOUDH . **6 W. R. Cr. 92**

27. ——— *House-breaking by night and theft.* A prisoner may be convicted of theft in a building and of house-breaking by night with intent to commit theft, though if the Judge considers the punishment for the first offence sufficient, he need not award any additional sentence for the second. QUEEN *v.* TINCOUREE
W. R. 1864, Cr. 31

28. ——— *House-breaking and theft—Joinder of charges—Limit of conviction—Criminal Procedure Code (Act X of 1872), ss. 452, 454, 455. Held*, that, where in the course of one and the same transaction an accused person appears to have committed several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal, but the subsidiary, crimes alleged to have

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SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

Criminal Procedure Code (*Act X of 1882*), *s. 235.* Four persons were charged with being members of an unlawfal assembly consisting of themselves and others, the common object of which assembly was resisting the execution of a legal process, namely, the arrest of a judgment-debtor by a Civil Court peon, who went with a warrant for his arrest accompanied by other persons, *A* and *B*, for the purpose of identifying him, and with using force or violence in prosecution of the common object, such force or violence consisting of an assault on the Civil Court peon, and another by means of a dangerous weapon on *A*. The Deputy Magistrate convicted all the accused of offences under ss.147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under the former section and two months' rigorous imprisonment under the latter. He further convicted one of the accused of an offence under s. 324 in respect of the assault on *A*, and sentenced him to one month's rigorous imprisonment in respect of that offence, and directed that the sentences were to take effect one on the expiry on the other. *Held*, that the offence of rioting was completed by the assault on *A*, and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure. *Held*, further, that, even if *A* had not been assaulted, the conviction and sentences passed for rioting and the assault on the peon were legal, inasmuch as the acts of the accused, taken separately, constituted offences under ss. 143 and 353 of the Penal Code, and combined, an offence under s. 147 ; and under s. 235, sub-s. (*3*), of the Code of Criminal Procedure, the accused might be charged with and tried at one trial for the offence under s. 147, and those under ss. 143 and 353, and therefore also separately convicted and sentenced for each such offence, provided the punishment did not exceed the limit imposed by s. 71 of the Penal Code as amended by s. 4 of Act VIII of 1882, which limit had not been exceeded in the present case. *In the matter of* CHANDRA KANT BHATTACHARJEE. CHANDRA KANT BHATTACHARJEE *v.* QUEEN-EMPRESS
I. L. R. 12 Calc. 495

46. ——————— *Penal Code* (*Act XLV of 1860*), *ss. 147, 353,* and $\frac{353}{149}$, *cumulative sentences under—Legality of sentence—Criminal Procedure Code* (*Act X of 1882*), *ss. 35, 235. Held*, that a double sentence under ss. 147 and 353, Penal Code, is illegal where the force which was used, and which formed one of the component elements of the offence of rioting, was the criminal force used to the public servants. *Held*, also, that a sentence under s. 353, Penal Code, for actually committing an offence under that section, and a further sentence under s. 353 read with s. 149 for committing the same offence constructively, is illegal. The High Court set aside the cumulative sentences under ss. 353 and $\frac{353}{149}$ respectively, but upheld the sentence under s. 147. RAMDIHAL *v.* QUEEN-EMPRESS
3 C. W. N. 174

SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

7. ——————— *Penal Code Amendment Act* (*VIII of 1882*), *s. 4—Offence made up of several offences—Rioting—Grievous hurt—Criminal Procedure Code, 1882, s. 235—Penal Code, ss. 146, 147, 149, 325.* A member of an unlawful assembly, some members of which have caused grievous hurt, cannot lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt. EMPRESS *v.* RAM PARTAB
I. L. R. 6 All. 121

48. ——————— *Separate charge—Criminal Procedure Code* (*Act X of 1872*), *s. 454, illus.* (*f*)—*Penal Code* (*Act XLV of 1860*), *ss. 147, 148, and 324.* Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code must not exceed that which may be awarded for the graver offence. *Quære :* Whether separate convictions under ss. 147 and 324 of the Penal Code are legal. *In the matter of the petition of* JUBDUR KAZI. EMPRESS *v.* JUBDUR KAZI . **I. L. R. 6 Calc. 718**

S.C. *In re* JUBDUR KAZI . **8 C. L. R. 390**

49. ——————— *Rioting—Grievous hurt—Criminal Procedure Code, 1882, s. 235—Penal Code, ss. 146, 147, 149, 325.* Three persons who were convicted (i) of the riot under s. 147 of the Penal Code, (ii) of causing grievous hurt in the course of such riot, were respectively sentenced to six months' rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 147, and three months' rigorous imprisonment under s. 325. *Held, by* PETHERAM, *C.J.*, and STRAIGHT and TYRRELL, *JJ.*, that inasmuch as the evidence upon the record showed that the three prisoners had committed individual acts of violence with their own hands, which constituted distinct offences of causing grievous hurt or hurt separate from an independent of the offence of riot, which was already completed, and the fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under s. 325 of the Penal Code, the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress* v. *Ram Partab, I. L. R. 6 All. 121,* distinguished. *Per* BRODHURST, *J.*, that the evidence showed that only one of the three prisoners had caused grievous hurt with his own hands, and that the others could only be properly convicted of that offence under the provisions of s. 149 of the Penal Code, but that the separate sentences passed under ss. 147 and 325 were not illegal. *Queen-Empress* v. *Dungar Singh, I. L. R. 7 All. 29,* followed. Also *per* BRODHURST, *J.*—Illus. (*g*) of s. 235 of the Criminal Procedure Code does not apply merely to the case of persons who, in addition to the offence of rioting, have with their own hands committed the further offences of voluntarily causing grivous hurt, and of assaulting a public servant when engaged in suppressing a riot ; and the convictions referred to in the illustration relate especially to convictions

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SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

obtained under the provisions of s. 149 of the Penal Code. QUEEN-EMPRESS *v.* RAM SARUP **I. L. R. 7 All. 757**

50. ——— *Criminal Procedure Code, 1882, s. 35 and s. 235—Convictions of rioting and causing grievous hurt—Offences distinct—Penal Code (Act VIII of 1882), s. 4—Penal Code, ss. 147, 325.* The offences of rioting, of voluntarily causing hurt, and of voluntarily causing grivous hurt, each of the two latter offences being committed against a different person, are all distinct offences within the meaning of s. 35 of the Criminal Procedure Code. Under the first paragraph of s. 235 of the Criminal Procedure Code, a person accused of rioting and of voluntarily causing grievous hurt may be charged with and tried for each offence at one trial, and under s. 35 a separate sentence may be passed in respect of each. *Queen-Empress* v. *Ram Partab, I. L. R. 6 All. 121*, dissented from. QUEEN-EMPRESS *v.* DUNGAR SINGH **I. L. R. 7 All. 29**

51. ——— *Penal Code, s. 71, —Criminal Procedure Code, ss. 39, 235—Rioting, grievous hurt, and hurt—Punishment for more than one of several offences.* On the 8th August 1884 a Magistrate of the second class began an inquiry in a case in which several persons were accused of rioting and of voluntarily causing grievous hurt. On the 6th September the powers of a Magistrate of the first class were conferred on the Magistrate by an order of Government, which was communicated to him on the 8th September. On the 9th September the case for the prosecution having closed, the Magistrate framed charges against each of the accused under ss. 323 and 325 of the Penal Code, recorded the statements of the accused and the evidence for the defence, and on the 10th September convicted the accused of all the charges, passing upon each of them, in respect of each charge, sentences which he could pass as a Magistrate of the first class, but could not have passed as a Magistrate of the second class. On appeal, the Sessions Judge, on the ground that the prisoners had committed the offence described in s. 148 of the Penal Code, held that the sentences passed by the Magistrate were illegal, as being inconsistent with the provisions of s. 71, paragraphs 2 and 4; and he accordingly reduced the sentences of imprisonment which the Magistrate had passed to the maximum of imprisonment which the Magistrate could have inflicted under s. 148. *Held*, by the Full Bench (PETHERAM, *C.J.*, and BRODHURST, *J.*, dissenting), that the sentences passed by the Magistrate were legal. *Per* OLDFIELD and DUTHOIT, *JJ.*, that the provisions of s. 71 of the Penal Code had no application to the case, inasmuch as the offences of causing grievous hurt and hurt formed no part of the offence of rioting. *Per* BRODHURST, *J.*, that the sentences passed by the Magistrate were, as a whole, illegal; that if he had convicted the accused under s. 148 of the Penal Code, his order would, under the circumstances, have been legal, and that a

SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

member of an unlawful assembly, some members of which have caused grievous hurt, can be legally punished for the offence of rioting as well as for the offence of causing grievous hurt. *Empress* v. *Dungar Singh, I. L. R. 7 All. 29*, referred to. QUEEN-EMPRESS *v.* PERSHAD **I. L. R. 7 All. 414**

52. ——— *Penal Code, s. 71 and ss. 147, 149, and 325—Rioting—Grievous hurt committed in the course of riot and in prosecution of the common object—Distinct offences—Separate sentences—Act VIII of 1882, s. 4—Criminal Procedure Code, s. 235.* S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object. In prosecution of the common object of an unlawful assembly, *M*, with his own hand, caused grievous hurt. *M* and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 147 and grievous hurt under s. 325 of the Penal Code, and were each sentenced to separate terms of imprisonment for each offence. The highest aggregate punishment, which was *M*'s, was six years' rigorous imprisonment, being one year for rioting and five years for causing grievous hurt. *Held*, that, assuming s. 71 of the Penal Code to be applicable, the sentences were not illegal as the combined periods of imprisonment did not, in the case of any prisoner, exceed the maximum punishment of seven years' rigorous imprisonment which could have been awarded for the offence punishable under s. 325. *Held*, also, that the riot could not in any of the cases be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal. *Queen-Empress* v. *Ram Partab, I. L. R. 6 All. 121*, dissented from. *Queen-Empress* v. *Dungar Singh, I. L. R. 7 All. 29*; *Queen-Empress* v. *Ram Sarup, I. L. R. 7 All. 767*; *Queen* v. *Rubbee-oollah, 7 W. R. Cr. 13*; *Loke Nath Sarkar* v. *Queen-Empress, I. L. R. 11 Calc. 349*; *Queen-Empress* v. *Pershad, I. L. R. 7 All. 414*; *Chandra Kant Bhattacharjee* v. *Queen-Empress, I. L. R. 12 Calc. 498*; and *Reg.* v. *Tukaya bin Tamana, I. L. R. 1 Bom. 214*, referred to. QUEEN-EMPRESS *v.* BISHESHAR . **I. L. R. 9 All. 645**

53. ——— *Separate sentences for rioting and grievous hurt—Penal Code, ss. 71 (para. 1), 144, 147, 148, 334—Act VIII of 1882, s. 4—Criminal Procedure Code (Act X of 1882), s. 35. Per curiam* (TOTTENHAM, *J.*, dissenting). Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code. *Empress*

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SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

v. *Ram Partab, I. L. R. 6 All. 121,* approved. *Loke Nath Sirkar* v. *Queen-Empress, I. L. R. 11 Calc. 349,* overruled. NILMONEY PODDAR *v.* QUEEN-EMPRESS . . **I. L. R. 16 Calc. 442**

54. ——— Separate sentences should not be passed for rioting and assaulting a public sevant in execution of his duty when practically the offence of assaulting the public servant was the common object of the unlawful assembly, the members of which committed such rioting. *Nilmoney Poddar* v. *Queen-Empress, I. L. R. 16 Calc. 422,* followed. HRIDOY MONDAL *v.* JAGANANDA DAS . . **4 C. W. N. 245**

55. ——— *Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV of 1860), ss. 147, 323, 325.* Six accused persons were charged with, and convicted of, rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the Penal Code. *Held,* that the sentences were legal. During the course of a riot, in which *X* was attacked and beaten by several of the rioters, one of them, *K*, inflicted grievous hurt on *X* by breaking his rib with a blow stuck with a lathi ; *X* and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code, and *K* was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on *K*, and also on the other three for each of the offences : *Held,* that the sentences on *K* were legal, but that, as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted *X*, the conviction of them under s. 325 read with s. 109 could not be supported. *In the matter of the petition of* MOHUR MIR *v.* QUEEN-EMPRESS. *In the matter of the petition of* KALI ROY *v.* QUEEN-EMPRESS . . . **I. L. R. 16 Calc. 725**

56. ——— *Rioting and theft—Common object of unlawful assembly being theft—Separate sentences, legality of—Penal Code (Act XLV of 1860), ss. 71, 147, 149, 379.* When persons are charged with rioting and theft and the common object of the unlawful assembly by which the rioting was caused is theft and they are convicted both for rioting and theft, without any finding by the Court that any one of the accused persons individually committed theft :—*Held,* that, under s. 71 of the Indian Penal Code, it is improper to pass separate sentences upon accused persons both for rioting and theft, when the former offence is but an element of the latter, and that they are under that section liable to punishment only in

SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

respect of one or other of those offences. *Nilmoney Poddar* v. *Queen-Empress, I. L. R. 16 Calc. 442,* followed. MITHOO SINGH *v.* GOPAL LAL **3 C. W. N. 761**

57. ——— *Rioting armed with deadly weapons—Separate and distinct offences—Causing hurt and grievous hurt—Resistance and obstruction to Police—Penal Code, ss. 71, 148—152, 332, 333.* Eight persons, who were charged with a number of others, were tried on various charges consisting of rioting armed with deadly weapons (s. 148, Penal Code), assaulting or obstructing a public servant when suppressing a riot (s. 152), and voluntarily causing hurt and grievous hurt to deter a public servant from his duty (ss. 332 and 333). The common object set out in the charge was " to resist the execution of a decree obtained by *A* against *B* in the Court of the Second Subordinate Judge of Alipore, dated 30th April 1891, and also by means of criminal force or show of criminal force to overawe the members of the police force in the execution of their lawful powers as police-officers," and it was held that resistance to the police was one of the component parts of the offence of rioting charged. At the trial in the Court of Session all eight accused were convicted of the offence charged under s. 148, and each was sentenced to the maximum punishment allowed under the section, *viz.*, three years' rigorous imprisonment. Seven out of the eight were convicted of offences under s. 152, and sentenced each to an additional term of two years' rigorous imprisonment for those offences. Two out of the seven accused were further convicted of offences under s. 332 of the Penal Code, the hurt therein charged being caused to police officers engaged in suppressing the riot, and each sentenced to a further additional term of two years' rigorous imprisonment for that offence. The eighth accused, who was not convicted of an offence under s. 152, was convicted of an offence under s. 333, the grievous hurt being similarly caused to a police officer, and for that offence was sentenced to five years' rigorous imprisonment in addition to the sentence of three years passed on him under s. 148. It was contended on appeal—(1) that the sentences passed under s. 152 in addition to those under s. 148 were illegal ; (2) that separate sentences under s. 152 and ss. 332 and 333 were illegal ; (3) that the cumulative sentences under s. 148 and ss. 332 and 333 were illegal in so far as they exceeded the maximum sentence provided for either of the offences. *Held,* as regards (i), that as resistance to the police was one of the component parts of the offence of rioting of which the accused were convicted and sentenced to the maximum punishment provided by s. 148, and having regard to the provisions of s. 71, the additional sentences under s. 152 were illegal. *Held,* as regards (ii), that separate sentences under s. 152 and ss. 332 and 333 were illegal, as the hurt inflicted on the police officers was the violence towards them which constituted the essence of the offence under s. 152. *Held,* as regards (iii), that the separate

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SENTENCE—*contd.*

3. CUMULATIVE SENTENCES—*contd.*

sentences passed under s. 148 and ss. 332 and 333 were not illegal, there being nothing in s. 71 of the Penal Code which limits the amount of punishment that may be imposed for these offences. FERASAT *v.* QUEEN-EMPRESS . **I. L. R. 19 Calc. 105**

58. _____ *Penal Code, ss. 71, 148, 149, 326—Separate sentences for rioting and grievous hurt.* When a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of s. 149 of the Penal Code, it is illegal to pass two sentences, one for riot and one for hurt. But in such a case the two sentences would be legal, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences. When, however, the accused is guilty of rioting and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt. In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences. *Queen-Empress* v. *Ram Sarup, I. L. R. 7 All. 757*, approved. QUEEN-EMPRESS *v.* BANA PUNJA . . . **I. L. R. 17 Bom. 260**

59. _____ *Personating public servant—Extortion—Conviction for each offence proved necessary—Separate sentences—Sentence necessary upon each conviction—Penal Code (Act XLV of 1860), ss. 71, 170, 383—Criminal Procedure Code, ss. 35, 235.* Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether s. 71 of the Penal Code applies to the case or not ; and, subject to the provisions of s. 71, a separate sentence must be passed in respect of each such conviction. Under s. 35 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently. In a trial for offences under ss. 170 and 383 of the Penal Code committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the act of extortion complained of. *Held*, that the first and second paragraphs of s. 71 of the Penal Code did not apply to the case ; that the third paragraph also did not apply because the words " constitute an offence " refer to the definitions of offences contained in the Code, irrespective of the evidence where by the acts complained of are proved, and personating a public servant as defined in s. 170 was not a constituent element of extortion as defined in s. 383 ; that in the present case the former offence was completed before the latter had begun ; and that separate sentences for each offence were therefore not illegal. QUEEN-EMPRESS *v.* WAZIR JAN **I. L. R. 10 All. 58**

60. _____ *Receiving stolen property and assisting in concealment of it—Penal Code, ss. 411, 414—Criminal Procedure Code, 1861, s. 46.* The offences specified in ss. 411 and 414 of the Penal Code cannot be considered as two distinct offences, so as to allow of the procedure of s. 46 of the Criminal Procedure Code being adopted. ANONYMOUS . . . **4 Mad. Ap. 14**

61. _____ *Theft from two persons in same room.* Where the accused stole property at night belonging to two different persons from the same room of a house, it was *held* that he could not be sentenced separately as for two offences of theft. QUEEN *v.* MONEEAH **11 W. R. Cr. 38**

62. _____ *Theft—Receiving stolen property.* A person convicted of robbery of theft cannot be also convicted of dishonestly receiving in respect of the same property. QUEEN *v.* MUDDUN ALLY . . . **1 W. R. Cr. 27**

QUEEN *v.* SREEMUNT ADUP . **2 W. R. Cr. 63**

QUEEN *v.* SEEBCHURN HAREE **11 W. R. Cr. 12**

QUEEN *v.* SHEEB CHUNDER HAREE **11 W. R. Cr. 12 note**

63. _____ *Theft and mischief—Double sentence.* A double sentence for theft and mischief is illegal and improper. BICHUK AHEER *v.* AUHUCK BHOONEEA . **6 W. R. Cr. 5**

64. _____ *Mischief and theft—House-breaking and theft.* Separate convictions and sentences under ss. 429 and 379 and under ss. 457 and 380 of the Penal Code were set aside ; and the convictions under s. 429 in the former case, and under s. 457 in the latter, allowed to stand. QUEEN *v.* SAHRAE . **8 W. R. Cr. 31**

65. _____ *Criminal trespass—Mischief—Criminal Procedure Code, 1872, s. 454.* Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass and at the same time committed mischief :—*Held*, that such person could not, under cl. iii of s. 454 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established. EMPRESS *v.* BUDH SINGH **I. L. R. 2 All. 101**

66. _____ *Separate offences—Penal Code, ss. 143, 253.* A cumulative sentence under s. 143 of the Penal Code (being a member of an unlawful assembly), and under s. 253 (using criminal force against a public servant) was upheld by the High Court in this case. *In the matter of* GOBIND CHUNDER ROY . **16 W. R. Cr. 70**

4. FINE.

1. _____ **Specific fine on each prisoner**—*Trial of several prisoners.* A sentence of fine must impose a specific fine on each prisoner. ANONYMOUS . . . **5 Mad. Ap. 5**

2. _____ **Wrongful confinement**—*Penal Code, s. 344.* Fine alone is not a legal sentence for a prisoner convicted under s. 344 of the Penal Code. REG. *v.* BAHIRAJI BIN KRISHNAJI **1 Bom. 39**

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SENTENCE—*contd.*

4. FINE—*concld.*

3. ———— **Separate offences**—*Alternative sentence allowed only in one.* Where a conviction has been had under two sections of the Penal Code, in one of which only an alternative sentence of imprisonment of fine is allowed, a sentence of fine cannot be passed. QUEEN *v.* BHOOBAN MOHUN **11 W. R. Cr. 39**

4. ———— **Offence under Act XIX of 1838, s. 13**—*Omission of owner of harbour craft to produce certificate of registry.* The Legislature when it enacted in s. 13 of Act XIX of 1838 that persons who committed certain acts should be "subject to a fine of ten times the fee" or "subject to a fine of ten rupees," intended that the penalties so specified should be inflicted in full. The owner of a harbour craft having been fined R2 for omission to produce a certificate of registry when demanded by the customs authorities, the High Court annulled the sentence as being illegal, and inflicted the full penalty of ten rupees. EMPRESS *v.* MHASNYA RAMA . . . **I. L. R. 7 Bom. 280**

5. ———— **Theft in dwelling-house**—*Penal Code, s. 380—Imprisonment.* On conviction for theft in a dwelling under s. 380 of the Penal Code, fine cannot be substituted in lieu of imprisonment, though it may be added to imprisonment. DULLOO *v.* ZAINAH BEBEE . **16 W. R. Cr. 17**

6. ———— **Offence under Act XVIII of 1854 (Railways Act), s. 34**—*Imprisonment.* S. 34 of Act XVIII of 1854 prescribes the mode in which fines levied under that Act are to be recovered. It is only on the return of the warrant of distress unsatisfied, or on the Magistrate being otherwise satisfied that no sufficient distress exists, that imprisonment can be imposed. ANONYMOUS **6 Mad. Ap. 37**

7. ———— **Transportation with fine**—*Levy of portion of fine.* When a fine is imposed in addition to transportation, and the whole or part of the fine is levied, it is the duty of the Sessions Judges to inform the authorities at Port Blair of the fact. ANONYMOUS . . **5 Mad. Ap. 44**

8. ———— **Imposition of additional fine under Court Fees Act (VII of 1870), s. 31.** An Assistant Magistrate, having convicted the accused persons, sentenced them to pay a fine, out of which R2 was to be paid to the complainant for his expenses; the Deputy Magistrate, on appeal, having confirmed the conviction, passed an order under Court Fees Act, s. 31, directing the accused to pay a further sum to the complainant. *Held*, that the order was illegal, and should be set aside. QUEEN-EMPRESS *v.* TANGAVELU CHETTI **I. L. R. 22 Mad. 153**

5. IMPRISONMENT.

(*a*) IMPRISONMENT GENERALLY.

1. ———— **False statement on oath to public servant**—*Penal Code, s. 181—Illegal sentence.* A sentence under s. 181 of the Penal Code which awards no term of imprisonment is illegal. ANONYMOUS . . . **4 Mad. Ap. 18**

SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*a*) IMPRISONMENT GENERALLY—*contd.*

2. ———— **Accumulation of sentences of imprisonment**—*Criminal Procedure Code, 1861, s. 46—Sentences not simultaneous.* Sentences of imprisonment might be accumulated beyond the period of fourteen years, notwithstanding s. 46 of the Criminal Procedure Code, which limit had reference only to sentences passed simultaneously, or passed upon charges tried simultaneously. QUEEN *v.* PUBAN . . . . . **7 W. R. Cr. 1**

3. ———— **Concurrent sentences**—*Criminal Procedure Code, 1882, s. 35.* Under s. 35 of the Criminal Procedure Code, sentences of imprisonment cannot be passed so as to run concurrently. QUEEN-EMPRESS *v.* WAZIR JAN **I. L. R. 10 All. 58**

4. ———— *Criminal Procedure Code (Act X of 1882), s. 35—Sentence—Concurrent sentences of imprisonment—Penal Code (Act XLV of 1860), s. 409.* Sentences of imprisonment passed for distinct offences to run concurrently are not warranted by law. *Queen-Empress v. Wazir Jan, I. L. R. 10 All. 58,* referred to. DAITARI DAS *v.* QUEEN-EMPRESS . **I. L. R. 25 Calc. 557**

5. ———— *Criminal Procedure Code (Act X of 1882), ss. 35 and 397—Concurrent sentences not authorized by the Code.* There is no provision in the Code of Criminal Procedure by which a Court is empowered, on convicting an accused person of two or more offences at the same time, to direct that the sentences imposed in respect of such offences shall run concurrently. QUEEN-EMPRESS *v.* ISHRI . . **I. L. R. 20 All. 1**

6. ———— **Criminal Procedure Code, 1872, s. 309**—*Penal Code, s. 65.* S. 309 of the Criminal Procedure Code did not extend the period of imprisonment which might be awarded by a Magistrate under s. 65 of the Penal Code; it only regulated the proceedings of Magistrates whose powers were limited. EMPRESS *v.* DARBA **I. L. R. 1 All. 461**

7. ———— **Commencement of sentence of imprisonment**—*Postponement of sentence—Criminal Procedure Code (Act XXV of 1861), ss. 46, 47, 48, and 421.* A sentence of imprisonment ought to commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence at some future period. Except as in the cases provided for by ss. 46, 47, and 48 of the Criminal Procedure Code, a Magistrate cannot authorise a sentence passed by him to take place from some future date, nor, except as provided for by s. 421 of the Code of Criminal Procedure, can a sentence, which is to take place immediately, be suspended. *In the matter of* KRISHNANAND BHUTTACHARJEE . . **3 B. L. R. A. Cr. 50**

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SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*a*) IMPRISONMENT GENERALLY—*contd.*

S.C. *In the matter of* KISHEN SOONDER BHUTTARCHARJEE . . . **12 W. R. Cr. 47**

8. ——— Imprisonment in lieu of whipping—*Criminal Procedure Code, s. 395—Infliction of fine in lieu of whipping.* A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, etc. The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment, for default in payment of a fine. QUEEN-EMPRESS *v.* SHEODIN **I. L. R. 11 All. 308**

9. ——— Confirmation of sentence—*—Criminal Procednre Code, 1872, s. 36.* S. 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, referred to cases in which the sentence of imprisonment was a sentence of upwards of three years, without including any additional sentence as to fine or whipping. *In the matter of the petition of* SUMSHER KHAN. EMPRESS *v.* SUMSHER KHAN . . . . . **I. L. R. 6 Calc. 624**

10. ——— Attempt to commit offence—*Penal Code, s. 511.* The term of imprisonment for attempting to fabricate false evidence for the purpose of being used in a stage of a judicial proceeding cannot extend beyond one-half of seven years. QUEEN *v.* SOONDUR PUTNAICK **9 W. R. Cr. 59**

11. ——— Offence under Act XIII of 1859, s. 2—*Form of sentence.* A sentence of imprisonment should not be announced beforehand in the order directing performance of the contract in a case under Act XIII of 1859, s. 2, but should follow on a complaint of non-compliance. ANONYMOUS . . . . . **6 Mad. Ap. 24**

12. ——— Interruption of public servant in course of judicial proceeding—*Penal Code, s. 228—Criminal Procedure Code, 1861, s. 163.* In a case of interruption to a public servant in a stage of a judicial proceeding, under s. 228, Penal Code, a sentence of imprisonment cannot be passed under s. 163 of the Code of Criminal Procedure. *In the matter of* BUHRAM KHAN **10 W. R. Cr. 47**

13. ——— Dacoity—*Penal Code, s. 395.* A sentence of fourteen years' imprisonment cannot be passed for dacoity under s. 395 of the Penal Code. QUEEN *v.* HAROO RUJWAR **13 W. R. Cr. 27**

14. ——— Disobedience to order of public servant—*Rigorous imprisonment—Penal Code, s. 188.* A sentence of rigorous imprisonment passed by a Magistrate, under s. 188 of the Penal Code for disobedience to an order duly promulgated by a public servant, altered to one of simple imprisonment, as the Magistrate's finding did not show that the case came within the latter part of the section, in which case alone the infliction of rigorous imprisonment was authorised. REG. *v.* RATANRAV BIN MAHADEVRAV CHAVAN . **3 Bom. Cr. 32**

15. ——— Giving false evidence—*Penal Code, s. 193—Duty of Court.* Under s. 193 of the Penal Code it is obligatory upon the Court in every case of conviction under that section to pass some sentence of imprisonment. EMPRESS *v.* KHODAI SINGH . . . **3 C. L. R. 527**

16. ——— False evidence to procure acquittal of guilty person—*Measure of sentence. Held*, by the majority of the Court, that a sentence of five years' imprisonment was not excessive in the case of a man convicted of making a false statement in a judicial proceeding, with the intention of defeating the ends of justice by procuring the acquital of a guilty person. QUEEN *v.* ANOO **W. R. 1864, Cr. 16**

17. ——— Deliberately fabricating false evidence—*Measure of sentence.* A sentence of three years' imprisonment is not too severe a punishment for a deliberate attempt to pervert justice by fabricating in one office false statements to be designedly and corruptly used in another. QUEEN *v.* KALACHAND BOIDYO . **8 W. R. Cr. 18**

18. ——— Grievous hurt—*Penal Code, s. 325—Fine.* The offence of voluntarily causing grievous hurt is punishable, not by fine alone, but by imprisonment, the offender being also liable to fine. QUEEN *v.* SHARODA PESHAGUR **2 W. R. Cr. 32**

QUEEN *v.* MENAZOODIN . **2 W. R. Cr. 33**

19. ——— House-breaking—*Whipping—Rigorous imprisonment—Commutation of punishment.* Upon conviction of the offence of housebreaking, the accused was sentenced by the Deputy Magistrate to six months' rigorous imprisonment and to be whipped. On appeal, the Judge found that, as this was the first offence, the additional punishment of whipping was illegal, and, setting aside so much of the sentence, passed a sentence of three months' rigorous imprisonment in addition to the six months' rigorous imprisonment passed by the Deputy Magistrate. *Held*, that the commutation of the punishment was illegal. QUEEN *v.* BANDA ALI **6 B. L. R. Ap. 95: 15 W. R. Cr. 7**

20. ——— Offence under Madras Police Act, 1859, s. 48—*Rigorous imprisonment—Measure of sentence.* A sentence of rigorous imprisonment under conviction for an offence under s. 48, Act XXIV of 1859, was illegal. ANONYMOUS . . . **5 Mad. Ap. 35**

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SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*a*) IMPRISONMENT GENERALLY—*contd.*

21. ——— Offence under Registration Act (VIII of 1871), s. 80—*General Clauses Consolidation Act (I of 1868), s. 2, cl. 18—Rigorous and simple imprisonment. Held,* that under Act I of 1868, s. 2, cl. 18, the Sessions Judge should have specified in his warrant whether the imprisonment awarded to a person convicted under s. 80, Act VIII of 1871, should be simple or rigorous, but that as he had omitted this at the proper time, simple imprisonment should now be set forth in the sentence and warrant. LEGAL REMEMBRANCER *v.* RADHOO CHURN ASH. GOVERNMENT *v.* RADHOO CHURN ASH **18 W. R. Cr. 3**

22. ——— Indefinite period of imprisonment in default of security, order for. An order directing an accused " to be imprisoned until he gives security " is bad ; a definite period for such imprisonment, not exceeding one year, should be stated in the order. MAILAMDI FAKIR *v.* TARIPULLA PRAMANIK . . **I. L. R. 8 Calc. 644**

23. ——— Imprisonment in default of giving security for good behaviour—*Criminal Procedure Code, 1861, s. 296.* Where a prisoner, in addition to a sentence passed upon him, is required to furnish security for his good behaviour, under s. 296 of the Criminal Procedure Code, for a period of one year, his imprisonment in default of providing such security must commence to run from the date of the order to furnish security, and cannot be directed to run from the expiry of the sentence passed upon the prisoner. QUEEN *v.* TORAL GUJAR . . . . **3 N. W. 126**

24. ——— Receiving stolen property—*Criminal Procedure Code, 1872, s. 505—Addition to sentence of order for security for good behaviour. P* was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and on the expiration of the term of imprisonment to furnish security for good behaviour. *Held,* that the order requiring security should not have formed part of the sentence for the offence of which *P* was convicted. A proceeding should have been drawn out representing that the Magistrate was satisfied from the evidence as to general character adduced before him in the case, that *P* was by repute an offender within the terms of s. 505 of Act X of 1872, and therefore security would be required from him, and an order should have been recorded to the effect that, on the expiry of imprisonment, *P* should be brought up for the purpose of being bound. EMPRESS *v.* PARTAB . . **I. L. R. 1 All. 666**

25. ——— Addition to sentence of further imprisonment in default of engagement to keep the peace—*Criminal Procedure Code, 1869, s. 280.* The prisoner was convicted of an offence punishable under s. 307 of the Penal Code. In addition to the sentence passed upon him under that section, the Sessions Judge directed, under s. 280 of the Code of Criminal Procedure, that at the expiration of the term of imprisonment imposed, the prisoner do execute a formal engagement in a sum of R100 for keeping the peace towards the prosecutor for a period of one year, and in default to undergo simple imprisonment for that period. The High Court set aside so much of the sentence as directed the imprisonment of the prisoner in default of entering into the required engagement. QUEEN *v.* SELLAM . . . . . **6 Mad. 25**

26. ——— Imprisonment for allowance remaining unpaid after execution of warrant—*Criminal Procedure Code, s. 488—Maintenance—Wife—Breach of order for monthly allowance—Warrant for levying arrears for several months—Act I of 1868, s. 2, cl. 18—" Imprisonment."* Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order of maintenance is dealt with in one proceeding, and arrears levied under a single warrant, the Magistrate acting under s. 488 of the Criminal Procedure Code has no power to pass a heavier sentence in default than one month's imprisonment, as if the warrant only related to a single breach of the order. *Per* EDGE, *C.J.*—S. 488 contemplates that a separate warrant should issue for each separate monthly breach of the order. *Per* STRAIGHT, *J.*—The third paragraph of s. 488 ought to be strictly construed and, as far as possible, construed in favour of the subject. Under the section a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance, and where, after distress has been issued, *nulla bona* is the return. The section contemplates one warrant and one punishment, and not a cumulative warrant and cumulative punishment. Also *per* STRAIGHT, *J.*—With reference to s. 2, cl. (18), of the General Clauses Act (I of 1868), " imprisonment " in s. 488 of the Criminal Procedure Code may be either simple or rigorous. *Per* OLDFIELD, *J.*—A claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding, and arrears levied under a single warrant. QUEEN-EMPRESS *v.* NARAIN . . . . **I. L. R. 9 All. 240**

27. ——— Imprisonment in default of giving security for good behaviour—*Criminal Procedure Code, ss. 110, 123—Security for good behaviour—Term for which imprisonment in default of finding security should be ordered.* Although it is within the competence of a Sessions Judge, acting under s. 123 (*3*) of the Code of Criminal Procedure, to direct that a person who has been ordered to give security shall, on failure to give security, be imprisoned for any term not exceeding three years, yet it is advisable that the term of imprisonment in default, ordered under that section, should always be the same as the period for which the security is

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SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*a*) IMPRISONMENT GENERALLY—*concld.*

directed to be given. KING-EMPEROR *v.* KARIM-UD-DIN BEG (1901) . **I. L. R. 23 All. 422**

(*b*) IMPRISONMENT AND FINE.

28. ——— Case under s. 21, Cattle Trespass Act, 1871—*Sentence of fine or imprisonment—Default in payment of compensation.* It is not lawful to pass a sentence of fine or imprisonment in default of payment of the compensation awarded in a matter under s. 21 of the Cattle Trespass Act, 1871. *In the matter of* KETABDI MUNDUL . . . . **2 C. L. R. 507**

29. ——— Contempt of Court—*Imprisonment added to fine—Trial of case of contempt.* Where, in punishing for contempt of Court the summary procedure sanctioned by s. 163 of the Code of Criminal Procedure, 1861, is followed, the Court must sit as the Court before which the offence was committed, and, not in any other capacity, and is bound to take cognizance of the contempt on the day on which it was committed. In such a case imprisonment cannot be added to fine as a punishment. In a case in which it was dealt with in a summary manner, the offence must under s. 163 be tried by an officer other than the person before whom the contempt was committed. QUEEN *v.* CHUNDER SEEKUR ROY . **12 W. R. Cr. 18**

30. ——— Making false charge—*Penal Code, s. 211—Imprisonment with or without fine.* A prisoner convicted under the second clause of s. 211 of the Penal Code should be sentenced to imprisonment, with or without fine, and not to fine alone. REG. *v.* RAMA BIN RABHAJI . **1 Bom. 34**

31. ——— Conviction under Military Cantonment Act (Bom. Act III of 1867)—*Simultaneous sentence of fine and imprisonment.* In cases of convictions under ss. 11 and 12 of the Military Cantonment Act (Bom. Act III of 1867), a simultaneous sentence of fine and imprisonment in default of the payment of the fine can only be awarded, under s. 14 of the Act, in the event of no property sufficient for the payment of the fine being found. REG. *v.* LADU . . **7 Bom. Cr. 87**

32. ——— Conviction under s. 48, Act XXIV of 1859—*Mad. Act V of 1865—Procedure to enforce fine.* Persons convicted under s. 48 of the Police Act (XXIV of 1859) are not liable to both fine and imprisonment in default of payment. The procedure to be followed in enforcing the fine is that laid down in Madras Act V of 1865. ANONYMOUS . . . **3 Mad. Ap. 9**

ANONYMOUS . . . **7 Mad. Ap. 22**

33. ——— Attempt to commit suicide—*Penal Code, s. 309.* A prisoner found guilty, under s. 309 of the Penal Code, of an attempt to commit suicide, must be sentenced to some imprisonment, and not merely to payment of a fine. REG. *v.* CHANVIOVA . . . **1 Bom. 4**

SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*c*) IMPRISONMENT IN DEFAULT OF FINE.

34. ——— Additional imprisonment—*Rigorous imprisonment.* Additional imprisonment in default of payment of fine for the offence of dacoity must be rigorous. QUEEN *v.* SRIMONTO KOTAL . . . . **7 W. R. Cr. 31**

35. ——— Limitation of imprisonment in summary trials—*Fine—Criminal Procedure Code, 1882, ss. 32, 33, 262—Penal Code, s. 67—Act VIII of 1882.* In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the rule of s. 262 of the Criminal Procedure Code limiting the period of imprisonment in summary trials does not apply, as that section only refers to substantive sentences of imprisonment. EMPRESS *v.* ASGHAR ALI **I. L. R. 6 All. 61**

36. ——— Presidency Magistrates' Act, 1877, s. 167—*Award of substantive sentence of imprisonment.* The words " to imprisonment for a term exceeding six months or to fine exceeding R200 " in s. 167 of the Presidency Magistrates' Act (IV of 1877) are confined in their meaning to substantive sentences, and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. *In the matter of* JOTHARAM DAVAY . **I. L. R. 2 Mad. 30**

37. ——— Committing affray—*Penal Code, s. 160—Criminal Procedure Code, 1872, s. 309.* Prisoners were convicted of having committed an offence punishable under s. 160 of the Penal Code, and were sentenced to pay a fine of R25 each, or in default to be rigorously imprisoned for thirty days, the full term of imprisonment under the section. *Held*, by a majority of the High Court (KINDERSLEY, *J.*, dissenting), that having regard to the provisions of s. 309 of the Criminal Procedure Code (Act X of 1872), the sentence was legal. REG. *v.* MUHAMMAD SAIB . **I. L. R. 1 Mad. 277**

38. ——— Criminal Procedure Code, s. 33—*Penal Code, s. 65.* S. 33 of the Code of Criminal Procedure, 1882, does not authorize a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Indian Penal Code. *Reg.* v. *Muhammad Saib, I. L. R. 1 Mad. 277*, was overruled in 1881. QUEEN-EMPRESS *v.* VENKATESAGADU **I. L. R. 10 Mad. 165**

ANONYMOUS . **I. L. R. 10 Mad. 166 note**

39. ——— Assault—*Penal Code, ss. 65 and 352.* In a case of assault, a sentence inflicting a fine of R50 and awarding imprisonment for one month in default of payment of the fine is illegal, with reference to ss. 65 and 352 of the Penal Code. *In the matter of* JEHAN BUKSH . **16 W. R. Cr. 42**

40. ——— Sentence under Bom. Act VII of 1867, s. 31—*Simple imprisonment.* Imprisonment in default of payment of a fine

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SENTENCE—*contd*

5. IMPRISONMENT—*contd.*

(*c*) IMPRISONMENT IN DEFAULT OF FINE—*contd.*

inflicted under Act (Bombay) VII of 1867, s. 31, ought to be simple, not rigorous. REG. *v.* BECHAR KHUSHAL . . . . **5 Bom. Cr. 43**

41. ——— **Conviction under Cattle Trespass Act (III of 1857)**—*Fine and imprisonment.* Certain persons were convicted under s. 13, Act III of 1857, and sentenced to fifteen days' imprisonment and a fine, or in default imprisonment for the term of seven days. No provision was made in the Act for awarding imprisonment in default of payment of fine, but the prisoners were liable under the section to six months' imprisonment and a fine of R500. The High Court refused to interfere with the sentence passed. ANONYMOUS **5 Mad. Ap. 21**

But *see* ANONYMOUS . . **7 Mad. Ap. 22**

42. ——— **Contempt of Court**—*Criminal Procedure Code, 1861, s. 163—Power of Magistrate.* The Magistrate convicted the defendant of contempt of Court under s. 163 of the Code of Criminal Procedure, and sentenced him to pay a fine of R10, or in default two days' imprisonment. *Held,* that the Magistrate had not exceeded his powers. ANONYMOUS . . . . **6 Mad. Ap. 16**

43. ——— **Offence under Income Tax Act (IX of 1869)**—*Power of Magistrate.* A Magistrate has no power under s. 25, Act IX of 1869, to sentence to imprisonment in default of the payment of the fine imposed for not paying income tax. QUEEN *v.* NODIAR CHAND KOONDOO **14 W. R. Cr. 70**

44. ——— **Offence under Income Tax Acts (IX of 1869 and XXIII of 1869)**—*General Clauses Consolidation Act (I of 1868), s. 5.* The Income Tax Act (Act IX of 1869, supplemented by Act XXIII of 1869) having been passed subsequently to the General Clauses Act (I of 1868), s. 5 of the latter authorised the award of imprisonment in default of payment of the fine imposed under s. 25 of the former. REG. *v.* SANGAPA BIN BASHIAPA . . . **7 Bom. Cr. 76**

45. ——— **Offences under Madras Abkari Act (III of 1864), ss. 21, 22, 30, 32**—*Penal Code, s. 64.* Prisoners were sentenced to fines under ss. 21 and 22 of Madras Act III of 1864, and in default of payment of fine to rigorous imprisonment. *Held,* that, as fine in these cases was the only assignable punishment, and by ss. 30, 31 and 32 a specified procedure is laid down for the levy of the penalty, s. 64 of the Penal Code had no application. ANONYMOUS . **6 Mad. Ap. 40**

46. ——— **Offence under License Acts (XXI of 1867, s. 15, and XXIX of 1867, s. 3)**—*Power of Magistrate.* Where a Magistrate sentenced a person, who had neglected to take out a license, under Act XXI of 1867, s. 15, and Act XXIX of 1867, s. 3, to pay a fine of R10, and in default of payment to suffer seven days' simple

SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*c*) IMPRISONMENT IN DEFAULT OF FINE—*contd.*

imprisonment, the High Court reversed so much of the sentence as awarded imprisonment, as the trying Magistrate had under the Act no power to make such an order. REG. *v.* CHENAPPA VALAD NAGAPPA . . . . **5 Bom. Cr. 44**

47. ——— **Neglect to comply with order for maintenance**—*Criminal Procedure Code, 1882, s. 488—Subsequent offer to pay, effect of, on sentence.* A sentence of imprisonment awarded under s. 488 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute, and the defaulter is not entitled to release upon payment of the arrears due. BIYACHA *v.* MOIDIN KUTTI . **I. L. R. 8 Mad. 70**

48. ——— **Committing public nuisance**—*Penal Code, s. 290.* The sentence of imprisonment passed in default of the payment of a fine inflicted under s. 290 of the Penal Code (for committing a public nuisance) should be one of simple, not rigorous, imprisonment. REG. *v.* SANTU BIN LAKHAPPA KORE . . . **5 Bom. Cr. 45**

49. ——— *Penal Code, s. 290.* A sentence of rigorous imprisonment in default of payment of fine for the offence of nuisance under s. 290 of the Penal Code is legal. QUEEN *v.* YELLAMANDU . . . **I. L. R. 5 Mad. 157**

(*Contra*) *see* REG. *v.* SANTU BIN LAKHAPPA KORE **5 Bom. Cr. 45**

50. ——— **Salt Act (XVII of 1840), breach of**—*Mad. Reg. I of 1805.* A sentence of imprisonment in default of payment of a fine imposed under the provisions of Act XVII of 1840 is illegal. QUEEN *v.* AMIRTAM **I. L. R. 4 Mad. 335**

51. ——— *Substantive sentence—Mad. Reg. I of 1805.* Act XVII of 1840 authorizes a substantive sentence of imprisonment. ANONYMOUS CASE . **I. L. R. 4 Mad. 335 note**

52. ——— **Offence under Salt Revenue Act (XXXI of 1850)**—*Criminal Procedure Code, 1861, ss. 21 and 45—Penal Code, s. 65.* S. 45 of the Criminal Procedure Code made applicable the provisions of s. 65 of the Penal Code not only to offences falling under that Code as defined in its 40th section, but to every case in which a Magistrate had jurisdiction under s. 21 of the Criminal Procedure Code. Imprisonment for one month awarded in default of payment of a fine under s. 3 of the Salt Revenue Act (XXXI of 1850) was accordingly reduced to three weeks' simple imprisonment. REG. *v.* VITHÓBA BIN SOMA **5 Bom. Cr. 61**

53. ——— **Non-payment of taxes**—*Bombay District Municipal Act (Bom. Act VI of 1873), s. 84, as amended by Bombay District Municipal Act (Bom. Act II of 1884), s. 49—Penal Code (Act XLV of 1860), s. 40 and s. 64—Penalty, "Fine"—Imprisonment in default of*

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SENTENCE—*contd.*

5. IMPRISONMENT—*contd.*

(*c*) IMPRISONMENT IN DEFAULT OF FINE—*contd.*

payment of penalty. There is no distinction between the word " penalty " as used in the Bombay District Municipal Act (Bombay Act VI of 1873) and the word " fine " as used in s. 64 of the Indian Penal Code (Act XLV of 1860). Imprisonment can therefore be awarded in default of any penalty inflicted under s. 84 of the Municipal Act as amended by Bombay Act II of 1884. *In re* LAKMIA
I. L. R. 18 Bom. 400

54. ——— **Excess charge and fare, non-payment of**—*Railway Act (IX of 1890), s. 113—Power of Magistrate to impose imprisonment in default—Fine.* S. 113, sub-s. (4), of the Indian Railways Act (IX of 1890), which directs that, on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, do not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such. QUEEN-EMPRESS *v.* KUIRAPA
I. L. R. 18 Bom. 440

55. ——— **Penal Code (Act XLV of 1860), ss. 40 and 64**—*Madras Towns Nuisances Act (Mad. Act III of 1889), ss. 3 and 11—Magistrate, jurisdiction of.* Where a conviction has taken place under the Towns Nuisances Act (Madras), 1889, s. 8, a Magistrate has jurisdiction to impose a fine and also to pronounce a sentence of imprisonment in default of payment of the fine. QUEEN-EMPRESS *v.* RAPPEL . **I. L. R. 18 Mad. 490**

56. ——— **ss. 65, 67**—*Imprisonment in default of fine—Madras Towns Nuisances Act (Mad. Act III of 1889), s. 3, cl. 10.* An accused having been convicted of an offence under s. 3, cl. 10, of the Towns Nuisances Act (Madras), 1889, and sentenced to pay a fine of R8 and in default of payment to undergo simple imprisonment for a week :—*Held,* (i) that s. 67 of the Indian Penal Code refers solely to cases in which the offence is punishable with fine only : has no application to offences punishable either with imprisonment or with fine, but not with both ; such sentences are governed by s. 65 of the Indian Penal Code ; and (ii) that the sentence of imprisonment in default should not exceed one-fourth of the maximum term of imprisonment provided for the offence. QUEEN-EMPRESS *v.* YAKOOB SAHIB
I. L. R. 22 Mad. 233

57. ——— **Sentence, powers of Appellate Court in respect of**—*Magistrate, jurisdiction of—Criminal Procedure Code, 1882, s. 423—Enhancement of sentence.* Where a District Magistrate acting as an Appellate Court in a Criminal case altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but imposed a fine of R10, or in default a further term of six weeks' rigorous imprisonment :—*Held,* that, as the latter sentence

SENTENCE—*contd.*

5. IMPRISONMENT—*concld.*

(*c*) IMPRISONMENT IN DEFAULT OF FINE—*concld.*

might involve an enhancement of the former, such sentence was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure. QUEEN-EMPRESS *v.* ISHRI
I. L. R. 17 All. 67

58. ——— *Powers of Appellate Court as to alteration of sentence—Alteration so as to enhance sentence—Criminal Procedure Code, 1882, s. 423.* The accused was convicted of criminal breach of trust and sentenced to nine months' rigorous imprisonment. On appeal, the conviction was upheld, but the sentence was altered to one of six months' rigorous imprisonment and a fine of R1,000, or, in default of payment, three months' further rigorous imprisonment. The accused applies to the High Court in revision, contending that the alteration of the sentence amounted to an enhancement of the sentence beyond the powers of the Appellate Court under s. 423 of the Code of Criminal Procedure (Act X of 1882). *Held,* that there was no enhancement of the sentence. *Queen-Empress* v. *Ishri, I. L. R. 17 All. 67,* distinguished. QUEEN-EMPRESS *v.* CHAGAN JAGANNATH **I. L. R. 23 Bom. 439**

59. ——— *Criminal Procedure Code (Act V of 1898), s. 423—Alteration of sentence on appeal—Effect of alteration—Enhancement of sentence.* A sentence of three months' imprisonment was on appeal altered by the Sessions Judge to one month's imprisonment with the fine of R20, or in default of payment to 15 days' rigorous imprisonment. This alteration of sentence was held not to amount to an enhancement of the sentence such as was contrary to the terms of s. 423 of the Criminal Procedure Code. No general rule can be laid down to determine what is or is not an enhancement of sentence when only a portion of a sentence is altered to a punishment of a lesser decree of severity. In each case the Court has to consider what is the effect of the alteration. *Queen-Empress* v. *Chagan Jagannath, I. L. R. 23 Bom. 439,* dissented from. RAKHAL RAJA *v.* KHIRODE PERSHAD DUTT . . **I. L. R. 27 Calc. 175**

60. ——— Under s. 388 (*2*) of the Code of Criminal Procedure, 1898, the issue of a warrant for the levy by distress of the amount awarded as compensation is a condition precedent to the carrying out of the sentence of imprisonment. *In the matter of* BYRAVALU NAIDU (1902)
I. L. R. 26 Mad. 127

6. SENTENCE AFTER PREVIOUS CONVICTION.

1. ——— **Penal Code, s. 75**—*Receiving stolen property acquired by dacoity.* Where soon after his release on expiry of a sentence of seven years' imprisonment on conviction of " receiving stolen property acquired by dacoity " a person is convicted of house-breaking and theft he is suffi-

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SENTENCE—*contd.*

6. SENTENCE AFTER PREVIOUS CONVICTION—*contd.*

ciently punished by a sentence of seven years' transportation; a sentence of transportation for life is too severe. It is not the intention of the Legislature that a previous conviction should so enormously enhance the heinousness of petty offences. *In the matter of* SHAMJEE NASHYO . **1 C. L. R. 481**

2. ——— *Previous convictions of offence before Penal Code came into operation. Held,* by the majority of the Court (CAMPBELL, *J.*, dissenting), that s. 75 of the Penal Code only applies to conviction of offences committed after the code came into operation. QUEEN *v.* HURPAUL . . . . . **4 W. R. Cr. 9**

REG. *v.* KUSHYA BIN YESU . **4 Bom. Cr. 11**

3. ——— *Previous conviction not under Penal Code.* An accused person can only be punished under s. 75 of the Penal Code where the previous conviction has been under that Code. BUDHUN RUJWAR *v.* EMPRESS **10 C. L. R. 392**

4. ——— *Evidence of previous conviction.* To warrant a sentence awarding an additional punishment under s. 75 of the Penal Code, as on a second conviction, the evidence that there was a previous conviction against the accused under the Penal Code must be clear and precise. QUEEN *v.* NAIMUDDI SHEIKH *alias* ABBAS SHEIKH . . . . . **14 W. R. Cr. 7**

5 ——— *Amalgamation of sentence—Transportation.* Sentence of transportation for fourteen years under s. 392 of the Penal Code annulled, as the offence for which such sentence was passed was not committed subsequently to any conviction; and s. 75 had therefore been improperly applied. *Semble:* That a Sessions Judge cannot (under s. 75 of the Penal Code or otherwise) by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has last been convicted. REG. *v.* SAKYA VALAD KAVJI **5 Bom. Cr. 36**

6. ——— *Attempt to commit offence—Penal Code, Ch. XXIII.* S. 75 of the Penal Code is restricted to offences under Chs. XII and XVII of the Penal Code when the term of imprisonment awardable is three years' imprisonment and upwards, and does not refer to an attempt to commit any of those offences (Ch. XXIII), nor can any case be brought within it merely because the punishment that may be given for it extends to three years and upwards. QUEEN *v.* DAMU HAREE . . . **21 W. R. Cr. 35**

7. ——— *Previous convictions of offence not under Ch. XVII of Penal Code.* An offender is only liable to enhanced punishment, under s. 75 of the Penal Code, for an offence punishable under Ch. XVII, after having been punished with imprisonment for the same offence or for an offence punishable under the same chapter. QUEEN *v.* PUBON . **5 W. R. Cr. 66**

8. ——— *Previous offence under Ch. XII or Ch. XVII of the Penal Code. Held,* that, where a person commits an offence punishable under Ch. XII or Ch. XVII of the Penal Code punishable with three years' imprisonment, and, previously to his being convicted of such offence, commits another such offence punishable under either of such chapters, he is not subject, on being convicted of the second offence, to the enhanced punishment provided in s. 75 of the Penal Code. EMPRESS *v.* MEGHA . . **I. L. R. 1 All. 637**

9. ——— *Additional sentence—Sufficiency of sentence.* The object of s. 75 of the Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient. SHEO SARAN TATO *v.* EMPRESS **I. L. R. 9 Calc. 877**

10. ——— *Enhanced punishment—Transportation for seven years—Imprisonment.* The accused having been previously convicted of offences punishable, under Ch. XII or Ch. XVII of the Penal Code with imprisonment for a term of three years or upwards, was subsequently convicted of an offence under one of those chapters punishable with imprisonment which may extend to three years and sentenced to imprisonment for seven years. *Held,* that a sentence of imprisonment for seven years was illegal. Under s. 75 of the Penal Code, the accused might be transported for life, but he could not be imprisoned for a longer period than six years. EMPRESS *v.* MAHADU **I. L. R. 6 Bom. 690**

11. ——— *Further sentence after actual sentence—Penal Code, s. 46.* Where a first class Subordinate Magistrate sentenced a prisoner to six months' imprisonment under s. 457 of the Penal Code, and finding that the prisoner was liable to enhanced punishment under s. 75 of the Penal Code, sentenced the prisoner to six months' further imprisonment under s. 46 of the Code of Criminal Procedure, the latter sentence was set aside by the High Court. ANONYMOUS **5 Mad. Ap. 3**

12. ——— *Prisoner having had several previous convictions.* Where the prisoner had already been several times convicted of similar offences, the Magistrate should have committed him to the Court of Session, with a view to his being punished as after previous conviction under s. 75 of the Penal Code. REG. *v.* GANU LADU . . **2 Bom. 132: 2nd Ed. 126**

13. ——— *Imprisonment—Power of Magistrate—Counterfeiting marks on documents.* The prisoner was convicted under s. 475

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SENTENCE—*contd.*

6. SENTENCE AFTER PREVIOUS CONVICTION—*concld.*

of the Penal Code, and having been previously convicted of an offence punishable under Ch. XVII of the Code, the Magistrate sentenced him to four years' rigorous imprisonment. *Held*, that the Magistrate had power to pass sentence of two years' imprisonment only under s. 75, Penal Code. ANONYMOUS . . . . . **6 Mad. Ap. 3**

14. ——— ——— *Attempt to commit offence—Penal Code, Ch. XVII, s. 457—Lurking house-trespass.* A person, having been convicted of an offence punishable under s. 457 (Ch. XVII) of the Penal Code, was subsequently guilty of an attempt to commit such an offence. *Held*, that the provisions of s. 75 of the Penal Code were not applicable to such person. EMPRESS *v.* RAM DAYAL **I. L. R. 3 All. 773**

15. ——— *Conviction of an attempt to commit theft—Previous conviction of theft.* (MELVILL, *J. dissentiente*). If a person who has been convicted of an offence punishable, under Ch. XII or Ch. XVII of the Penal Code, with imprisonment for a term of three years or upwards, is convicted of an attempt to commit any such offence, he does not thereby become liable to the enhanced punishment allowed by s. 75 of the Code. EMPRESS *v.* NANA RAHIM . . **I. L. R. 5 Bom. 140**

16. ——— **and ss. 179, 511**—*Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction.* A person who has been convicted of the offence of theft (an offence punishable under Ch. XVII of the Penal Code) does not, on being convicted of an attempt to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code. QUEEN-EMPRESS *v.* SRICHARAN BAURI **I. L. R. 14 Calc. 357**

17. ——— **and ss. 457 and 511**—*Attempt to commit house-breaking by night after previous conviction.* S. 75 of Act XLV of 1860 does not apply to the case of an attempt to commit the offence punishable under s. 557 of the Code after previous convictions of offences falling within Ch. XII or Ch. XVII, such offence being punishable under s. 511. *Sheo Saran Tato* v. *Empress, I. L. R. 9 Calc. 877; Empress of India* v. *Ram Dayal, I. L. R. 3 All. 778; Empress* v. *Nana Rahim, I. L. R. 5 Bom. 140; Queen-Empress* v. *Sricharan Bauri, I. L. R. 14 Calc. 357*, referred to. QUEEN-EMPRESS *v.* AJUDHIA . **I. L. R. 17 All. 120**

18. ——— **and s. 511**—*Attempt to commit an offence after previous conviction.* S. 75 of the Penal Code does not apply to cases which are confined to s. 511 of that code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen-Empress* v. *Ajudhia, I. L. R. 17 All. 120*, approved. QUEEN-EMPRESS *v.* BHAROSA . **I. L. R. 17 All. 123**

SENTENCE—*contd.*

7. SOLITARY CONFINEMENT.

1. ——— **Duration of solitary confinement.** Solitary confinement must not be imposed for the whole term of a person's imprisonment. Under s. 74 of the Penal Code it is to be imposed at intervals. *In the matter of* NYAN SUK METHER . . **3 B. L. R. A. Cr. 49**

2. ——— **Summary trial**—*Criminal Procedure Code, ss. 32 (a), 262.* It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily. EMPRESS *v.* ANNU KHAN . . . . **I. L. R. 6 All. 83**

8. TRANSPORTATION.

1. ——— **Measure of punishment**—*Murder.* A sentence of transportation other than for life is illegal in the case of a prisoner convicted of murder. QUEEN *v.* BHOOTOO MULLICK **6 W. R. Cr. 8**

2. ——— *Reasons for sentence—Criminal Procedure Code, 1861, s. 380.* S. 380 of the Code of Criminal Procedure, 1861, did not authorize a Sessions Judge to sentence a prisoner convicted of murder to anything less than transportation for life, and it required the Judge, if he sentence such prisoner to transportation for life instead of capitally, to assign his reasons for so doing. QUEEN *v.* DABEE . **W. R. 1864 Cr. 27**

3. ——— *Unpremeditated murder.* Where murder is not premeditated transportation for life is a sufficient punishment. QUEEN *v.* RAM CHURN KURMOKAR **24 W. R. Cr. 28**

4. ——— *Penal Code, ss. 307 and 394—Attempt to murder—Causing hurt in committing robbery.* Neither under s. 307 nor under s. 394 of the Penal Code can a prisoner be sentenced to fourteen years' transportation, the punishment awardable under those sections being transportation for life, or rigorous imprisonment for ten years, with fine. QUEEN *v.* BHAMOUR DOOSADH **7 W. R. Cr. 41**

5. ——— *Waging war with Power in alliance with the Queen.* The punishment for a prisoner convicted of waging war with an Asiatic Power in alliance with the Queen must, under the Penal Code, be either transportation for life or imprisonment of either description which may extend to seven years. Where such a prisoner was sentenced to ten years' transportation, the sentence was held to be illegal. QUEEN *v.* KEIFA SINGH **3 W. R. Cr. 16**

6. ——— ——— *Killing a wizard.* A sentence of death was commuted into one of transportation for life in the case of a prisoner who committed murder in the belief that the deceased was a wizard and the cause of his child's illness, and that by killing the deceased the child's life might be saved. QUEEN *v.* OCRAM SUNGRA **6 W. R. Cr. 82**

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SENTENCE—*contd.*

8. TRANSPORTATION—*contd.*

7. ——— *Murder by way of retaliation.* The sentence of death reduced to transportation for life in a case of murder committed rather by way of retaliation for injury than under the influence of any worse passion. QUEEN *v.* TONOO . . . . . **6 W. R. Cr. 46**

8. ——— *Reckless assault with deadly weapon.* The punishment of transportation for life was inflicted instead of capital punishment in a case where there was no intention to cause death, but a reckless assault with a deadly weapon which inflicted an injury likely in the ordinary course of nature to cause death. QUEEN *v.* KHOAZ SHEIKH . . . . **5 W. R. Cr. 20**

9. ——— **Commutation of capital sentence**—*Likelihood of accident at execution.* Where the condition of the convict rendered it likely that, if he were hanged, decapitation would ensue, the sentence of death was commuted to one for transportation for life. BOODHOO JOLAHA *v.* EMPRESS . . . . . **2 C. L. R. 215**

10. ——— *Penal Code, s. 59 Measure of punishment—Penal Code, s. 412.* A sentence of transportation under ss. 412 and 59 of the Penal Code cannot exceed ten years. QUEEN *v.* MOHANUNDO BHUNDARY **5 W. R. Cr. 16**

11. ——— *Measure of punishment—False evidence and forgery.* Under s. 59 of the Penal Code, no sentence of transportation for a shorter period than seven years can be passed on any charge. Therefore where a prisoner was convicted on separate charges of giving false evidence in a judicial proceeding under s. 193, and of forgery under s. 467, and sentenced to seven years' transportation for the first offence and a further period of transportation for three years for the second offence, the second sentence was quashed as illegal. QUEEN *v.* GOUR CHUNDER ROY **8 W. R. Cr. 2**

12. ——— *Criminal Procedure Code, 1861, s. 59—Power to commute punishment after sentence of imprisonment.* Under s. 59 of the Penal Code, a Court can sentence to transportation only in a case in which the offence is punishable with imprisonment for seven years or upwards. It may, in passing sentence for the offence, commute the imprisonment to transportation, but it cannot commute the sentence after the sentence of imprisonment has been passed. QUEEN *v.* PREM CHUND OUSOWAL . . . **W. R. 1864, Cr. 35**

13. ——— *Commutation of sentence after amalgamating two sentences.* To bring s. 59 of the Penal Code into operation, the punishment awarded on one offence alone must be seven years' imprisonment, and cannot be made up by adding two sentences together and then commuting the amalgamated period to transportation. QUEEN *v.* MOOTKEE KORA . . **2 W. R. Cr. 1**

QUEEN *v.* TONOORAM . . **3 W R Cr. 44**

SENTENCE—*contd.*

8. TRANSPORTATION—*concld.*

QUEEN *v.* SHONAULLAH **5 W. R. Cr. 44**

14. ——— *Commutation of sentence—Imprisonment in default of payment of fine.* S. 59 of the Penal Code does not authorise the substitution of transportation for the imprisonment to which a Court can sentence an offender in default of payment of fine. KUNHUSSA *v.* QUEEN **I. L. R. 5 Mad. 28**

15. ——— *Imprisonment—Penal Code, s. 377—Unnatural offence.* When an offence is punishable either with transportation for life or imprisonment for a term of years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment. QUEEN *v.* NAIADA **I. L. R. 1 All. 43**

16. ——— *Commutation of sentence—Powers under Act XV of 1862, s. 1—Imprisonment or transportation.* An officer who, in the exercise of the powers described in s. 1, Act XV of 1862, had passed a sentence of imprisonment for seven years, had power, under s. 59 of the Penal Code, to commute that sentence into one of transportation for the like period. JACKSON, *J.*, dissented. QUEEN *v.* BOODHOOA **B. L. R. Sup. Vol. 869 : 9 W. R. Cr. 6**

7. ——— *Commutation of sentence—Penal Code, ss. 376, 511—Attempt at rape.* *A* was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for seven years, which he commuted, under s. 59 of the Penal Code, to transportation for the same term. *Held*, that, under ss. 376 and 511 of the Penal Code, a sentence of imprisonment for the offence committed could not be for a longer term than five years, and such sentence could not be commuted, under s. 59, to transportation for a longer term. QUEEN *v.* MERIAM **1 B. L. R. A. Cr. 5 : 10 W. R. Cr. 10**

18. ——— *Commutation of sentence—Imprisonment.* When the law gives the alternative punishments of death, transportation for life, or rigorous imprisonment extending to ten years, a sentence of fourteen years' transportation is illegal. If the Judge thinks it proper to pass a sentence of transportation short of life, he should pass a sentence of imprisonment for the term fixed by law, and then, under s. 59, change it to transportation for that period. QUEEN *v.* RUGHOO **W. R. 1864, Cr. 30**

19. ——— **Successive sentences of transportation**—*Criminal Procedure Code, 1861, s. 46.* A sentence of transportation for two periods, each of seven years, one sentence to commence after the expiration of the other, was not warranted by s. 46 of the Code of Criminal Procedure, that section allowing such sentences only when the penalties consist of imprisonment. QUEEN *v.* KASSIM ALLY **11 W. R. Cr. 10**

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SENTENCE—*contd.*

9. WHIPPING.

1. ——— **Sentence giving both whipping and imprisonment**—*Power of Magistrate—Act XIII of 1856, s. 27.* Act XIII of 1856, s. 27, gave a Magistrate power to award either imprisonment or whipping, but not both, and a sentence which gave both was illegal. QUEEN *v.* FYZO . . . . . **Bourke O. C. 269**

2. ——— **Person convicted of two or more offences under Penal Code**—*Imprisonment and whipping.* When a person is convicted at one time of two or more offences punishable under the Penal Code, the Court is empowered to sentence the prisoner in the one case to rigorous imprisonment and in the other case to whipping under Act VI of 1864. ANONYMOUS . **5 Mad. Ap. 18**

3. ——— **Imprisonment in lieu of whipping**—*Criminal Procedure Code, s. 395—Court not authorised to inflict fine in lieu of whipping.* A Court has no power, under s. 395 of the Criminal Procedure Code, to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, etc. The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. QUEEN-EMPRESS *v.* SHEODIN **I. L. R. 11 All. 308**

4. ——— **Sentence of imprisonment in lieu of whipping**—*Criminal Procedure Code, 1882, s. 395—Powers of Magistrate.* Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence, and such sentence is accordingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the Court passing the sentence is competent to inflict. *Queen-Empress* v. *Sheodin, I. L. R. 11 All. 308*, referred to. QUEEN-EMPRESS *v.* RAM BARAN SINGH . **I. L. R. 21 All. 25**

5. ——— **Ground for sentence**—*Statement of grounds in judgment.* When whipping is imposed as a punishment, the grounds for that form of punishment should be set out in the judgment. BADIYA *v.* QUEEN . **I. L. R. 5 Mad. 158**

10. POWER OF HIGH COURT AND APPELLATE COURTS AS TO SENTENCES.

(*a*) GENERALLY.

1. ——— **Power of High Court to interfere with sentence.** After a sentence has once been passed by a competent authority, the High Court has no more power to interfere with it than a private individual, except upon appeal, or on a reference, or by way of revision, as provided by the Code of Criminal Procedure. QUEEN *v.* PUBAN . . . . . **7 W. R. Cr. 1**

SENTENCE—*contd*

10. POWER OF HIGH COURT AND APPELLATE COURTS AS TO SENTENCES—*contd.*

(*a*) GENERALLY—*concld.*

2. ——— **Consolidation by High Court of sentences passed by lower Court**—*Separate sentence, illegality of.* When the circumstances of the case justify, the High Court may substitute one aggregate or consolidated sentence for separate sentences passed by the Court below sufficient to meet the offence of which the accused has been convicted. HRIDOY MONDAL *v.* JAGANANDA DAS . . . **4 C. W. N. 245**

(*b*) ENHANCEMENT.

3. ——— **Power to enhance**—*Criminal Procedure Code, 1861, s. 419—Sessions Judge.* A Sessions Judge had, under s. 419 of the Criminal Procedure Code, 1861, no authority to enhance a sentence on appeal. QUEEN *v.* BULORAM DOSS **4 W. R. Cr. 20**

4. ——— *Acquittal by Sessions Judge and Assessors.* Where a Sessions Judge and assessors acquit in a case of murder, but find the prisoner guilty of a minor charge, the Appellate Court has no power to interfere to enhance the punishment awarded. *In the matter of* TOYAB SHAIKH . . **1 Ind. Jur. N. S. 58**

5. ——— *Appellate Court—Criminal Procedure Code, 1872, s. 280.* S. 280 of the Code of Criminal Procedure, 1872, authorized an Appellate Court, subject to the proviso in the final sentence, to enhance any punishment that had been awarded. ANONYMOUS **I. L. R. 1 Mad. 54**

6. ——— *Criminal Procedure Code, 1872, s. 18—"Modify."* The word "modify" in s. 18, cl. 2, of the Code of Criminal Procedure did not include the power to enhance a sentence: consequently where an Assistant Sessions Judge passed a sentence of more than three years' imprisonment, the Sessions Judge could not enhance it. IMPERATRIX *v.* RAMA PREMA **I. L. R. 4 Bom. 239**

7. ——— *Criminal Procedure Code, 1872, s. 280—Enhancement without notice.* Where a District Magistrate on appeal made an order under the Code of Criminal Procedure, s. 280, enhancing the sentence appealed from, without having served notice on the appellant, the order of enhancement was quashed as illegal. QUEEN *v.* HEKMUT ALI . . . **24 W. R. Cr. 72**

8. ——— **Exercise of power**—*Criminal Procedure Code, 1872, s. 280.* Circumstances under which the High Court would, on appeal by the prisoner, enhance the punishment under s. 280, Act X of 1872. QUEEN *v.* SOFFIRUDDI PALWAR **13 B. L. R. Ap. 23: 22 W. R. Cr. 5**

9. ——— *Criminal Procedure Code, 1872, s. 280 (1861—69, s. 419).* The

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SENTENCE—*contd.*

10. POWER OF HIGH COURT AND APPELLATE COURTS AS TO SENTENCES—*contd.*

(*b*) ENHANCEMENT—*contd.*

High Court on appeal, being of opinion that the case was one where no circumstances of mitigation were set forth, and where, without any sufficient reason, the Judge had awarded a punishment which in ordinary cases would be quite inadequate enhanced the punishment under s. 280, Act X of 1872. QUEEN *v.* GOOJREE PANDAY
11 B. L. R. Ap. 3 : 20 W. R. Cr. 21

10. ———— *Enhancement of sentence on appeal—Criminal Procedure Code (Act X of 1882), ss. 423, 439.* A head constable was convicted under s. 330 of the Penal Code, and at a trial before a Sessions Judge sentenced to four months' simple imprisonment. The prisoner appealed. The High Court, in dismissing the appeal, directed, as a Court of Revision, that the sentence passed should be enhanced. METHER ALI *v.* QUEEN-EMPRESS . . . **I. L. R. 11 Calc. 530**

11. ———— *Criminal Procedure Code, 1872, s. 280—Alteration of conviction from culpable homicide to murder.* Under s. 280 of the Code of Criminal Procedure, the High Court altered the conviction in this case from culpable homicide into one for murder, and enhanced the sentence accordingly. QUEEN *v.* ROHEEM
21 W. R. Cr. 39

12. ———— *Enhancement of sentence on persons not appealing.* Five persons were convicted of mischief ; one prisoner appealed. Notice to attend the hearing of the appeal was sent to all five prisoners, of whom only three attended. The Head Assistant Magistrate, however, enhanced the sentence passed on all. *Held*, that the enhanced sentence passed on the prisoners who did not appear and who did not appeal must be annulled. ANONYMOUS . . . . . **8 Mad. Ap. 8**

13. ———— *Enhancement of sentence on appeal—Appellate Court.* Where the Magistrate convicted the accused of two distinct offences and passed only a single sentence for both and the Appellate Court acquiting the accused of one of the offences maintained the sentence in its entirety : *Held*, that this amounted to an enhancement of the sentence passed for the offence, the conviction for which alone was maintained. PARAMASIVA PILLAI *v.* EMPEROR (1906)
I. L. R. 30 Mad. 48

14. ———— *Criminal Procedure Code, s. 423—Sentence, enhancement of—No enhancement when aggregate period of imprisonment reduced, although fine imposed in addition.* Where the aggregate period of imprisonment awarded on appeal is to any extent less than the period of the original sentence, the fact that a fine is imposed by the Appellate Court is no enhancement of the sentence within the meaning of s. 423 of the Code of Criminal Procedure. Where

SENTENCE—*contd.*

10. POWER OF HIGH COURT AND APPELLATE COURTS AS TO SENTENCES—*contd.*

(*b*) ENHANCEMENT—*concld.*

the Appellate Court reduced a sentence of one month's imprisonment to five days but imposed in addition a fine with two weeks' imprisonment in default : *Held*, that the sentence of the Appellate Court was not illegal. BHAKTHAVATSALU NAIDU *v.* EMPEROR (1906) . **I. L. R. 30 Mad. 103**

(*c*) MITIGATION.

15. ———— **Power to mitigate sentence** —*Criminal Procedure Code (Act XXV of 1861), ss. 405 and 428.* The High Court could, under ss. 405 and 428 of the Criminal Procedure Code, mitigate a sentence passed by a Magistrate and confirmed or altered on appeal by the Sessions Judge, on the ground that the sentence was excessive. *In the matter of the petition of* BISSUMBHUR SHAHA
B. L. R. Sup. Vol. 484 : 6 W. R. Cr. 7

Overruling QUEEN *v.* RAMDHONE MUNDUL
4 W. R. Cr. 15

16. ———— *Criminal Procedure Code, 1861, s. 405.* The High Court (like the Sessions Judge) could not, under s. 445, Criminal Procedure Code, 1861, nullify the verdict of a jury by interfering to lessen the punishment. S. 405 referred to cases where the offence was proved, but where the punishment inflicted was *held* to be too severe, and not to cases where the conviction itself was considered improper. QUEEN *v.* BISSONATH MITTER . . . . **6 W. R. Cr. 6**

17. ———— **Exercise of powers**—*Case submitted for consideration of Government.* If there are circumstances which render expedient or advisable a mitigation of the sentence required by the law to be passed in cases of murder, the Judge may record these circumstances and submit them for the consideration of the Government, and the Government might, under s. 54, Criminal Procedure Code, 1861, act as to it seems proper. QUEEN *v.* DABEE . . . . **W. R. 1864 Cr. 27**

(*d*) REVERSAL.

18. ———— **"Reverse," meaning of**— *Criminal Procedure Code (Act XXV of 1861), ss. 419, 426.* The word "reverse" in ss. 419 and 426, Code of Criminal Procedure (Act XXV of 1861), ss. 280 and 283 of Act X of 1872, meant to make void, to set aside, or annul, and not merely to change or turn into the contrary. QUEEN *v.* ELAHI BAX
B. L. R. Sup. Vol. 459 : 5 W. R. Cr. 80

19. ———— **Power to reverse sentence** —*Criminal Procedure Code (Act XXV of 1861), s. 426.* *A* was charged with the offence of voluntarily causing hurt to *C*, and *B* was charged with the same offence, and also with the offence of abetting

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SENTENCE—*concld.*

10. POWER OF HIGH COURT AND APPELLATE COURTS AS TO SENTENCES—*concld.*

(*d*) REVERSAL—*concld.*

A. The Magistrate found *A* guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found *B* guilty of abetment of the offence of voluntarily causing hurt to *C*, and sentenced him to one month's rigorous imprisonment and a fine. On appeal, the Sessions Judge held that there was no evidence to convict *A*, and he accordingly released the prisoner. The appeal of *B*, however, was rejected, on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt; and therefore, under s. 426 of the Code of Criminal Procedure, the sentence could not be reversed. No "error or defect either in the charge or in the proceedings on trial" was alleged. *Held* (by MITTER, *J.*), that s. 426 of the Code of Criminal Procedure did not apply. QUEEN *v.* MAHENDRANATH CHATTERJEE . **5 B. L. R. Ap. 39**

S.C. GOUR MOHUN GHOSE *v.* MOHINDRO NATH CHATTERJEE . . . **13 W. R. Cr. 78**

20. ——— *Reversal of conviction—Reception of evidence inadmissible—Criminal Procedure Code, 1872, s. 280.* If in a case tried by a jury the High Court finds that inadmissible evidence has been received, but that, after setting it aside, there is other evidence on the record on which the jury may find a verdict of guilty, the High Court may reverse the conviction and sentence and order a new trial (s. 280 of the Code of Criminal Procedure). REG. *v.* AMRITA GOVINDA **10 Bom. 497**

11. FORFEITURE OF PROPERTY.

——— *Penal Code (Act XLV of 1860) s. 62—Criminal breach of trust—Sentence. Held*, that the special sentence provided for by s. 62 of the Indian Penal Code is a sentence which should only be inflicted in rare cases—those in which crimes of an atrocious nature are exposed or in which offences have been committed under aggravated circumstances. *Queen* v. *Mahomed Akhir, 12 W. R. Cr. 17*, followed. EMPEROR *v.* AMRIT LAL (1906) . . **I. L. R. 29 All. 25**

SEPARATE ACQUISITION.

See HINDU LAW—JOINT FAMILY—

PRESUMPTION AND ONUS OF PROOF AS TO JOINT FAMILY;

NATURE OF, AND INTEREST IN PROPERTY—ACQUIRED PROPERTY.

See SELF-ACQUIRED PROPERTY.

See SELF-ACQUISITION.

SEPARATE CHARGES.

See JOINDER OF CHARGES.

SEPARATE OFFENCES.

——— conviction for—

See APPEAL IN CRIMINAL CASE—PRACTICE AND PROCEDURE. **I. L. R. 30 Calc. 288**

See REVISION—CRIMINAL CASES—SENTENCES . **B. L. R. Sup. Vol. 488**

See SENTENCE—CUMULATIVE SENTENCES.

See STOLEN PROPERTY, OFFENCES RELATING TO . . **I. L. R. 1 All. 379**

——— trial of—

See JOINDER OF CHARGES.

SEPARATE PROPERTY.

See SEPARATE ACQUISITION.

See HINDU LAW—JOINT FAMILY—NATURE OF, AND INTEREST IN, PROPERTY—ACQUIRED PROPERTY.

See HUSBAND AND WIFE.

See SUCCESSION ACT, s. 4. **13 B. L. R. 383**

SEPARATE SUIT.

See SUIT.

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 82 . **I. L. R. 34 Calc. 13**

SEPARATION IN ESTATE.

See HINDU LAW . **I. L. R. 36 Calc. 481**

SEQUESTRATION.

1. ——— Writ of sequestration—*Contempt of decree or order of Court—Rule of Bombay Supreme Court, 389—"Forthwith."* The process of sequestration for contempt of a decree or order of Court, as it existed in the late Supreme Court, will, in a proper case, issue out of the High Court. The object of rule 389 of the Supreme Court Rules, which required a party who wished to enforce an order by sequestration to indorse upon the copy of the order served upon his opponent a memorandum to the effect that in default of performance of the order he would be liable to be arrested and to have his estate sequestered, was to enable the party making such endorsement to apply *ex parte* for the writ. In the absence of such a memorandum indorsed upon the copy order, a party desirous of enforcing an order by sequestration must give proper notice to his opponent of his intention to apply for the writ. An order commanding an act to be done "forthwith" is sufficiently in conformity with the rule that requires the time within which an act ordered to be done is to be performed to be specified in the order. HARIVALLABHDAS KALLIANDAS *v.* UTAMCHAND MANIKCHAND . **8 Bom. O. C. 135**

2. ——— *Property out of jurisdiction of High Court—Power of High Court.* The High Court will assert its jurisdiction for the purpose of preventing a writ of sequestration issued by it from becoming a mere form, and under proper circumstances will operate in *personam* where the

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SEQUESTRATION—*concld.*

property sought to be sequestered is outside its jurisdiction. HARIVALLABHDAS KALLIANDAS *v.* UTAMCHAND MANIKCHAND. *In re* GOPALRAV MYRAL . . . . **8 Bom. O. C. 236**

SERVANT.

See LIMITATION ACT, 1877, SCH. II, ART. 7 (1859, s. 1, CL. 2).
See MASTER AND SERVANT.
See PUBILC SERVANT.

——— **custody of—**

See ARMS ACT, 1878, s. 19.
I. L. R. 20 Calc. 444
I. L. R. 16 All. 276

See CONTRACT ACT, s. 178.
I. L. R. 4 Calc. 497

——— **domestic—**

See ACT XIII OF 1859.
2 B. L. R. A. Cr. 32

See WILL—CONSTRUCTION.
8 B. L. R. 244
9 B. L. R. Ap. 4

——— **liability of—**

See BENGAL EXCISE ACT, VII OF 1878, SS. 53, 59 . . **11 C. L. R. 416**
I. L. R. 6 Calc. 207
I. L. R. 9 Calc. 847
I. L. R. 17 Calc. 567
I. L. R. 29 Calc. 496; 606

See BOMBAY ABKARI ACT, 1876, s. 45.
I. L. R. 15 Bom. 45

——— **possession by, of gun—**

See ARMS ACT, s. 19 (*f*).
13 C. W. N. 124

SERVICE INAM.

——— *Lands—Resumption.* The combination of an interest in land and an obligation as to service may fall under three heads, *viz.* : (i) there may be a grant of land burdened with service ; (ii) there may be a grant in consideration of past and future service ; and (iii) there may be the grant of an office the services attached to which are remunerated by an interest in land. In either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect lands held under those grants are not resumable at will. Where a plaintiff inamdar asserts that he has a right to resume, he has to establish that the combination in such as permits of resumption, and where there has been long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on plaintiff's part to make out his case. LAKHAMGAVDA *v.* KESHAV ANNAJI (1901)
I. L. R. 28 Bom. 305

SERVICE OF PROCESS.

See PROCESS.
See SUMMONS, SERVICE OF.

SERVICE OF SALE PROCLAMATION.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 311 . **12 C. W. N. 757**

SERVICE OF SUMMONS.

See SUMMONS.

SERVICE TENURE.

See BENGAL CESS ACT, 1871, s. 3.
7 C. L. R. 373

See BOMBAY REVENUE JURISDICTION ACT, S. 4 . . **I. L. R. 18 Bom. 319**

See GHATWALI TENURE.

See GRANT—CONSTRUCTION OF GRANTS.
4 Bom. A. C. 1
I. L. R. 9 Bom. 561
I. L. R. 15 Bom. 222
L. R. 18 I. A. 22
I. L. R. 10 Mad. 1

See HEREDITARY OFFICES ACT.
I. L. R. 19 Bom. 250
I. L. R. 20 Bom. 423

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 339

See LEASE . **I. L. R. 32 Calc. 243**

See LIMITATION ACT, 1877, SCH. II, ART. 130 (1871, ART. 130)
I. L. R. 1 Bom. 586

See OCCUPANCY RIGHT **8 C. W. N. 860**

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—SUBJECTS OF ACQUISITION.
I. L. R. 4 Calc. 67

See TRANSFER OF PROPERTY ACT, s. 106.
8 C. W. N. 904

——— **entry in choukidari register—**

See EVIDENCE ACT, s. 32 (*2*).
13 C. W. N. 71

——— **ghatwali tenure—**

See ATTACHMENT—SUBJECTS OF ATTACHMENT—EXPECTANCY.
I. L. R. 28 Calc. 483

1. ——— **Creation of service tenure—** *Long possession—Presumption—Chakeran lands—Chowkidari duties—Onus probandi.* Long possession of lands as chowkidari chakeran affords ground for the presumption that the lands were set apart as such as the decennial settlement. The onus of proof that the lands were the private lands of the zamindar, not set apart at the decennial settlement as chowkidari chakeran, is on the zamindar. MOOKTAKESHEE DEBIA CHOWDHRAIN *v.* COLLECTOR OF MOORSHEDABAD . . . . **4 W. R. 30**

2. ——— **Performance of services—** *Nature of grant.* A grant to a man and his heirs on condition of performing service does not in general mean that the service is to be personally performed by the grantee or his heirs, but that the grantee is to be responsible for its performance. SHIB LALL SINGH *v.* MOORAD KHAN . . **9 W. R. 126**

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SERVICE TENURE—*contd.*

3. ——— Deshmukh, services of— *Hereditary offices—Bom. Act XI of 1842, s. 2.* By s. 2 of Act XI of 1843 hereditary officers are bound to "render the usual services of their respective offices as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or the orders of Government." *Semble:* That the "usual services" of a deshmukh consist in making himself thoroughly acquainted with all circumstances affecting the land revenue in his district, and in communicating such information to the Mamlatdar or mohalkari; and that the deshmukh is bound to perform or get performed so much writing business as is necessary for the above purposes, and no more. But if by reason of the sub-division of the talukhs his duties in that respect are increased, he is bound either personally to perform such increased duties or to provide a karkun or karkuns to perform them for him. RANGOBA NAIK *v.* COLLECTOR OF RATNAGIRI **8 Bom. A. C. 107**

4. ——— Right of female to inherit service tenure. The law in the Bombay Presidency recognises the right of females to hold majumdari vatans, males being appointed by them to perform the service. GOVERNMENT OF BOMBAY *v.* DAMODHAR PARMANANDAS . **5 Bom. A. C. 202**

5. ——— *Hereditary Offices Act (Bom. Act XI of 1843)—Right of females to inherit.* Since the passing of Act XI of 1843 a female can inherit a majumdari vatan. The Collector can assign the whole proceeds of a vatan to the officiating person who is entitled to retain such proceeds as his remuneration. BAI SURAJ *v.* GOVERNMENT OF BOMBAY. BAPUBHAI KHUSHALDAS *v.* BAI SURAJ . . . **8 Bom. A. C. 83**

6. ——— Right to officiate in proportion to shares held in vatan—*Discretion of Collector—Act XI of 1843.* The plaintiff had two shares, and the defendant one, in a patilki vatan. In an action brought by the plaintiff to establish his right to officiate twice as often as the defendant:—*Held,* that the plaintiff was not necessarily entitled to such right, though the fact of his holding two shares in the vatan might be a reason for the Collector to exercise his discretion under Act XI of 1843 (when it was in force) in favour of the plaintiff by assigning to him a longer period of management than to the defendant, in the event of two sharers not agreeing as to the person to officiate. BHAVANI SADASHIV *v.* BHAVANI MANAJI . **12 Bom. 232**

7. ——— Power of a vatandar to create a perpetual mutalik—*Exclusion of successors from entire management of vatan—Kararpatra grant, construction of—Vatan—Sanad, construction of.* The creation of a perpetual mutalik, with a certain share of the vatan as vritti on account of mutaliki, is within the powers of a holder of the vatan for the time being, more especially when it is done for good and valuable consideration passing to the vatan. But it is not competent to him to exclude his successors from the entire management of the vatan. In 1825 the ancestor of the plaintiff who

SERVICE TENURE—*contd.*

was a desai and the last proprietor of the deshgati vatan of Tegur, granted to the ancestor of the defendants a kararpatra whereby, in cosideration of the services the latter was to render to the former in recovering the vatan, the defendants' ancestor was to enjoy one-third of the vatan as vatani mutalik from generation to generation. Subsequently the plaintiff's ancestor granted to the defendants' ancestor a sanad which referred to the kararpatra already executed, and vested the entire management of the vatan in the defendants' ancestor from generation to generation after the said vatan was recovered. After protracted legal proceedings, in which the defendants' ancestor assisted the plaintiff's great-grandfather, the vatan was recovered in 1839. In 1846 the defendants' ancestor actually entered into the management and continued to manage till 1850, in which year Government put the vatan under attachment. From 1850 to 1864 he remained out of possession in consequence of the attachment. In 1864 Government removed the attachment and restored the vatan to the plaintiff's father. On being asked by the Collector to appoint some one to take possession and management of the vatan, the plaintiff's father wrote a reply on the 15th July 1865 that he had appointed the defendants' father to manage it, and the defendants' father continued to manage it till his death in 1880. On his death, a fresh mookhtearnama was executed to the defendants 1 and 4 by the mother of the plaintiff, who was then a minor. Under that mukhtearnama, the defendants managed the vatan till 1882, in which year the plaintiff, having attained his majority, wished to manage it himself, but was opposed by the defendants. The services in connection with the vatan had ceased in 1864. The plaintiff therefore brought the present suit in 1884 to recover the vatan, with mesne profits. The defendants set up the kararpatra and the sanad by which they contended they had acquired the hereditary right to keep the whole vatan in their possession and management and to take one-third of the income derived from the same. The plaintiff impeached these documents as forgeries, and contended that in any case they were not binding on him, as it was not competent to his ancestor to make a permanent alienation of the vatan or its management beyond his lifetime. The Court of first instance awarded the plaintiff's claim. On appeal by the defendants to the High Court:—*Held,* reversing the decree of the lower Court, that the rights of the defendants under the kararpatra were in force and binding on the plaintiff notwithstanding that the services incidental to the vatan had ceased. That document had been executed not merely to create a permanent office for the services of which a certain share in the vatan was allotted as remuneration, but it proceeded on the special service to be rendered to the family of the grantor by the recovery of the vatan itself. In other words, the performance of the service as mutalik was not the entire consideration or motive for the grant, nor did it expressly provide for the grant ceasing when the services should be no longer required. *Held,* also, that the sanad purported to exclude the grantor's

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SERVICE TENURE—*contd.*

successors in the vatan entirely from the management of the vatan, and to vest it in the permanent mutalik, and, whilst leaving them as the absolute owners of the two-thirds, to deprive them of all control over it. This was virtually to attach an incident to the vatan inconsistent with its nature which the plaintiff's ancestor was not competent to do. The parties were entitled to the joint management of the vatan as tenants-in-common in respect of their undivided shares. BHIMAJI BALVANT *v.* GIRIAPA TIMAPA DESAI . **I. L. R. 14 Bom. 82**

8. ——— Appointment of deputy—*Power of holder of tenure.* The holder of an hereditary office, such as a despande vatan, cannot create an hereditary deputy. The appointment of a deputy made by a particular incumbent cannot extend beyond the life of such incumbent. RAVJI RAGHUNATH *v.* MAHADEVRAV VISHVANATH **2 Bom. 237**

9. ——— Death of grantee without heirs—*Custom—Reversion of jaghir to grantor.* Where the custom of the country was found to be that on the death of a service tenure-holder without heirs his jaghir reverted to the grantor, the right of the grantor to the land on the death of the grantee without heirs was recognised. RAMESSURNATH SINGH *v.* HURO LAL SINGH . . **6 W. R. 87**

10. ——— Abandonment of tenure—*Mokuraridar abandoning tenure—Forfeiture of property for rebellion.* A mukuraridar, having fled and abandoned his tenure appertaining to a rebel's estate which was confiscated by Government, was held not entitled to recover the tenure on the ground that the mokurari was not an absolute tenure, but one on condition of service to be rendered to the former proprietor whose estate has been confiscated for rebellion. NEPAL SINGH *v.* RAM SURUN SINGH **W. R. 1864, 5**

11. ——— Alienation by holder—*Crotriyam—Power of holder to alienate.* Each holder of a *crotriyam* conferred for lives can only alienate his own life-interest. SUNDARAMURTI MUDALI *v.* VALLINAYAKKI AMMAL . . **1 Mad. 465**

See VISSAPPA *v.* RAMAJOGI **2 Mad. 341**

12. ——— *Interest of one of co-parceners in service tenure—Nature of interest—Act XI of 1843. Held,* that the interest enjoyed by one of a body of co-parceners in possession of land attached by way of emolument to an hereditary office cannot be bequeathed to one or more of the other co-parceners, as the estate held by each sharer is only a life interest, subject to the right of the Collector, under Act XI of 1843, to assign a fit remuneration from the rent and profits for the maintenance of the person appointed to conduct the duties of the office. BHIMAPPA *v.* MARIAPPA **3 Bom. A. C. 128**

13. ——— *Adverse possession against one holder how far a bar against a succeeding holder—Judgment against one holder how far res judicata against succeeding holder—*

SERVICE TENURE—*contd.*

Alienability of lands when services are abolished—Bom. Act II of 1865—Bom. Act VII of 1863. Held, (i) that in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service vatan lands is a bar to succeeding holders. (ii) In the absence of fraud and collusion, judgment against one holder of service vatan lands is *res judicata* as regards a succeeding holder. (iii) Such lands become alienable when the services are abolished, except in cases where there is a concurrent family custom operating similarly to keep the vatan estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of the public duty does not alter the nature of the estate. If the family custom forbids alienation beyond the lifetime of the alienor, the custom will operate equally after the patrimony has ceased to be a vatan, as before. Where, however, such a concurrent custom does not affect an estate, then when it is freed from its connection with the public office the reason arising from that connection for the preservation of the estate necessarily fails, and the lands become subject to the ordinary law of descent and disposal. *Per* WEST, *J.*—(i) Lands with respect to which a summary settlement under Bombay Acts II and VII of 1863 has been effected are wholly exempt from official obligation. (ii) Where service lands, or what were deemed service lands have been aliened, and at a later period the service has been disclaimed or abolished, this subsequent abolition or discharge renders the title of the alience in possession undisputable by the alienor's heirs, assuming that there is no special family custom operating apart from the law which preserves service lands for the intended uses. The alienation is, of course, subject to the terms on which family property can usually be alienated. RADHABAI *v.* ANANTRAV BHAGVANT DESPANDE . **I. L. R. 9 Bom. 198**

See VASANJI HARIBHAI *v.* LALLU AKHU **I. L. R. 9 Bom. 285**

14. ——— *Liability to sale in execution of decree—Police jaghir—Public services.* A service tenure can be sold in execution of a decree for arrears of its own rent, provided that the service due from the holder be of a private kind and personal to the plaintiff, but not where the service is of a public kind, as in the case of a police jaghir. NILMONEE SINGH DEO *v.* KASHEE MAHTOON . . . . . **25 W. R. 206**

15. ——— *Vatan—Mortgage of vatan property—Adverse possession—Limitation—Succession to vatan—Entry of vatan in name of trespasser—Effect of Gordon Settlement effected with trespasser—Right of redemption. B D* died in 1847, leaving his two widows, *K* and *R*. The plaintiff *P* was born to *R* in 1848, *i.e.*, the year after *B D*'s death. *B D*'s vatan had been attached by Government in 1844, but in 1848 or 1849 Government restored a small portion of it, entering it in the name of *K* and refusing to recognize the infant *P*. In 1865 the Government restored

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SERVICE TENURE—*contd.*

the rest of the vatan, again acknowledging *K* as the holder, the agreement with her being under "the Gordon Settlement." In 1865 *K* mortgaged two villages (part of the vatan) to one *S* (father of the defendants), who was the vatani karkun, for R9,900, which had been advanced by him to *K*, while the vatan was under sequestration. Possession was given to *S*, and the village officers were directed to pay him the revenues. Subsequently *K* repented of her bargain, and directed the village officers not to pay the revenues to *S*. He accordingly brought a suit against her for the revenues of 1869-70, and obtained a decree, in execution of which he sold the villages and bought them at the sale. In 1878, however, the Collector cancelled the sale under the Vatan Act (Bombay Act III of 1874). In 1873 *S* obtained a further decree against *K* for the revenue of two years (1870—72) and for possession as mortgagee. He got possession through the Court in 1875. *K* and *P*, who had been on good terms, quarrelled, and on the 16th March 1872 *K* adopted one *B* as a son to her deceased husband *B D*. In December 1872 *P* sued *K* and *B*, praying that he might be declared the son of *B D*, and that the adoption of *B* might be cancelled. In 1879 the High Court held that *P* was the legitimate son of *B D*, and that *B*'s adoption was invalid. The legitimacy of *P* being thus established, the Collector, in 1878, entered the vatan in his name. At that time and until 1880, *P* and *S* were on friendly terms, the two having joint possession of the mortgaged villages, *P* being subsequently to October 1878 the recognised occupant, and *S* taking some, if not all, of the revenues of the two villages. In 1880 *S* died, and his sons, the defendants, quarrelled with *P*, who in 1881 obtained an order from the Collector directing the village officers to pay the revenues of the two villages to him, and not to the defendants. This order was subsequently set aside, and thereupon *P* in August 1887 filed the present suit to have the mortgage executed by *K* to *S* on the 15th September 1865 declared null and void and to recover possession of the two villages. In the alternative, he prayed for redemption of the mortgage. The defendants pleaded, *inter alia*, that the villages were not vatan; that they were entitled to the villages by reason of adverse possession; that the suit was barred by limitation; and that the plaintiff was estopped from disputing the mortgage, etc. *Held* (i), on the evidence, that the property in question was part of a dasai vatan, and as such was held on service tenure. (ii) That the property in question was subject to the rule which was in force in 1865, when the mortgage to *S* was executed, *viz.*, that alienation by way of mortgage of any portion of vatan property had no force beyond the life of the vatandar who mortgages it. (iii) That the plaintiff having been declared to be the legitimate son of *B D*, he was from the date of his birth in 1848 the rightful vatandar, and *K*, unless she was manager acting on his behalf, was a trespasser. The fact that Government had entered the vatan in her name, and that the "Gordon Settlement" was effected with her, would no make her vatandar as long as *B D*'s son (the plaintiff) was alive. (iv) That if *K* was a mere trespasser, then the plaintiff's right to recover the lands free from incumbrance, on the ground that he was the vatandar, had been lost by limitation, and the property had become *K*'s by adverse possession. The plaintiff, however, as her step-son, was her heir. The mortgage was proved and was binding on him as heir, and as such he had a right to redeem it. SWAMIRAO *v.* PADAPA BIN BHUJANGRAV . . . . . **I. L. R. 18 Bom. 22**

SERVICE TENURE—*contd.*

16. _____ *Vatan service land, alienation of—Gordon Settlement in the Southern Maratha Country—Effect of the application of, to service vatan—Alienability of such vatan where services have been dispensed with—Vatandars (Bombay) Act III of 1874—Bom. Reg. XVI of 1827—Bom. Acts II and VII of 1863.* *R* and his sons were members of an undivided family. In execution of certain money-decrees passed against *R*, the lands in dispute were sold to various persons from whom they were afterwards bought by the defendant. In 1875 *R* died, and in 1887 his sons and grandson filed this suit against the defendant to recover the lands. They alleged that the lands were service vatan lands and inalienable, and that the execution-sales affected nothing except *R*'s life-interest, and that on *R*'s death they (the plaintiffs) became entitled. They also contended that, even if the Court should find that the lands were not service vatan lands, they were at all events ancestral property, and that the plaintiff's interests therein were not affected by execution-sales under decrees to which they were not parties. *Held*, on the evidence affirming the judgment of the Court below, that, with the exception of two fields, none of the lands in question were service vatan lands. *Held*, further, that the two fields which were so excepted, and which had been the subject of a "Gordon Settlement" in 1864, remained inalienable vatan lands, although the services in respect of them had been dispensed with. The settlements made under Bombay Acts II and VII of 1863 made the lands thenceforth transferable as the property of the holder. *Radhabai* v. *Anantrav, I. L. R., 9 Bom. 215.* What is termed a "Gordon Settlement" was an arrangement, entered into in 1864 by a Committee, of which Mr. Gordon as Collector, was Chairman, acting on behalf of Government, with the vatandars in the Southern Maratha Country, by which the Government relieved certain vatandars in perpetuity from liability to perform the services attached to their offices in consideration of a judi or quit-rent charged upon the vatan lands. These settlements were given binding legal effect by cls. 2 and 3 of s. 15 of Bombay Act III of 1874. At the time when these settlements were made, lands were alienable by Bombay Regulation XVI of 1827 (as construed by the Courts) beyond the life of the actual incumbent, and the Gordon Settlement of 1864 (unless where it was otherwise specially provided by a particular settlement) was not intended by either party to those settlements to convert the vatan lands into

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SERVICE TENURE—*contd.*

the private property of the vatandar with the necessary incident of alienability, but to leave them attached to the hereditary offices, which although freed from the performance of services, remained intact, as shown by the definition of hereditary office in the declaratory Act III of 1874. APPAJI BAPUJI *v.* KESHAV SHAMRAV. KESHAV SHAMRAV *v.* APPAJI BAPUJI . . . . **I. L. R. 15 Bom. 13**

17. ——— **Cessation of services**—*Land held on quit-rent—Waiver of performance—Lapse of tenure.* As an ordinary rule, if land is given on a quit-rent, or no rent at all, in consideration of service to be performed, the tenure would lapse when those services ceased. *Quære:* When no service has been required or performed for a long series of years, and the tenure has been allowed to be held at a quit-rent, or no rent at all, whether there has not been such a waiver of service as puts it out of the power of the grantor to resume the tenure, simply on the ground that he has now no need of the service for which the tenure was originally created? *Quære:* Whether, when land is given at a quit-rent on condition that the grantee shall aid the grantor in repelling the attacks of his enemies or for any other particular purpose, while the grantee is willing to render those services, the grantor can put an end to the contract by saying that he has no enemies to repel, and therefore no need of the grantee's further services? NILMONEY SINGH DEO *v.* SHEO TEWARY . . . . . **W. R. 1884, 324**

18. ——— *Impartible vatan.* A cessation (even though sanctioned by the Government) of the performance of the duties attached to an impartible vatan does not alter the nature of the estate and make it partible. SAVITRIAVA *v.* ANANDRAV . . . . . **12 Bom. 224**

19. ——— *Impartible vatan—Discontinuance of services.* Discontinuance of services attached to an impartible vatan does not alter the nature of the estate and make it partible. RAMRAO TRIMBAK *v.* YESHVANTRAO MADHAVRAO **I. L. R. 10 Bom. 327**

20. ——— *Commutation of services—Desaigiri allowance—Right to hold as personal gratuity—Amin sukhdi—Suit to establish right to amin sukhdi.* The parties, who were desais of Mahudha, in addition to their "desaigiri" allowance enjoyed an allowance called "amin sukhdi." In 1847 the plaintiff sued the defendant's father and the Collector of Kaira for a share of the allowance; but as the whole of it had been reserved by the Collector to the defendant's father as the officiating desai, the suit was rejected under Act XI of 1843. In 1866 an arrangement was come to, under which a sum of R40-2-0 was to be annually available over and above the remuneration of the officiator. On the 9th of July 1867 the defendant received this sum for the first time. In 1873 a new arrangement was effected, under which the service was abolished, the Government resuming half of the allowance and giving up the other half freed from service unconditionally to the desais. On the 4th of October 1878 the plaintiff brought this suit to establish his right to a share of the moiety of the amin sukhdi allowance given to the desais by the Government and to recover his share of the amount received by the defendant. The defendant contended that the allowance was impartible and in the nature of a personal gratuity exclusively enjoyable by himself. *Held*, that, independently of its origin and the light in which it was regarded by the Government and the parties, the amin sukhdi allowance having been actually included in and dealt with as part of the desaigiri vatan, and a moiety of it having been subsequently freed from the obligation of service, the desai who happened to officiate at the time the allowance was freed from service had no right to hold the moiety exclusively as a personal allowance to himself. MANEKLAL AMRATLAL *v.* SHIVLAL BHOGILAL . **I. L. R. 8 Bom. 426**

SERVICE TENURE—*contd.*

21. ——— *Long possession—Liability for rent.* The mere fact of a long prior possession or a service tenure on no rent at all gives the holder no exemption from the payment of rent when the service is no longer required or performed. CHUNDAR NATH ROY *v.* BHEEM SARDAR **W. R. 1864, Act X, 37**

22. ——— *Commutation of services for rent.* Where the original donee of a service tenure ceases to do any service and pays in lieu a rent which his descendants continue to pay, the condition of the tenure becomes altered from service to rent. MAHENDRA SINGH *v.* JOKHA SINGH **19 W. R. P. C. 211**

23. ——— **Resumption of tenure**—*Partition where service lands are all allotted to one co-sharer.* The joint proprietors of a talukh assigned to the defendants a portion of land therein in consideration of chowkidari services rendered by him throughout the area of the talukh. A butwara having been effected, the plaintiff obtained a fourth share within which fell the assigned land. Upon this the plaintiff sued the defendant to take back three-fourths of the service land on the ground that being a one-fourth shareholder, he ought not to pay more than a one-fourth share of the consideration for the services rendered. *Held*, that, as long as the defendant's services were required and rendered, the plaintiff could not, in equity or justice, withdraw from the defendant that land which had been given him by all the shareholders, when they were joint, as a consideration for those services. BEECHOOK PASBAN *v.* KULAR SINGH . **20 W. R. 369**

24. ——— *Bom. Act VII of 1863, s. 2—Jurisdiction of Civil Courts—Resumption of service tenures.* Cl. 4 of s. 2 of Bombay Act VII of 1863 (an Act for the summary settlement of claims to exemption from the payment of Government land revenue) enacted that no suit or action between Government and the holders of . . . any lands held for service in regard to the tenure of such lands should be entertained in any Court of Civil Judicature. *Held*, that the phrase "lands held for service" meant lands declared by Government under s. 32 (*d*) of the Act to be so held, though the plaintiff might deny that the lands in respect of

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SERVICE TENURE—*contd.*

which he sues were service lands. The laying down of general rules by Government as to the resumption of service lands under art. 3, cl. 3 of s. 2 of the Act, was not a condition precedent to their protection from suits and actions in respect of such lands. PREMSHANKAR RAGHUNATHJI *v.* GOVERNMENT OF BOMBAY . . . . **8. Bom. A. C. 195**

25. ——— *Suit for ejectment—Bengal Tenancy Act (VIII of 1885), ss. 89 and 181.* Service tenures are excepted from the operation of s. 89 of the Bengal Tenancy Act. MOKBUL HOSSAIN *v.* AMEER SHEIKH **I. L. R. 25 Calc. 131**

26. ——— *Resumption by Government of the estates held on political tenure—Mixed estate of saranjam and inam so held—Jurisdiction of the Civil Court.* The engagements entered into by treaty between the British Government and the Raja of Satara in 1819, and the terms fixed separately with the several Satara jaghirdars in 1820, did not impart any greater fixity of tenure than had previously belonged to the latter under Maratha rule and their jaghirs remained liable to resumption at the will of the Government. The question to whom a saranjam, or jaghir, shall be granted, upon the death of its holder, is one which belongs exclusively to the Government to be determined upon political considerations; and it is not within the competency of any legal tribunal to review the decision. Inam villages and lands, with the mokasa, included originally in one saranjam granted under the Maratha rule for the support of troops, remained after 1820, when the rule of the Peshwa had ceased, a personal and military jaghir, forming a mixed estate of saranjam and inam. The tenure remained, under British rule, political; and no distinction could be drawn in this respect between the inam lands and the saranjam. The whole estate passed to the persons whom the Government at its discretion for political reasons recognised as the grantee, without its being competent to any Court of law to question the decision of the executive authority in the matter. SULTAN SANI *v.* AJMODIN. SULTAN SANI *v.* BEGUMBI **I. L. R. 17 Bom. 431 L. R. 20 I. A. 50**

27. ——— *Bhoomear tenures.* Bhoomears are bound to render certain customary services, but their lands are not resumable. GOPALNATH TEWAREE *v.* BHOOYAH ORANOO **6 W. R. 137**

28. ——— *Power of Government to resume majumdari vatans.* Government has no power to resume majumdari vatans where it dispenses with the services in respect of them, if the holders of such vatans are ready and willing to perform such services. GOVERNMENT OF BOMBAY *v.* DAMUDHAR PARMANANDAS . **5 Bom. A. C. 202**

29. ——— *Services dispensed with—Right of zamindar to resume.* A zamindar has *primâ facie* a right to resume lands of the zamindar granted subject to a quit-rent to tenants upon condition of their rendering personal services when such services are dispensed with. SANNIYASI RAZU *v.* ZAMINDAR OF SALUR. PAKIR RAZU *v.* ZAMINDAR OF SALUR . . **I. L. R. 7 Mad. 268**

SERVICE TENURE—*contd.*

30. ——— *Suit for enhancement of rent—Right to resume when services not required—Evidence.* *R* sued *S* to recover instalments of kist due on the ground that *S* held a village on service tenure (granted on condition of paying kist and performing service); that the services of *S* were not at present required, as the Court of Wards had assumed the management of the estate of *R*; that the assessment had accordingly been increased; and that defendant had declined to accept a lease at an enhanced rate and to execute a counterpart. *S* denied that he held on service tenure, and set up a gift from one of the ancestors of *R*. *Held*, that, as *S* failed to prove the alleged gift and had not traversed *R*'s allegation that he was entitled to resume the grant when the services were not required, and as it was proved that the kist had been enhanced on one occasion without objection from *S*, there was evidence to warrant the conclusion that the village was neither inam nor granted in perpetuity burdened with a certain service, and that *R* was entitled to the enhanced rate claimed. SITARAMARAZU *v.* JAGANADA NARAYANA **I. L. R. 3 Mad. 367**

31. ——— *Landlord and tenant—Service tenure with rent—Enhancement of rent—Resumption—Onus probandi.* In a suit brought in 1886 by a zamindar to recover an estate granted by his predecessor to the predecessor of the defendant on a service tenure, a small money-rent being also reserved, it appeared that in 1864 the right of the plaintiff's predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but in 1885 it was intimated to the defendant that the service was dispensed with, and a notice to quit was given to him; the option of holding the estate at an enhanced rent was, however, given to him at the same time. *Held*, that the plaintiff was not precluded by any implied contract from increasing the rent; and that the burden or proving the plea that the plaintiff was not entitled to eject lay on the defendants, and had not been discharged. MAHADEVI *v.* VIKRAMA . . . . **I. L. R. 14 Mad. 365**

32. ——— *Grant of service tenure rent-free—Assessment of rent by settlement officer when service no longer required—Bom. Act VI of 1862.* The talukhdari settlement officer having assessed rent-free land, on the ground that it had been granted for service, and that service was no longer required:—*Held*, that this was not a sufficient defence to an action by the holder of the land it not being shown that by the terms of the grant (assuming that there had been a grant of an estate burdened with service) the estate was determined by the remission of the service. KEVAL KUBER *v.* TALUKDARI SETTLEMENT OFFICER **I. L. R. 1 Bom. 586**

33. ——— *Lands held on amaram tenure resumable at will on reasonable notice—What amounts to reasonable notice considered.*

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SERVICE TENURE—*contd.*

A village and its hamlets had been given by a plaintiff's ancestors to the ancestors of the defendants on amaram service. Plaintiff now required the defendants to hand over the land, and had served two notices on them to that effect. The first of such notices had been served less than three months before the end of a fasli ; in the second, suit was threatened in default of reply within ten days. *Held*, that lands held on amaram tenure are resumable, and that the defendants had no permanent right of tenure. *Held*, further, that, before such resumption of lands can take place, reasonable notice must be given ; and that the notices which had been served were insufficient. NARASAYYA *v.* VENKATAGIRI RAJAH . . I. L. R. 23 Mad. 262

See UNIDE RAJAHA RAJE BOOMARANGE BAHADUR *v.* PEMRUASAMY VENKATADRY NAIDOO 7 Moo. I. A. 128

34. ——— *Jagir granted to gorait or village watchman—Resumption by zamindar—Liability to ejectment—Notice to quit.* A service tenure created for the performances of services, private or personal, to the zamindar may be resumed by the zamindar when the services are no longer required, or when the grantee of the tenure refuses to perform the services. The distinction between a grant of an estate burdened with a certain service and an office the performance of the duties of which is remunerated by the use of certain lands pointed out. *Sannayasi* v. *Solur Zamindar, I. L. R. 7 Mad. 268 ; Hurrogobind Raha* v. *Ramrutno Dey, I. L. R. 4 Calc. 67 ; Sreesh Chunder Rae* v. *Madhub Mochee, S. D. A. (1857), p. 1772 ; Nilmoney Singh Deo* v. *Government, 18 W. R. 321 ; Unide Rajaha Raje Bammarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo, 7 Moo. I. A. 128 ; Forbes* v. *Meer Mahomed Takee, 13 Moo. I. A. 438 ; Lilanand Singh* v. *Munorunjun Singh, 13 B. L. R. 124 : L. R. I. A. Sup. Vol. 181 ;* and *Mahadevi* v. *Vikrama, I. L. R. 14 Mad. 365* referred to. In a suit for resumption of jagir lands granted by the zamindar to a gorait (village watchman), the lower Courts found that the grant was made in favour of the defendant's ancestor more than twelve years before suit and descended from father to son, who was allowed to retain possession without rendering services to the zamindar, and that the zamindar could not prove the terms of the grant. *Held*, that the facts found did not legitimately lead to the inference drawn therefrom that the tenure was of a permanent character, but that the defendants could not be ejected without notice. RADHA PERSHAD SINGH *v.* BUDHU DASHAD I. L. R. 22 Calc. 938

35. ——— *Resumption of service grant.* The plaintiff sued for possession of three villages granted by his predecessor to the ancestors of the defendants on the ground that the villages had been granted on service tenure, and that he was entitled to resume them. *Held*, on the evidence, that the plaintiff was not entitled to resume the villages. VIZIANAGRAM MAHARAJAH *v.* SITARAMARAZU . . I. L. R. 19 Mad. 100

SERVICE TENURE—*contd.*

36. ——— *Resumption of land granted with condition of service—Land granted as remuneration for service—Service attached to grant of hereditary office—Adverse possession—Limitation.* Land granted with a condition of service attached to the grant cannot be resumed when the service is no longer required. But land granted as remuneration for service may be resumed when the service is no longer required, except when there has been a grant of an hereditary office to those who are to perform the service. In that case, the land can only be resumed when the need of such service altogether ceases. Where the services are still required, and the grantee has a right to the hereditary office, he cannot be deprived of the land on the mere ground that the grantee prefers to appoint some one else to officiate. The ancestors of the plaintiff appointed the ancestors of the defendants as hereditary kulkarnis, and granted to them certain lands as remuneration for service as kulkarni and as karkun. The service required as karkun ceased in 1863-64. Members of defendants' family officiated as kulkarnis for more than two hundred years. They continued to officiate till 1887. Their services were then dispensed with, and a stranger was appointed kulkarni by the plaintiff. In 1894 the plaintiff sued to recover all the lands. *Held*, (i) that the appointment of the defendants' family as hereditary kulkarni was valid. (ii) That the claim to recover possession of part of the lands assigned for the remuneration of the defendants as karkun was time-barred by the defendants' adverse possession since 1863-64. (iii) That the defendants' possession of the lands assigned for the remuneration of the defendants as kulkarni was not adverse to the plaintiff previously to 1887, but that, as the hereditary kulkarnis of the village, the defendants were entitled to enjoy the land to long as the services of a kulkarni were required, whether their services were accepted or were refused, provided they duly discharged the duties of the office should their services be required. BHIMAPAIYA *v.* RAMCHANDRA BHIMRAO . I. L. R. 22 Bom. 422

37. ——— *Non-performance of service, effect of—Adverse possession—Limitation, liability to.* Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse, there must be a refusal to perform service or a claim to hold the land free of service. KOMARGOWDA *v.* BHIMAJI KESHAV . . . I. L. R. 23 Bom. 602

38. ——— *Non-performance of service—Payment of assessment by mortgagee—Change of title—Redemption.* Plaintiff was the holder of certain inam lands, which were exempted from payment of assessment in consideration of his rendering certain services to Government. In 1873 the lands were mortgaged to defendant, on condition that he was to enjoy the usufruct in lieu of interest. In the famine of 1876 plaintiff left the village, and as no service was rendered, Government appointed another person to perform the service and demanded

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SERVICE TENURE—*contd.*

payment of the full assessment from defendant. Defendant paid the assessment and continued in possession. But Government did not forfeit the holding, and the lands continued, as before, in plaintiff's name in the vatan register. In 1896 plaintiff filed a suit to redeem the lands. *Held*, that, in the absence of a declaration of forfeiture of the holding, the steps which Government took to recover the assessment in lieu of service had not the effect of creating any change of title, and that the plaintiff was therefore entitled to redeem. BHIMA *v.* RAGHAVENDRACHARYA . . . **I. L. R. 24 Bom. 482**

39. ——— *Chakeran lands—Chowkidari duties.* In a suit for the resumption of certain chakeran lands on the appellant's talukh, Government contended that the lands were appropriated to the maintenance of a chowkidar, and that the holder of these lands was liable to the performance of none but police or chowkidari duties. The talukhdar (appellant) contended that the lands were gram surinjami lands not liable to the performance of any but personal services to him, and not legally appropriated for the performance of these services, but resumable by him. *Held*, by the Privy Council, that the lands in question were to be considered as appropriated to the maintenance of a chowkidar in the talukh ; that the right of appointing such officer belonged to the talukhdar ; and that such officer was liable to the performance of such services to the talukhdar as, by usage in the zamindari, chowkidars were accustomed to render to the zamindar. JOYKISHEN MOOKERJEE *v.* COLLECTOR OF EAST BURDWAN . **1 W. R. P. C. 26 : 10 Moo. I. A. 16**

40. ——— *Resumption of jaghir—Proof of personal services—Grant of sanad to jagirdar.* Where a sanad granted to the holder of a jagir was only a confirmation by the Government and the Rajah of the tenure under which the jagir was held, and authorised the jagirdar to remain in possession and in the performance of the services with his brothers, without describing the kind of service : *Held* by the Privy Council, that the Rajah could not resume the land without proof that the services to be performed by the jagirdar were personal services only to the Rajah. NILMONEY SINGH DEO *v.* GOVERNMENT . . **18 W. R. 321**

s.c. in High Court . . . **6 W. R 121**

41. **Forfeiture of tenure**—*Alienation without grantor's consent.* In a suit to obtain khas possession of lands which were found to have been held of plaintiff and his ancestors by defendants and their ancestors upon a service tenure, but which the grantees alienated to strangers, without any acquiescence on the part of the grantor, and then ceased to perform the services, it was *held* that the defendants had forfeited their right to hold the land at all. RAMGOPAL CHUCKERBUTTY *v.* CHUNDERNATH SEIN . . . **10 W. R. 289**

42. ——— *Refusal to perform services—Ejectment.* A distinct refusal by a tenant to perform services incidental to his holding renders him liable to ejectment. HURROGOBIND RAHA *v.* RAMRUTNO DEY . **I. L. R. 4 Calc. 67**

SERVICE TENURE—*contd.*

43. ——— *Tenure resumable at will to grantor—Notice to surrender.* Where land held on service tenure is resumable at the will of the grantor, the holder cannot be ejected before a reasonable notice to surrender the land has been given. LAKSHMI *v.* CHENDRI . **I. L. R. 8 Mad. 72**

44. ——— *Land tenure—"Mokhassadars"—Distinction between outright grant subject to performance of services, and grant of an office with remuneration from use of lands—Primâ facie ownership—Burden of proof of right to eject or resist ejectment.* The tenure known as "*mokhassa*" is one which is created by an assign ment of a village or land to an individual, either rent-free or at a low quit-rent, on condition of service. Where the grantor of land on *mokhassa* tenure has made the grant as payment for services in lieu of money, *semble* that he may discontinue the employment and, with it, the remuneration, and resume the subject-matter of the grant. But when the grant was outright, subject only to the performance of certain services, the grantor is only entitled to insist upon the performance of the services, and is not entitled to eject the grantees until such performance is refused. Where the lands granted were the lands of the *zamindar*, and the grant was on the condition that services should be rendered, and that a certain sum should be payable to the *zamindar* in recognition of his ownership, *primâ facie* the ownership would remain with the *zamindar : Sanniyasi* v. *Salur Zamindar, 1. L. R. 7 Mad. 268 ;* and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the person resisting ejectment : *Mahadevi* v. *Vikrama, I. L. R. 14 Mad. 365*, referred to. A village was granted on a quit-rent of R144 per annum, and on condition that the grantees would provide the services of certain persons to act as custodians of the zamindar's property and to give personal attendance on the *zamindar*. These services were rendered intermittently, and not continuously, and *batta* was paid to the grantees when on duty. The quit-rent had never been varied throughout a period of 120 years, and the land descended hereditarily from father to son, there having been no instance of resumption during that period. Moreover, the present holder of the *zamindari* had taken leases from the *mokhassadars* as if they were the owners of the land, and had purchased other lands from them. *Held*, that the village had been granted in perpetuity to the *mokhassadars*, and that the present holder of the *zamindari* was not entitled to dispense with the services and resume the lands. *Forbes* v. *Meer Muhamed Tuquee, 13 Moo. I. A. 438 at p. 464*, and *Kooldeep Narain Singh* v. *The Government, 14 Moo. I. A. 247*, followed. SOBHANADRI APPA RAO *v.* VANKATANARASIMHA APPA RAO (1902) **I. L. R. 26 Mad. 403**

45. ——— *Grant of land for services—Grant in lieu of wages—Right of grantor to resume land, when services are not required—Grant of mokhasah village for long period at unvarying quit-rent—Resumption, suit for.* Where a grant of land is subject to a burden of service, and is not a mere

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SERVICE TENURE—*contd.*

grant in lieu of wages, the grantor has no right to put an end to the tenure, whether the services are performed or not, as long as the grantees are willing and able to perform the services. *Leelanund Singh* v. *Munoorunjun Singh, L. R. I. A. Sup. Vol. 181 : 13 B. L. R. 124,* followed. A mokhasah village had been held by the defendants and their ancestors in a yearly quit-rent of R144 from a period antecedent to the introduction of the British Government on conditions of service to provide a specified number of men as custodians of the grantor's property and to attend him on hunting or military expeditions. The services were rendered intermittently and not continuously, and batta was paid to the grantees when actually on duty. The quit-rent had never varied for a period of 120 years, and there had been no interference with a devolution of the property from heir to heir nor any instance of resumption during that period. *Held,* in a suit for resumption by the zemindar, that he was not entitled to dispense with the services and resume the village at his option. VENKATA NARASIMHA APPA RAO *v.* SOBHANADRI APPA RAO (1905)

I. L. R. 29 Mad. 52
s.c. L. R. 23 I. A. 46
10 C. W. N. 162

46. ——— *Occupancy right —Service-tenure—Under-tenants, if can acquire occupancy—Ejectment—Notice to quit.* When land was granted to a person as a service-tenure, the condition being that he was to hold it in lieu of services to be performed by him as chowkidar : *Held,* that tenants under him did not acquire occupancy right by holding the land for more than 12 years. *Held,* further, that on the death of the grantee, the grantor was entitled to sue the under-tenants in ejectment without previously serving them with notices to quit. *Ansar Ali Jemadar* v. *C. E. Grey, 2 C. L. J. 403,* referred to. MRITUNJOY ROY CHOWDHRY *v.* KENATULLAH NARYA (1906) . **11 C. W. N. 46**

47. ——— **Digwari tenure**—*Digwar of Ghat Tasra in Jheria—Police duties—Government control—Rights of the zamindar—Right in sub-soil—Mokurari lease of under-ground rights granted by Digwar, suit by zamindar questioning—Government a necessary party.* The Digwar of Tasra and Raharaband in Jheria has been holding under a tenure which is ancient and hereditary, subject to the payment to the zamindar of a fixed rent only, and on condition of the performance of certain police or public services for the due discharge of which the holder has been responsible to the Government, which alone has exercised the power of appointment to and dismissal from office. His position is analogous to that of the Ghatwals of Birbhum. The under-ground rights, including mining rights belong to the Digwar, the right to receive the fixed rent alone being reserved to the zamindar. *Sriram Chukrabutty* v. *Kumar Hari Narain Singha, 10 C. W. N. 425 ; s.c. 3 C. L. J. 59,* followed. Government has an interest in maintaining intact the mouzahs set apart for the remuneration of the Digwar, and it has all along assumed itself to possess the right to do so. Where therefore the zamindar

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instituted a suit against the Digwar with the object of establishing his exclusive right to the sub-soil and minerals. *Held,* that the Government was a necessary party to the suit. BROJO NATH BOSE *v.* DURGA PERSAD SINGH (1907) **12 C. W. N. 193**

48. ——— *Resumption—Digwars of Ramgurh—Dismissal by Government and re-settlement with them as sikmi talookdars—Default, proof of—Act VIII of 1878, settlement under—Effect.* The Digwari service in this case corresponded closely with what in other cases have been termed ghatwali. There is nothing in the use of the term Digwar to raise any presumption in favour of the contention that the holders of land by a service so named hold as personal servants of the Rajah. If anything, the presumption would seem to be the other way. The power of Government, although generally exercised through the Rajah, was always recognised as supreme with respect to the supervision over the Digwars in regard to the discharge by them of their police duties. The Rajah of Ramgurh never possessed or exercised a right to dismiss the Digwars and to resume the Digwari grants, save in cases of default ; and by the terms under which persons held Digwari grants, no such power was given or reserved to the Rajah. The dismissal by Government of the Digwars and the substitution for them as a new system of rural police supposed to be of superior quality did not entitle the Rajah to resume the lands as for default. The subsequent settlement of the lands by Government, purporting to act under Bengal Act VIII of 1878, with the dismissed Digwars, treating them as *sikmi* talookdars, and imposing on them assessments, for road and police purposes on an amount far beyond the burden which previously rested on the holdings in the shape of supplying patrols, amounted to a continuance in the form imposed by statute of their public duties. There was no default. NAM NARAIN SINGH *v.* TEKAIT GANJHU (1889)

12 C. W. N. 178

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20 W. R. Cr. 50
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See VERDICT OF JURY—POWER TO INTERFERE WITH VERDICTS.

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See JUDGMENT—CRIMINAL CASESS.
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See PLEADER—APPOINTMENT AND APPEARANCE . I. L. R. 23 Calc. 493

See PRACTICE—CRIMINAL CASES—RULE TO SHOW CAUSE.

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SESSIONS JUDGE—*concld.*

——— **duty of**—*concld.*

See REVISION—CRIMINAL CASES—DISCHARGE OF ACCUSED. . 7 C. W. N. 77

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See CRIMINAL PROCEDURE CODE, SS. 447, 449 . . I. L. R. 29 Bom. 575

See REMAND . I. L. R. 32 Calc. 1069

——— **Obligation to form independent opinion on case**—*Opinion of committing Magistrate, reference to, by Sessions Judge in his judgment.* On a case the decision of which is vested by law in him sitting with assessors, a Sessions Judge is bound to form his own opinion, aided by the assessors indeed, but quite independent of any expression of opinion on the part of the committing Magistrate. The Judge's reference in his judgment to the opinion of the committing Magistrate was held to be wholly irrelevant and wrong. DEWAN SING *v.* QUEEN-EMPRESS I. L. R. 22 Calc. 805

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See BAIL . . I. L. R. 1 All. 151
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7 C. L. R. 143
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LIKELIHOOD OF BREACH OF THE PEACE **I. L. R. 28 Calc. 416**

DECISION OF MAGISTRATE AS TO POSSESSION . **5 C. W. N. 71**

See REFORMATORY SCHOOLS ACT, 1897.
4 C. W. N. 225

See REGISTRATION ACT, 1877, s. 83 (1866, s. 95) . **6 B. L. R. 692 ; 693 note.**

See REVISION—CRIMINAL CASES—ACQUITTALS . . . **7 C. W. N. 711**

See SANCTION FOR PROSECUTION—POWER TO GRANT SANCTION.
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I. L. R. 2 Bom. 384
I. L. R. 2 All. 205
I. L. R. 10 All. 582

See SECURITY FOR GOOD BEHAVIOUR.
24 W. R. Cr. 10
I. L. R. 20 Calc. 155

See SESSIONS JUDGE.

1. ——— **Offence under Bom. Reg. XVII of 1827, s. 16**—*Criminal Procedure Code, 1869.* An offence under s. 16, Regulation XVII of 1827, being punishable by imprisonment for seven years was triable exclusively by a Court of Session under the provisions of the schedule of the Code of Criminal Procedure Amendment Act (VIII of 1869). REG *v.* AJAM DULLA . . **8 Bom. Cr. 115**

2. ——— **Offence under Opium Regulation**—*Bom. Reg. XXI of 1827. s. 7—Criminal Procedure Code, 1861, ss. 21 and 409.* Although the effect of s. 21 of the Code of Criminal Procedure, 1861, was to give exclusive original jurisdiction to the Magistrate of the district in the trial of cases under s. 7 of Regulation XXI of 1827 for abetting the smuggling of opium, that s. 21 did not exclude the appellate jurisdiction vested in the Court of Session by s. 409 of the Code. REG. *v.* SADU DADABHAI . . . . . **9 Bom. 166**

3. ——— **Offence under s. 26, Railways Act (XVIII of 1854)**—*Order for fresh trial.* A railway watchman was charged before a Head Assistant Magistrate with an offence under s. 26 of Act XVIII of 1854. That charge was dismissed, but the Sessions Judge ordered a fresh trial. *Held*, that in so doing the Sessions Judge acted without jurisdiction. ANONYMOUS . **6 Mad. Ap. 41**

4. ——— **Offence under Registration Act (XX of 1866), s. 95**—*Abetment of false personation of witness before Registrar.* The Sessions Judge had jurisdiction to try a case of abbeting false personation of a witness before a Registrar of Assurances under s. 95 of the Registration Act (XX of 1866). QUEEN *v.* SHEOGOLAM DAS
6 B. L. R. F. B. 693 : 15 W. R. Cr. 58

5. ——— **Order of Magistrate attaching land**—*Criminal Procedure Code, 1861, s. 319.* A Sessions Judge had no power to interfere with an order of a Magistrate attaching disputed land under s. 319 of the Code of Criminal Procedure, 1861. HURRONATH CHOWDHRY *v.* RAJENDER CHUNDER ROY . . . . . **15 W. R. Cr. 1**

6. ——— *Criminal Procedure Code, 1861, s. 319—Appeal from Magistrate. Held*, that the Sessions Judge had no jurisdiction to hear an appeal from the order of a Magistrate, under s. 319, Ch. XXII of the Criminal Procedure Code, 1861, and that the object of the chapter was to prevent breaches of the peace likely to be occasioned and not the adjudication of title. *In the matter of the petition of* DUTT RAM MISR
1 Agra Cr. 29

7. ——— **Appeals from sentences of Justice of the Peace acting under Act I of 1859.** The Sessions Court has jurisdiction to hear appeals from the sentences of a Justice of the Peace acting under the Merchant Seamen's Act (I of 1859). *In the matter of the petition of* EVANS
2 Mad. 473

8. ——— **Offence under Penal Code, s. 409, and under s. 29, Act V of 1861**—*Power of Sessions Judge after acquittal on former charge.* Where an accused was charged before the Sessions Judge under both s. 409, Penal Code, and under the special law, s. 29, Act V of 1861, and was acquitted under the former section, it was *held* that the Sessions Judge could not convict under the latter law, as the Magistrate alone had jurisdiction to convict under that law. QUEEN *v.* BHOOBUN SINGH. BHOOBUN SINGH *v.* QUEEN
9 W. R. Cr. 36

9. ——— **Power of Sessions Judge to add charge and try it**—*Addition of charge triable by any Magistrate—Criminal Procedure Code, 1882, s. 28.* Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code ; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Three persons were jointly committed for trial before the Court of Session, two of them being charged with culpable homicide not amounting to murder of *J* and the third with abetment of the offence. At the trial the Sessions Judge added a charge against all the accused of causing hurt to *C*, and convicted them upon both the original charges and the added charge. The assault upon *C* took place either at the same time as or immediately after the attack which resulted in the death of *J*. *Held*, that the Sessions Judge had

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SESSIONS JUDGE, JURISDICTION OF —*contd.*

power, under s. 28 of the Code, to try the charge, assuming that he had power to add it. QUEEN-EMPRESS *v.* KHARGA . **I. L. R. 8 All. 665**

10. ——— *Criminal Procedure Code, 1872, s. 231—Conviction on fresh charge in support of which there was no evidence before Magistrate.* *R*, having been committed by a Magistrate for trial by a Sessions Court on a charge, under s. 202 of the Penal Code, of having intentionally omitted to give information which he was legally bound to give respecting a murder, pleaded guilty, on his trial, to the charge on which he was committed. Upon the application of the Public Prosecutor, the Sessions Judge, under protest on the part of the prisoner, added a charge under ss. 109 and 201 of the Penal Code of abetting *C*, a female co-prisoner charged with having assisted in burying the body of the murdered person, required *R* to plead to the charge, and, having tendered a pardon to and examined *C* as a witness, convicted and sentenced *R* to two years' rigorous imprisonment. *Held*, that, as there was no evidence before the Magistrate to support the charge against *R* framed by the Sessions Judge, the action of the Judge was *ultra vires* and the conviction on the added charge illegal. *Held*, also, that, inasmuch as the Sessions Judge considered *R* more culpable that *C*, the proper course would have been to have adjourned the trial, sent the record to the Magistrate, and suggested an inquiry as to whether there was ground for a more serious charge against *R*. *Semble*: The object of restricting a Sessions Court from taking cognizance of any offence (except as provided in ss. 455, 472, 474 of the Criminal Procedure Code), unless the accused person has been committed by a Magistrate, is to secure to the prisoner a preliminary enquiry which affords him an opportunity of becoming acquainted with the circumstances of the offence imputed to him and enable him to make his defence. MUTIRAKAL KOVILAGATHA RAMA VARMA RAJA *v.* QUEEN . . . **I. L. R. 3 Mad. 351**

11. ——— **Trial without committal by Magistrate**—*Witness sent up with conditional pardon—Criminal Procedure Code, 1861, ss. 359, 439. Held*, that a Sessions Judge acted irregularly in at once trying and convicting a person who had been granted a conditional pardon by the Magistrate, and who had been sent up to the Sessions Court as a witness for the Crown. Such a course was held to be a material irregularity under s. 439 of the Code, and the Sessions Judge was directed to order the Magistrate to commit the accused to the Sessions for a fresh trial after hearing his defence and examining his witnesses. QUEEN *v.* BIPRO DASS **19 W. R. Cr. 43**

12. ——— **Order for re-trial on appeal**—*Criminal Procedure Code, 1872, s. 280, amended by s. 28, Act XI of 1874.* It is competent to a Court of Session under s. 280 of the Criminal Procedure Code as amended by s. 28, Act XI of 1874, to order a re-trial of a case which is before it on appeal. *In the matter of* SHER MAHOMED . **2 C. L. R. 511**

13. ——— **Power to give judgment on evidence partly recorded by predecessor**—*Criminal Procedure Code, 1872, s. 328.* The power given by the Criminal Procedure Code to a Magistrate to pronounce a judgment upon evidence partly recorded by his predecessor and partly by himself does not extend to a Sessions Judge. TARADA BALADU *v.* QUEEN . **I. L. R. 3 Mad. 112**

QUEEN *v.* RUGOONATH DASS . **23 W. R. Cr. 59**

14. ——— **Power in regular appeal**—*Insufficient evidence—Acquittal.* If the evidence which comes before a Sessions Judge in a regular appeal from a Magistrate's order is not sufficient to reasonably satisfy him that the prisoners have been rightly convicted, he ought to acquit them. *In the matter of the petition of* KHERAJ MULLAH. KHERAJ MULLAH *v.* JANAB MULLAH **11 B. L. R. 33 : 20 W. R. Cr. 13**

15. ——— **Power to suspend sentence.** A Sessions Judge has no authority to suspend his own sentence. ANONYMOUS . **4 Mad. Ap. 2**

16. ——— A Sessions Judge has no power to suspend a sentence in any case unless there is an appeal. ANONYMOUS **5 Mad. Ap. 1**

He should state distinctly whether he agrees with the verdict of the jury or not. QUEEN *v.* CHAND BAGDEE . . . **7 W. R. Cr. 6**

17. ——— **Power to prevent prisoner from appealing**—*Right to appeal.* It is not the province of the Sessions Judge to decide whether a prisoner has a right of appeal or not; he is bound to allow a prisoner, whose conviction he has confirmed, to execute a vakalatnama to appeal. QUEEN *v.* VAIYAPURI GAUNDAN . **1 Mad. 4**

18. ——— **Mitigation of sentence without appeal.** *Held*, that a Sessions Judge has no power to mitigate a sentence passed upon a prisoner who has not appealed to him. REG. *v* MULIYA NANA . . . **5 Bom. Cr. 24**

19. ——— **Power to sentence on appeal from decision of Magistrate**—*Commutation of sentence.* A Sessions Judge cannot, on appeal from a Magistrate's decision, inflict a term of imprisonment in commutation of a fine longer than that which the Magistrate himself could have inflicted. REG. *v.* HARI BIN VITHOJI . **1 Bom. 139**

20. ——— **Alteration of sentence in appeal**—*Enhancement of sentence—Appellate Court's power to alter a sentence of fine into one of imprisonment—Criminal Procedure Code, 1882, s. 423.* A Sessions Judge has no power to enhance a sentence in appeal by altering a sentence of fine into one of imprisonment. QUEEN-EMPRESS *v.* DANSANG DADA . . **I. L. R. 18 Bom. 751**

QUEEN-EMPRESS *v.* LACHMI KANT **I. L. R. 18 All. 301**

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SESSIONS JUDGE, JURISDICTION OF —contd.

21. ——— Power to pass sentence of death—*Affray with murder—Offence before Penal Code came into operation.* In a case of affray attended with murder, in which the offence was committed before the Penal Code came into force, it was *held* that a Sessions Judge had himself power, under s. 4, Act XVII of 1862, to pass sentence of death, instead of referring the matter for confirmation of the High Court. QUEEN *v.* BUSTI SINGH . . . **14 W. R. Cr. 76**

22. ——— Amendment of sentence—*Alteration of conviction—Criminal Procedure Code, 1861, s. 22. Held,* that an order of a Sessions Judge, by which he altered a conviction by the Assistant Sessions Judge of " dacoity " to one of " robbery " was illegal, not being an amendment of a sentence or order within the meaning of s. 22 of the Criminal Procedure Code. *Held,* further, that, if the accused were, in the opinion of the Sessions Judge, improperly convicted of " dacoity," he ought to have declined to confirm the sentence and to have left them to be charged with and tried for " robbery." REG. *v.* THOMESIT . . . . **5 Bom. Cr. 22**

23. ——— Concurrent jurisdiction with Magistrate—*Criminal Procedure Code, 1861, s. 434—Report to High Court.* A full-power Magistrate was not immediately subordinate to the Sessions Court, and therefore a Sessions Judge had no concurrent jurisdiction with the Magistrate of the district, under s. 434 of the Code of Criminal Procedure. His proper course, if he thinks that an illegal sentence or order has been passed by a full-power Magistrate, is to make a report to the High Court, which will then, if it thinks fit, call for the proceedings. REG. *v.* SHIVASAPA . **7 Bom. Cr. 73**

24. ——— Power to call for and refer to the High Court proceedings of Magistrate—*Criminal Procedure Code, 1869, s. 23. Held,* that under the provisions of s. 23 of the Code of Criminal Procedure, 1869, a full-power Magistrate was, for the purposes of s. 434, immediately subordinate to the Magistrate of the district, and not to the Court of Session. The Sessions Judge therefore had no power to call for or refer to the High Court proceedings in a case before a full-power Magistrate. REG. *v.* KESHAVSHET . . **6 Bom. Cr. 74**

25. ——— Power to refer to High Court—*Unnecessary reference to High Court.* Where an appeal is preferred to a Sessions Judge from the order of a Magistrate which he considers illegal, the Sessions Judge should himself deal with the case, instead of referring it to the High Court. QUEEN *v.* NUSSUROODDEEN SHAZWAL **11 W. R. Cr. 24**

26. ——— Power to call for report from Magistrate—*Power to call for record and proceedings.* A Sessions Judge ought not to call for a report from the Magistrate of the district in any case in which it is not competent to such Sessions Judge to call for the record and proceedings, *e.g.*, in the case of a person tried by a Subordinate Magistrate who has appealed to the District Magistrate.

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In trials by the Magistrate of the district, or full-power Magistrate, in which the Sessions Judge can call for the record and proceedings, he has power also to call for a report. REG. *v.* GIRDHAR DHARAMDAS . . . . . **6 Bom. Cr. 33**

27. ——— Power to call for and examine record—*Absence of order by Magistrate.* There was no provision in the Criminal Procedure Code, 1861, which made it lawful for a Court of Session to call for and examine the record of a case tried by a Subordinate Magistrate where no sentence or order had been passed thereon by the immediately subordinate Court of the Magistrate. REG. *v.* BHASKAR KHARKAR . . **3 Bom. Cr. 1**

28. ——— Trial in case committed by Magistrate—*Objection that case was tried without complaint.* A Court of Session cannot treat as a nullity the commitment of a full-power Magistrate, on the ground that he investigated the case, and committed the prisoner, without a formal complaint being made to him, but should proceed with the trial in the usual course. REG. *v.* RANCHODDAS NATHUBHAI . . . . **4 Bom. Cr. 35**

29. ——— ——— *Objection to irregularity of proceedings.* The fact of a commitment being made by a Joint Magistrate, who is an officer exercising the powers of a Magistrate, was sufficient, under s. 359, Code of Criminal Procedure, to enable the Sessions Judge to proceed with the trial; and it lay with the party impugning the correctness of the proceedings to show that there was no jurisdiction. QUEEN *v.* KOMUROODDEE SIKHDAR . . . . **13 W. R. Cr. 17**

30. ——— Power to quash sentence of Assistant Sessions Judge—*Sentence submitted for confirmation. Held,* that a Sessions Judge had no power to quash a sentence passed by an Assistant Judge, and by him submitted for confirmation, and to direct a new sentence to be passed, even supposing the sentence of the Assistant Sessions Judge to be illegal. REG. *v.* MURAR TRIKAM **5 Bom. Cr. 3**

31. ——— Power to quash commitment for illegality—*Duty to report proceedings to High Court.* The Criminal Procedure Code, 1861, did not authorise the Sessions Judge to quash a commitment on the ground of illegality. If the Sessions Judge is of opinion that the order of commitment should be annulled as illegal, he should move the High Court to annul the same under s. 404 of the Criminal Procedure Code. QUEEN *v.* MATA DYAL **4 N. W. 6**

32. ——— Power to annul conviction and sentence—*Offence beyond jurisdiction of subordinate Court.* It is only when a Court subordinate to a Court of Session convicts a person of an offence not triable by such Court that the Court of Session can annul the conviction and sentence. If the prisoner is guilty of an offence beyond the jurisdiction of the subordinate Court, the Court of Session should refer the case to the High Court. QUEEN *v.* ICHABUR DOBEY . **4 W. R. Cr. 11**

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SESSIONS JUDGE, JURISDICTION OF —*contd.*

33. ——— Power to quash proceedings of Magistrate. The order of a Sessions Judge to quash proceedings held before a full-power Magistrate annulled as having been made without jurisdiction. REG. *v.* GOBINDA BIN BABAJI **5 Bom. Cr. 15**

REG. *v.* GOPAL LAKSHUMAN . **5 Bom. Cr. 25**

34. ——— Power to quash illegal conviction—*Giving false evidence in judicial proceeding.* The offence of giving false evidence in a stage of a judicial proceeding is not cognizable by an Assistant Magistrate. A Sessions Judge on appeal can quash an illegal conviction by an Assistant Magistrate in such a case. QUEEN *v.* HEERAMUN SINGH . . . . . **8 W. R. Cr. 30**

35. ——— Power to annul conviction and order commitment—*Offences triable by Magistrate—Criminal Procedure Code* (*Act VIII of 1869*), *s. 435.* The Sessions Judge had no jurisdiction to annul a conviction and order a commitment for an offence triable by a Magistrate. S. 435, Act VIII of 1869, related to offences triable by the Sessions Judge. *In the case of* WAZIR SINGH **3 B. L. R. A. C. 65 : 12 W. R. Cr. 46**

QUEEN *v.* JEETUN KHAN . **11 W. R. Cr. 45**

36. ——— *Illegal conviction by Magistrate—Criminal Procedure Code, 1861, s. 435.* Where the Sessions Judge was of opinion that a Subordinate Magistrate had convicted the defendant of an offence which the Subordinate Magistrate had no power to try, the Sessions Judge might, under s. 435 of the Code of Criminal Procedure, 1861, annul the conviction and direct the committal of the accused for trial. ANONYMOUS **5 Mad. Ap. 32**

37. ——— Order to cancel proceedings of Divisional Magistrate—*Proceedings reviewing the calendars of Subordinate Magistrate.* A Sessions Judge has no power to direct a Divisional Magistrate to cancel his proceedings reviewing the calendars of Magistrates subordinate to him. ANONYMOUS . . . **7 Mad. Ap. 27**

38. ——— Power to direct Magistrate to commit to Sessions—*Conviction by Magistrate without jurisdiction.* Where a Magistrate has convicted and sentenced a prisoner of an offence which such Magistrate was competent to try, and the Sessions Judge considered the case so grievous that it should not have been disposed of summarily :—*Held*, that such Sessions Judge was not competent to direct the Magistrate to commit the prisoner to the Sessions Court for trial upon the same charge. QUEEN *v.* HIDDUN KHAN **2 N. W. 285**

39. ——— Power to reverse order of Magistrate as to stolen property. A Deputy Magistrate restored to an accused money found in his house along with stolen property, the prosecutor having failed to prove that the money was his. The Sessions Judge on appeal reversed that order, and directed the money to be made over to the prosecutor. *Held*, that the order of the Sessions Judge was made without jurisdiction. QUEEN *v.* SHIB CHUNDER RAI . . . **9 W. R. Cr. 57**

40. ——— Conviction on confession before Magistrate after plea of not guilty. A Sessions Judge, after a prisoner upon his trial has pleaded what in effect amounts to a plea of not guilty, is not justified in convicting the prisoner solely upon a confession made before the committing Magistrate. QUEEN *v.* HURSOOKH . **2 N. W. 479**

41. ——— Power to interfere with order of acquittal—*Acquittal by Magistrate—Criminal Procedure Code, 1861, s. 435.* After an accused person had been acquitted under s. 255 of the Code of Criminal Procedure, it was not competent to the Sessions Judge to interfere under s. 435 of the same Act. REG. *v.* VENKU NARSA **9 Bom. 170**

42. ——— Power to order commitment —*Cases exclusively triable by Court of Session.* The Court of Session can only order the commitment of an accused person in cases exclusively triable by it. QUEEN *v.* SEETUL PERSHAD **5 N. W. 168**

43. ——— *Power to commit to itself cases not triable exclusively by Court of Session—Criminal Procedure Code* (*Act X of 1872*), *ss. 231, 471, and 472.* A Court of Session had no power to commit to itself for trial a case not triable exclusively by such Sessions Court. The words "commit the case itself" in s. 471 of the Code of Criminal Procedure cannot (when read in connection with s. 231) be held to empower a Sessions Court to commit such a case to itself. *In the matter of* EMPRESS *v.* FUTTEH JYA KHAN **I. L. R. 4 Calc. 570**

S. C. *In re* FATA IYAH KHAN . **3 C. L. R. 599**

44. ——— *Criminal Procedure Code, 1861, s. 435.* Where a Judge, under s. 435 of the Criminal Procedure Code, had directed the Magistrate to commit certain accused persons, as also to take their defence:—*Held*, that, as the Magistrate could not require the accused to produce evidence nor to make a defence, the Judge should not have included such instructions in his order of commitment, but that the order was not, therefore, invalid. QUEEN *v.* GHASEE . . **4 N. W. 50**

45. ——— *False evidence.* The Sessions Judge has no power to commit a man for having given false evidence before the Magistrate, but he can commit him for having given false evidence in his own Court. QUEEN *v.* HARDYAL **3 B. L. R. A. Cr. 35**

46. ——— *Criminal Procedure Code, 1872, s. 472.* *L* made a complaint against *S* by petition, in which he only charged *S* with having committed offences punishable under ss. 193 and 218 of the Penal Code, but in which he also accused *S* of acts which, if the accusation had been true, would have amounted to an offence punishable under s. 466 of that Code with seven

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years' imprisonment. The Magistrate inquired into the charges against *S* under ss. 193 and 218 of the Penal Code, and directed his discharge. *L* then applied to the Court of Session to direct *S* to be committed for trial on the ground that he had been improperly discharged, which the Court of Session did, and *S* was committed for trial charged under s. 218 of the Code, and was acquitted by the Court of Session. The Court of Session then, under s. 472 of Act X of 1872, charged *L* with offences punishable under ss. 193, 195, 211, and 211 and 109 of the Penal Code, and committed him for trial. *Held*, that such commitment was not bad by reason that an offence under s. 193 of the Penal Code is not exclusively triable by a Court of Session. *Held*, also, *per* SPANKIE, *J.*, that the Court of Session was competent, notwithstanding that *L* had only charged *S* with offences under ss. 193 and 218 of the Penal Code, to charge *L* with offences under ss. 195 and 211, if such offences had come under its cognizance. EMPRESS LACHMAN SINGH . . **I. L. R. 2 All. 398**

47. ——— *Criminal Procedure Code, 1861, s. 435 and s. 359.* A Sessions Judge was competent, under s. 435, Code of Criminal Procedure, to order the committal of a person accused of giving false evidence after the discharge of such person by the Magistrate, s. 359 notwithstanding (*J.* KEMP, *dissentiente*). QUEEN *v.* BHOHISAN MAHATOON **W. R. 1864 Cr. 3**

48. ——— *Person discharged by Magistrate.* A Sessions Judge has discretion to order the commitment to the Court of Session of any accused person discharged by the Magistrate. The non-exercise of such discretion cannot be interfered with by the High Court. QUEEN *v.* SHEETARAM CHOWDHRY **2 W. R. Cr. 44**

49. ——— *Discharge of accused on inquiry before Magistrate—Further inquiry.* When an inquiry has been made and the accused discharged, the Session Court may order the commitment of the accused, but cannot merely direct further inquiry. QUEEN *v.* GHASSERAM **3 N. W. 90**

50. ——— *"Acquittal and release" of accused by Magistrate—Criminal Procedure Code, 1861, s. 435.* Where a Magistrate used the words "acquittal and release," when he intended only to discharge a person accused of an offence not triable by him :—*Held*, that the Court of Session was competent, under s. 435, Code of Criminal Procedure, to order a commitment of such accused person. QUEEN *v.* NEETIE DULAL **8 W. R. Cr. 41**

51. ——— *Discharge by Magistrate—Criminal Procedure Code, 1861, s. 435.* A Sessions Judge might, under s. 435 of the Code of Criminal Procedure, after a Magistrate has discharged an accused person, order the Magistrate to commit the accused person to the Sessions. *In the matter of the petition of* MUSMUD ALI CHOWDHRY *alias* MOOCHEE MEAN . . **7 W. R. Cr. 38**

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52. ——— *Conviction under Penal Code, ss. 323, 352.* A Sessions Judge has no authority to interfere and direct a committal in the case of a conviction for assault under s. 352 or of hurt under s. 323 of the Penal Code, both of them being offences triable by the subordinate Court. QUEEN *v.* RAMTOHUL SINGH . **5 W. R. Cr. 12**

53. ——— **Power of Joint Sessions Judge**—*Criminal Procedure Code (Act X of 1872, s. 17, and Act X of 1882, ss. 9 and 195, and Ch. XXXII)—Discharge by a Magistrate—Power of Joint Sessions Judge to direct committal.* A Joint Sessions Judge cannot exercise the powers of the Sessions Judge under Ch. XXXII of the Criminal Procedure Code (Act X of 1882). Accordingly where a Magistrate had discharged certain accused persons, and the Joint Sessions Judge had subsequently, on the application of the complainant, ordered their committal to the Sessions Court, the High Court set aside the proceedings of the Joint Sessions Judge, leaving it to the Sessions Judge of the district, if a proper case was made out to order a committal, or dispose of the application as he might think fit. *In the matter of the petition of* MUSA ASMAL . . . **I. L. R. 9 Bom. 164**

54. ——— *Applications under Criminal Procedure Code, 1882, Ch. XXXII—Sessions Judge, power of, to direct disposal by Joint Sessions Judge of such applications as cases transferred—Criminal Procedure Code, 1882, s. 193, and Ch. XXXII.* Applications under Ch. XXXII of the Code of Criminal Procedure (Act X of 1882) cannot be referred to a Joint Sessions Judge under s. 193, cl. 2, of the Criminal Procedure Code, so as to make it competent for a Joint Sessions Judge to dispose of them, a Joint Sessions Judge being strictly precluded from exercising any of the powers under Ch. XXXII of the Criminal Procedure Code, and s. 193, cl. 2, contemplating only cases for trial. REFERENCE BY THE SESSIONS JUDGE OF SURAT . . **I. L. R. 9 Bom. 352**

55. ——— *Criminal Procedure Code, s. 289—"No evidence"—Acquittal of accused without taking opinions of assessors.* The words "there is no evidence" in s. 289 of the Code of Criminal Procedure, 1882, cannot be extended to mean no satisfactory, trustworthy, or conclusive evidence ; but the third paragraph of the section means that, if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power, without consulting the assessors, to record a finding of not guilty. But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy, or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Code of Criminal Procedure. *In the matter of the petition of Narain Dass, I. L. R. 1 All.*

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610, referred to. QUEEN-EMPRESS *v.* MANNA LALL . . . . I. L. R. 10 All. 414

56. ——— *Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—Penal Code, s. 196.* A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code when he has as District Judge given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure. *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit, I. L. R. 16 Calc. 121*, overruled, *Empress* v. *D'Silva, I. L. R. 6 Bom. 479*. referred to. QUEEN-EMPRESS *v.* SARAT CHANDRA RAKHIT I. L. R. 16 Calc. 766

57. ——— *Criminal Procedure Code, ss. 193, 287, 288—Cancellation of conditional pardon to prisoner—Approver, trial of—Proof of confessional statements of accused.* Several persons were charged with dacoity. While the case was pending, two of the accused made confessional statements; afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the depositions made by them before the Magistrate, but not their confessional statements, to be read to the jury. *Held*, that the trial of the the two persons, who had not been committed to the Sessions Court, was *ultra vires*. The proper course was to have treated the evidence given by them before the committing Magistrate as evidence in the case under s. 288 of the Code, and to have allowed the other accused to cross-examine them. *Per curiam*: The Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as accused. QUEEN-EMPRESS *v.* RAMA TEVAN I. L. R. 15 Mad. 352

58. ——— *Conditional pardon to prisoner—Withdrawal of pardon and trial of person pardoned conditionally—Approver, trial of, jointly with other accused—Power of Sessions Court to try person not committed—Criminal Procedure Code, s. 193.* Two persons, *J* and *U*, were charged with the murder of *U*'s husband, and in the course of the police inquiry made certain statements to the police. They were then sent up by the police to a Deputy Magistrate for inquiry. *J* made three statements on the 28th of February, the 1st of March and the 9th of March 1894, respectively, two of which were confessions, the third being a withdrawal of such confessions. *U* also made two statements on the 2nd and 9th of March, the first of which was a confession, and the second a withdrawal thereof. On the 27th of April *U* was tendered a pardon, and was thereafter treated as an approver, in which capacity she gave evidence against *J*. *J* was then committed to the Court of Sessions to take his trial, *U* being sent up as an approver. In the Sessions Court *U* resiled from her deposition before the committing Magistrate, and was then and there treated as an accused person, and placed on her trial with the other accused and the deposition aforesaid was put in as evidence. Both accused were convicted mainly on their confessions, *J* of murder and *U* of abetment of murder. *Held*, that the conviction of *U* was bad, the Court of Sessions having had no jurisdiction to try her, as she was never committed to that Court by any competent Magistrate. QUEEN-EMPRESS *v.* JAGAT CHANDRA MALI . . I. L. R. 22 Calc. 50

59. ——— *Powers of Sessions Judge on revision—Further enquiry, power of Sessions Judge to direct—Criminal Procedure Code (Act X of 1882), ss. 423, 435, 436, 439.* A complaint was made before a Magistrate, which involved a charge of dacoity against the accused person and others. The Magistrate, in dealing with the case, proceeded under s. 209 of the Code of Criminal Procedure, and, finding no case of dacoity *primâ facie* established, proceeded to frame charges under s. 254 of the Code charging the accused with offences under ss. 380 and 448 of the Penal Code, *viz.*, theft in a building and criminal trespass. Having heard the whole of the evidence, he then acquitted the accused under s. 258 of the Code, and gave him sanction under s. 195 to prosecute the complainant under s. 211 of the Penal Code. The complainant then applied to the Sessions Judge to revoke that sanction. The Sessions Judge proceeded to consider the whole case, and finding that a proper inquiry had not been made and all evidence available not taken, and that, had this been otherwise, a Sessions case might have been established, directed the Magistrate to hold a further inquiry, and to proceed, in accordance with the result of such inquiry, either to commit the accused to the Sessions or grant the sanction, as the case might be. *Held*, that the Sessions Judge had exercised a jurisdiction not vested in him by law. Acting as a Revision Court, he could send for the record for any purpose mentioned in s. 436, but he was not competent under s. 436 to direct a fresh inquiry, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Session, but had been acquitted of an offence within the Magistrate's jurisdiction. The Sessions Judge had in fact exercised the jurisdiction vested in him as an Appellate Court under s. 423, as if an appeal had been presented to him from an order of an acquittal; such powers in revision cases are only conferred on the High Court. BAIJNATH PANDEY *v.* GAURI KANTA MANDAL . . . I. L. R. 20 Calc. 633

60. ——— *Sessions Judge's power to review his order in proceedings taken to revoke sanction.* A Sessions Judge, having once refused to revoke a sanction granted by a subordinate Court under s. 195 of the Criminal Procedure

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Code (Act X of 1882), has no jurisdiction afterwards to review his order and set aside the sanction. An application to a Sessions Judge for revocation of sanction granted under s. 195 of the Code is a criminal proceeding in revision. Any order passed in such a proceeding is final, and cannot be reviewed or revived by him. *Queen-Empress* v. *Fox, I. L. R. 10 Bom. 176*, and *Medhi Hasan* v. *Tota Ram, I. L. R. 15 All. 61*, referred to. QUEEN-EMPRESS *v.* GANESH RAMKRISHNA . **I. L. R. 23 Bom. 50**

61. ——— *Appeal from a conviction by a Magistrate, other than a Presidency Magistrate, where accused pleads guilty—Power of Sessions Court.* The accused pleaded gulity to a charge of kidnapping from lawful custody, and was thereupon convicted by a Magistrate of the first class and sentenced to four months 'rigorous imprisonment and a fine of R20. The accused appealed, and in appeal denied that he had committed the offence. The Sessions Judge was of opinion that, as the accused had pleaded guilty at the trial, he had no power to deal with the appeal except as regards the amount of punishment awarded. He therefore referred the case to the High Court. *Held*, that the Sessions Judge was competent to deal with the whole appeal. S. 412 of the Criminal Procedure Code (Act X of 1882) had no application. That section provides for convictions by Courts of Session or Presidency Magistrates only, and the exception is not only as to the extent, but also as to the legality of the sentence. QUEEN-EMPRESS *v.* KALU DOSAN **I. L. R. 22 Bom. 759**

62. ——— *Criminal Procedure Code (Act V of 1898), ss. 195, 476—Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere.* A Deputy Magistrate, having decided that certain witnesses (who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances. *Held*, that, whether the Deputy Magistrate had intended to pass an order under s. 476 or to make a complaint under s. 195 (*1*) (*b*) of the Code of Criminal Procedure, the Sessions Judge had no power to interfere. QUEEN-EMPRESS *v.* ANKANNA **I. L. R. 23 Mad. 205**

63. ——— *Criminal Procedure Code (Act V of 1898), s. 436—Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal.* Charges under ss. 304 and 147 of the Penal Code were brought by the police against certain accused in the Court of a Deputy Magistrate, who took all the evidence for the prosecution. but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence

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insufficient to support the charges, altered them to charges under ss. 325 and 147 of the Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge, considering the alteration in the charges improper at such a stage, ordered a fresh inquiry into the offence. *Held*, that the Sessions Judge had exercised jurisdiction not conferred upon him by law, and that his order for a fresh inquiry must be set aside. *Baijnath Pandey* v. *Gauri Kanta Mandal, I. L. R. 20 Calc. 633*, approved of. QUEEN-EMPRESS *v.* HANUMANTHA REDDI . . **I. L. R. 23 Mad. 225**

64. ——— **Evidence recorded partly by another Judge**—*Criminal Procedure Code (Act V of 1898), s. 350—Sessions Judge—Magistrate—Trial—Consent of the prisoner—Jurisdiction.* Under the Code of Criminal Procedure (Act V of 1898), a Sessions Judge is not authorised to try a case partly on evidence not recorded by himself; and he cannot do so, although the prisoner has given his consent to such a trial. S. 350 of the Criminal Procedure Code applies solely to Magistrates. KING-EMPEROR *v.* SAKHARAM PANDURAM (1901) **I. L. R. 26 Bom. 50**

65. ——— **Order for re-trial on appeal**—*Criminal Procedure Code (Act V of 1898), ss. 423 (b), 232—Re-trial, power of Sessions Court to order—Defective framing of charges—Prejudice—Penal Code (Act XLV of 1860), ss. 154, 155.* There is nothing in the language of s. 423 (*b*), Code of Criminal Procedure, to limit the power of an Appellate Court to direct a re-trial to cases in which the trying Magistrate had no jurisdiction. Apart from the general power given to an Appellate Court to order re-trial, under s. 423 (*b*), Code of Criminal Procedure, a Sessions Judge is empowered by s. 232, Code of Criminal Procedure, to direct a re-trial to be had upon a charge, framed in whatever manner he thinks fit, on the ground that the accused had been misled in his defence by the absence of a charge or a defect in the charge. Certain owners of land were convicted under s. 154 or s. 155 of the Indian Penal Code, for acts or omissions on the part of their agents. The charges framed by the Magistrate against them, however, referred only to the knowledge and belief and acts and omission of the accused themselves. The Sessions Judge, on appeal, held that, by reason of the omission to insert the words "or their agents or managers" in the charge, the accused had been seriously prejudiced in their defence, and directed a new trial upon charges so amended as to have reference to the acts and omissions of the agents. *Held*, that the order for re-trial was legally made by the Sessions Judge. SARAT CHANDRA SHAH CHOWDHRY *v.* EMPEROR (1902) **7 C. W. N. 301**

66. ——— **Powers on revision**—*Conviction of offence without charge—Order of Appellate Court for re-trial—Criminal Procedure Code (Act V of 1898), ss. 232, 243.* Where an accused was charged under s. 471 of the Penal Code with dishonestly using as genuine a false document, and the Magistrate convicted him under s. 500 of that Code of defamation,

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of which offence there was no charge framed against him : *Held*, that the Sessions Judge, if he thought a new trial necessary, should have proceeded under s. 232 of the Criminal Procedure Code, under which an Appellate Court is competent to direct a re-trial, and not, as he did, under s. 423. *Quære :* Whether an Appellate Court has, under s. 423 of the Code, general power to order a new trial. GOBINDA PERSHAD PANDEY *v.* GARTH (1900)
I. L. R. 28 Calc. 63
s.c. 5 C. W. N. 819

67. ———— Qualification—*Criminal Procedure Code (Act V of 1898) ss. 476, 487, 556—False statement made before District Judge—Order for inquiry—Conviction—Appeal to the Sessions Judge—Sessions Judge whether interested in the case, and disqualified from hearing appeal.* A Sessions Judge is not, by reason merely of having as a District Judge ordered an inquiry under s. 476, Code of Criminal Procedure, disqualified under s. 487 of that Code from trying the case, or hearing an appeal when the case has been tried by a lower Court ; nor does this make him "personally interested" in the case, within the meaning of s. 556 of the Code. *Queen-Empress* v. *Sarat Chandra Rakhit (1889), I. L. R. 16 Calc 766,* followed. Illustration in s. 556, Code of Criminal Procedure, distinguished. EMPEROR *v.* BANKA BEHARI BANIK (1903)
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1. GENERAL CASES.

1. ———— Raising issue of set-off on trial—*Procedure.* When a defendant raises a claim of set-off on the trial of that issue, he must be considered as plaintiff. JAGADAMBA DASI *v.* GROB
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As to how cases of set-off will be dealt with, *see* RAMGOPAL *v.* MAJETI MALLIKKARJANUD
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2. ———— Power of Revenue Court to allow set-off under Act X of 1859, s. 24—*Suit by principal against agent.* A Revenue Court acting under the provisions of s. 24, Act X of 1859, had jurisdiction to allow a set-off for any sums which the agent might either have paid to his principal directly or used for the benefit of his principal with his sanction and authority. MOHIMA RUNJUN ROY CHOWDHRY *v.* NOBO COOMAR MISSER
18 W. R. 339

3. ———— Written statement of set-off—*Act VIII of 1859, s. 121.* Under s. 121, Act VIII of 1859, a defendant, desirous of setting off against the claim of the plaintiff the amount of any payment made by him on plaintiff's account, was bound to tender a written statement containing the particulars of his demand. POORNA CHUNDER ROY *v.* BEHAREE LALL MOOKERJEE . **14 W. R. 473**

4. ———— Character in which claim is made—*Civil Procedure Code, s. 111—Written statement pleading a set-off.* In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference. *Held*, (i) that the written statement must be regarded as a plaint in regard to the set-off, and should have been stamped accordingly ; (ii) that if the plaintiff claimed as the heir and representative of his father, the set-off was rightly pleaded. CHENNAPPA *v.* RAGHUNATHA . **I. L. R. 15 Mad. 29**

5. ———— Right of set-off—*Cross-demands arising out of same transaction. Semble :* The right of set-off will be found to exist not only in cases of mutual debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. CLARK *v.* RUTHNAVALOO CHETTI . **2 Mad. 296**

6. ———— *Cross-demands arising out of same transaction—Suit to enforce*

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contract—Damages. The right of set-off exists where there are cross-demands arising out of one and the same transaction, or where these are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. In a suit to recover money due under a contract made between the plaintiff and defendants:—*Held*, that the defendants were entitled to set off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on. KISTNASAMY PILLAY *v.* MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS **4 Mad. 120**

7. ——— *Cross-demand arising out of the same transaction—Civil Procedure Code (Act XIV of 1882), s. 111.* When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under s. 111 of the Civil Procedure Code. *Bhagbat Panda* v. *Bamdeb Panda, I. L. R. 11 Calc. 557*, relied on. *Clark* v. *Ruthnavaloo Chetti, 2 Mad. H. C. 296*, referred to. CHISHOLM *v.* GOPAL CHUNDER SURMA **I. L. R. 16 Calc. 711**

8. ——— *Civil Procedure Code, s. 111—Suit for balance of account.* The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions, one to the effect that the Government, if it saw fit at the expiration of the lease to farm the bridge to any other contractor, should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge or for any other cause, for which the lessee is not responsible, he will be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease, and the Magistrate of the district, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock which was ultimately fixed at R10,900. The Magistrate added a percentage, bringing the total amount up to R12,100, and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract. *Held*, that the sum of R12,100 assessed in the manner above described could not strictly be regarded as a set-off. The suit was one for balance of account, and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the

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item allowed in their favour. SECRETARY OF STATE FOR INDIA *v.* MADARI LAL . **I. L. R. 13 All. 296**

9. ——— *Civil Procedure Code, ss. 111, 216—Cross-claims of the nature of set-off.* The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not of the quality contracted for. *Held*, that in such a suit the defendant might claim by way of set-off compensation for the loss which he had incurred in the re-sale of that portion of the timber, the subject of the contract, or which the plaintiffs had failed to take delivery. S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off. *Clark* v. *Ruthnavaloo Chetti, 2 Mad. 296; Kistnaswamy Pillay* v. *Municipal Commissioners for the Town of Madras, 4 Mad. 120; Kishorchand Champalal* v. *Madhowji Visram, I. L. R. 4 Bom. 407; Praji Lal* v. *Maxwell, I. L. R. 7 All. 284; Bhagbat Panda* v. *Bamdeb Panda, I. L. R. 11 Calc. 557;* and *Chisholm* v. *Gopal Chunder Surma, I. L. R. 16 Calc. 711*, referred to. NIAZ GUL KHAN *v.* DURGA PRASAD . **I. L. R. 15 All. 9**

10. ——— *Right to set-off a claim for unliquidated damages—Civil Procedure Code (Act X of 1877), s. 111—Costs—Act XXVI of 1864, s. 9.* The provisions of the Civil Procedure Code (Act X of 1877) do not give the right to set off claims for unliquidated damages, but that Code does not take away any right of set-off, whether legal or equitable, which parties to a suit would have independently of its provisions. Where, therefore, in a suit for the price of goods sold and delivered, the defendant admitted that there was a sum of R1,159-12-0 due by him to the plaintiff, but sought to set-off the sum of R972 as damages sustained by him by reason of the non-delivery of some of the goods contracted for, it was *held* that, as the claim of the defendant against the plaintiff was connected with the same transaction and arose out of one and the same contract as that in respect of which the plaintiff's suit was brought, and as the amount of the defendant's claims was capable of being immediately ascertained, the defendant might set-off his claim. *Clark* v. *Ruthnavaloo Chetti, 2 Mad. 296*, and *Kistnasamy Pillay* v. *Municipal Commissioners of Madras, 4 Mad. 120*, followed. Where the defendant proved a set-off against the plaintiff, and thus reduced the amount which he (plaintiff) was entitled to recover from the defendant, for breach of contract:—*Held*, that, notwithstanding the provisions of s. 9 of Act XXVI of 1864, the plaintiff was entitled to his costs. KISHORCHAND CHAMPALAL *v.* MADHOWJI VISRAM . **I. L. R. 4 Bom. 407**

11. ——— *Right to set-off a claim for an unascertained amount—Civil Procedure Code (Act XIV of 1882), s. 111.* The provision of the Civil Procedure Code (Act XIV of

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1882), s. 111, does not take away from parties any right to set-off, whether legal or equitable, which they would have had independently of that Code. And such right exists not only in cases of material debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover, and the defendant should be driven to a cross-suit. Where, therefore, a decree had been obtained against certain persons in respect of arrears of rent of an ijara held jointly by them, and one of them having been forced, to pay the whole amount of decree, sued the others, for contribution, and where in such suit the defendants pleaded that, although the plaintiff had paid off the whole of the decree in question, he was not entitled to recover any portion from them, inasmuch as he was indebted to them for his share of the ijara rents, the whole of which had been paid by them to the zamindar in previous years, as well as in respect of rent due to them for the share on account of a portion of the land which he himself held in nij-jote, and for which he had paid no rent, and that, on accounts being gone into, it would be found that their claim exceeded that of the plaintiff:—*Held*, following *Clark* v. *Ruthnavaloo Chetti*, *2 Mad. 296*, and *Kishorchand Champalal* v. *Madhowji Visram*, *I. L. R. 4 Bom. 407*, that notwithstanding the provisions of s. 111 of the Civil Procedure Code, the defendants' claim for the share of rents paid by them to the zamindar on account of the same ijara might properly be pleaded as a set-off and be taken into account in determining the plaintiff's suit as arising out of the same transaction, but that their claim for rent for the portion of the lands held by the plaintiff in nij-jote could not be treated in such manner, but must form the subject-matter of a separate suit. BHAGBAT PANDA *v.* BAMDEB PANDA **I. L. R. 11 Calc. 557**

12. ——— *Right to set off damages for breach of contract—Civil Procedure Code, 1882, s. 111—"Ascertained" sum.* A suit was brought by *P* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. Defendants claimed a set-off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October 1879 and subsequently. *Held*, that, although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set-off under s. 111 of the Civil Procedure Code, that section was one regulating procedure and was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions, that the right of set-off would be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arose out of one and

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the same transaction. or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit; and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai* v. *Ram Sahai*, *7 N. W. 157*; *Kistnasamy Pillay* v. *Municipal Commissioners of Madras*, *4 Mad. 120*; and *Kishorchand Champalal* v. *Madhowji Visram*, *I. L. R. 4 Bom. 407*, followed. *Per* OLDFIELD, *J.* That the excess of the set-off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set-off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim. *Per* DUTHOIT, *J.*—That although the set-off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court-fees on that account. PRAGI LAL *v.* MAXWELL . . **I. L. R. 7 Mad. 284**

13. ——— *Civil Procedure Code, 1859, s. 121—Suit or award determining several items—Mutual liability under award.* *G* and *R* referred to arbitration disputes between them regarding the partition of their paternal estate. The concluding portion of the award ran as follows: "Both parties shall jointly satisfy the debts on the creditors demanding payment, which debts are joint and have hereunder been declared payable by both parties. Should one party neglect to pay or show carelessness in the matter, and should the other be obliged to pay the whole amount of any such debts, the latter shall be competent to realize from the former portion of the debt paid on his account, together with costs and interest by the enforcement of this award, and shall also be entitled to recover the amount by suit in Court. Both parties shall act up to this award in its entirety. The sum of R338-0-9 which has been found due and payable by *G* to *R* as per account showing the mutual dealings between the parties, shall be made good as follows, *i.e.*, *G* shall pay to *R* the whole amount of R338-0-9 by the middle of the month of Pous 1276 Fasli, either in a lump sum or by instalments, and in case of non-payment within the said period he shall be charged with interest at the rate of one per cent. up to the day of payment." *R* sued to recover from *G* the money found to be due and payable to him under the award. *G* admitted the claim, but desired to set-off half the amount of certain debts which were payable under the award by the parties jointly, and which he alone had satisfied. The lower Appellate Court deducted from the claim items of the demand admitted by *R*, but refused to determine *G*'s right to set off the items which *R* disputed on the ground that they could be more conveniently inquired into in a separate suit. It was held (*per* STUART,

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C.J., SPANKIE, *J.*, dissenting), that *G* was entitled to demand a set-off, and that the lower Appellate Court should have inquired into the disputed items of the demand, and not have referred *G* to a separate suit in respect of those items. GAURI SAHAI *v.* RAM SAHAI . . . **7 N. W. 157**

14. ——— *Suit for redemption decree in—Set-off of costs against mortgage-money—Lien of attorney—Civil Procedure Code, 1877, ss. 111, 221.* The decree in a redemption suit directed the plaintiff (the mortgagor) to pay the mortgage-money and interest to the defendant, and directed the defendant to pay the plaintiff the costs of the suit. *Held*, that the plaintiff was entitled to set-off the amount of his taxed costs against the mortgage-money which he was liable to pay under the decree, notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of suit. BRIJNATH DASS *v.* JUGGERNATH DASS **I. L. R. 4 Calc. 742**

S.C. BRIJONATH DASS *v.* JUGGERNATH DASS **4 C. L. R. 122**

15. ——— *Civil Procedure Code (Act XIV of 1882), s. 221—Costs due by mortgage to mortgagor—Set-off against the mortgage-debt—Liability of mortgage for any balance—Redemption suit.* The mortagor is entitled to set-off or deduct the amount of costs payable to him under the decree against or from the mortgage-debt payable by him. If the amount of the costs be larger than the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance against the mortgagee. SIDU *v.* BALI **I. L. R. 17 Bom. 32**

16. ——— *Insolvency Act, s. 39—Mutual credit—Civil Procedure Code, 1877, s. 111.* Where there is a debt due from an insolvent prior to his insolvency to another from whom there was a debt which was in dispute due to the insolvent, in a suit brought by the Official Assignee to recover the latter debt, the defendant is entitled, under s. 39 of the Insolvent Act, 11 and 12 Vict., c. 21, to set-off the debt due from him to the insolvent against sums which may be claimed from him. MILLER *v.* BEER **6 C. L. R. 294**

17. ——— *Civil Procedure Code, 1882, s. 111—Court-fee on set-off.* In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant cla imed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commissio . It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him ; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission sale.

SET-OFF—*contd.*

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The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission sale was not gone into. The cloth now alleged to have been delivered on commission sale was the same as that alleged in the former suit to have been actually sold to the plaintiff. *Held*, that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set off the amount claimed as due for goods sold on commission against the plaintiff's demand. *Held*, also, that the court-fee payable on the claim for set-off was the same as for a plaint in a suit. AMIR ZAMA *v.* NATHU MAL . . **I. L. R. 8 All. 396**

18. ——— *Liquidated sum due on bond—Suit for rent.* A liquidated sum due on a bond is capable according to law, even without an agreement to that effect, of being set-off against sums due for rent. WATSON & Co. *v.* BROJOSOONDUREE DEBIA . . . **16 W. R. 225**

19. ——— *Debt due from deceased husband—Debt due to widow.* A widow is liable for a debt contracted by her husband. Such debt may be set-off against a debt due to her. GRISH CHUNDER LAHOORY *v.* KOOMAREE DABEA **1 W. R. Mis. 23**

20. ——— *Lambardar—Co-sharer—Revenue, payment of—Profits, suit for share of. Held*, (SPANKIE, *J.*, dissenting), that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharers, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment. UDAI SINGH *v.* JAGAN NATH . **I. L. R. 1 All. 135**

21. ——— *Purchase by patnidar of shares in zamindari—Set-off on payment of rent.* The four defendants obtained jointly a patni lease of *R*, and subsequently purchased jointly a 5 annas share in the zamindari. Defendants 1 and 2 separated from 3 and 4, each taking 8 annas of the patni and 2½ annas of the zamindari, and then defendants 3 and 4 sold their zamindari right in 2 annas and 15 gundas share to *K*, the plaintiff, retaining 5 gundas share on their own account. The plaintiff sued to recover the rent of 2 annas and 15 gundas from the defendants 1 and 2, who denied the plaintiff's claim, while they admitted that they were liable for 8 annas rent of the patni, treating themselves as their own zamindars for 2½ annas share in the zamindari, and the alleged payment of 5½ annas of the patni rent to the 8 annas share-holder in the zamindari, and a set-off against the other 2½ annas against their own claim as zamindars. *Held*, that, as the defendants 1 and 2 were strangers to the transfer of the rights of defendants 3 and 4 to the plaintiff, they had, as between themselves and the plaintiff, a right still to do what they did formerly, namely, set-off their patni liability against their zamindari right. GOOROO DYAL CHUCKERBUTTY *v.* KESHUB BIBEE **20 W. R. 409**

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SET-OFF—*contd.*

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22. ——— *Rent, suit for—Rent paid in kind—Set-off allowed for—Account.* In a suit for arrears of rent, where defendant pleaded that, under an arrangement between him and plaintiff's ancestors, payment had been made by him in cash or in kind, and asked for an account to be taken, the lower Court was *held* to have been wrong in decreeing the suit on the ground that it could not go into evidence on a question of set-off in a rent suit, and was bound to take an account. ROY NUNDEEPUT MOHATOON *v.* STEWART **23 W. R. 20**

23. ——— *Plea of payment in suit for arrears of rent—Indirect payment.* In a suit by a zamindar for arrears of rent the defendant alleged that his tenure had been placed under the management of the Collector, and had so remained for a number of years, and that the Collector, from money realized by him as manager, had, in addition to satisfying all other claims of the plaintiff, paid the rents accruing, not only during the period of his management, but up to, and inclusive of, the years the arrears of rent for which were claimed in the suit. The lower Court refused to consider the defendant's plea, on the ground that it was in the nature of a set-off, and that, not being a debt due from the plaintiff to the defendant, it was not such a set-off as could be allowed by the Court. *Held*, that the plea was a plea of payment merely and not in the nature of a set-off. KOONJO BEHARY SINGH *v.* NILMONEY SINGH DEO . . . . **4 C. L. R. 296**

24. ——— *Suit for contribution against person jointly liable for rent.* In ascertaining the amount due for contribution in a suit by one of two persons jointly liable under a decree for rent, the Court is bound to take into consideration sums paid by the defendant, on former occasions for rent in excess of his own share of the rent, although such sums are not claimed in his written statement, the sums paid not being in the nature of a set-off. GOGUN CHAND DUT *v.* HURI MOHUN DUT **12 C. L. R. 539**

25. ——— *Civil Procedure Code, 1859, ss. 121, 195—Claim arising out of same transaction.* Where a defendant claims a right of set-off arising out of one and the same transaction as that in which the suit originated, it is not equitable to drive him to a cross-suit: a decree under Act VIII of 1859, s. 195, and the latter portion of s. 121, being of the same effect and subject to the same rule as if it had been made in a separate suit. RADHA RAM DEB *v.* JAMES . . . **20 W. R. 410**

26. ——— *Decree for defendant on set-off where nothing found due to the plaintiff. Held*, that a defendant may deny the plaintiff's claim, and also plead a set-off and obtain a decree for it, although no sum may be found to be due to the plaintiff. HAYATKHA *v.* ABDULAKHA **6 Bom. A. C. 151**

27. ——— *Civil Procedure Code, 1859, s. 195—Counter-claim—Deductions allowed in ascertaining mesne profits.* S. 195, Act VIII of 1859, which enabled a defendant to obtain a decree against a plaintiff in respect of a counter-claim, was only applicable where defendant had been allowed to "set-off" a demand against plaintiff's claim, and did not apply to a case where, in ascertaining a defendant's liability for mesne profits, deductions were allowed from the rent proved to have been received, in the nature of allowances made for costs of cultivation or collection expenses. TILUCK CHAND *v.* SOWDAMINEE DASSEE **25 W. R. 275**

28. ——— *Subordinate Judge invested with Small Cause Judge's powers—Civil Procedure Code (Act XIV of 1882), s. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Procedure.* In a suit brought by the plaintiff to recover R36-7-9 from the defendant under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set-off R72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court:—*Held*, that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off. RAMPRATAP *v.* GANESH RANGNATH **I. L. R. 12 Bom. 31**

29. ——— *Civil Procedure Code, ss. 111, 216—Suit for dissolution of partnership.* A suit for dissolution of partnership in which the claim was valued at R2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above R5,000, then by reason of the provision in paragraph ii, s. 216 of the Code, an appeal from that decree will lie to the High Court, and not to the District Court. RAMJIWAN MAL *v.* CHAND MAL **I. L. R. 10 All. 587**

30. ——— *Claim of different nature.* It is not equitable to allow a set-off against a claim relating to a particular account stated, of a matter of another nature altogether. KALEE KOOMAR CHUCKERBUTTY *v.* HURO CHUNDER CHUCKERBUTTY . . . **17 W. R. 177**

31. ——— *Amount in excess of jurisdiction of Court.* A Court cannot entertain the question of set-off if the amount claimed by the defendant exceeds the amount cognizable by it. When a defendant pleads a set-off and claims a decree, the subject-matter of the suit is no longer the mere claim of the plaintiff, but the cross-claim of both parties. RAM LAL *v.* LANCASTER **3 N. W. 114**

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SET-OFF—*contd.*

1. GENERAL CASES—*contd.*

32. ——— *Unascertained sums.* Setting off an unascertained sum against another is a mode of settlement which, if suggested to the parties as a compromise, may, with their assent, be a fit end of a litigation, but cannot properly be made the basis of a decree between hostile litigants. BACHUN *v.* HAMID HOSSEIN. ABDOOL AZEEZ *v.* HAMID HOSSEIN
17 W. R. 113 : 10 B. L. R. 45

33. ——— *Civil Procedure Code, 1859, ss. 121, 195—Claim for unliquidated damages—Suit on bill of exchange—Cross-demands.* Ss. 121 and 195 of the Code of Civil Procedure (Act VIII of 1859) had not the effect of enlarging the right of set-off. In a suit against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set-off a claim for unliquidated damages unconnected with the bills of exchange. *Held*, that defendant had no right to set off his claim against the debt due to the plaintiffs. CLARK *v.* RUTHNAVALOO CHETTI . **2 Mad. 296**

34. ——— *Unascertained damages—Civil Procedure Code, 1859, s. 121.* Under s. 121, Act VIII of 1859, a defendant could not claim a set-off for damages in respect of an alleged breach of contract which had not been ascertained in a suit brought against him to recover the amount due on certain dishonoured hundis. RAM DYAL *v.* RAMDHUN DASS . . . **3 Agra 43**

RAM LALL *v.* KOONDUN LALL . **3 Agra 97**

35. ——— *Separate debt—Joint and several debt—Directors.* A separate debt cannot be set-off against a joint and several debt, and directors cannot set-off money due from the company to them against sums which may be ordered to refund to the liquidators. NEW FLEMING SPINNING AND WEAVING COMPANY *v.* KESSOWJI NAIK . . . . . **I. L. R. 9 Bom. 373**

36. ——— *Joint and separate debts—Mutual dealings.* *A* had dealings with a firm consisting of a father and two sons, who carried on business jointly. Shortly after the father's death, the two brothers separated, and *A* dealt with each separately, having notice of the separation. *A* could not set-off, against a claim made by one of the brothers, in respect of the separate dealings between himself and *A*, a debt due to himself from the former joint concern. DHUNPUT SINGH *v.* FORBES
1 Ind. Jur. N. S. 354

37. ——— *Costs—Omission to award costs.* A set-off cannot be allowed for costs not actually awarded, as where a decree of the High Court gave the successful appellant costs of that Court and of the lower Appellate Court, but omitted to award the costs of the first Court. HURO PERSHAD ROY CHOWDHRY *v.* FOOL KISHOREE DOSSEE
16 W. R. 308

38. ——— *Suit for carriage of goods—Set-off for damages.* In a suit for money

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claimed on account of the carriage of goods in which defendant pleaded non-indebtedness and a set-off on account of damage caused to the goods: *Held*, that defendant could not answer the claim with the set-off on account of damages, though the extent, if any, to which defendant was entitled to draw back might be put in issue, after which it would still be open to defendant to bring an action against plaintiff for special damages. SCANLAN *v.* HERROLD . **10 W. R. 295**

39. ——— *Suit for mesne profits—Civil Procedure Code, 1859, s. 121.* A set-off is not admissible in a suit for mesne profits, which is not suit for a debt within the meaning of s. 121, Act VIII of 1859. ROTEE ROMON OOPADHYA *v.* GREEJA NUND OOPADHYA . . **5 W. R. 160**

40. ——— *Unascertained mesne profits—Debt not due at time of suit.* An indefinite claim for damages in the nature of unascertained mesne profits cannot be pleaded as a set-off against specific claim for rent of later years. Such damages must be sued for separately. In a suit for rent a defendant has no right to set-off against the plaintiff's claim money in deposit with the plaintiff, unless such money was due and payable to the defendant at the time the suit was brought. GOCOOL COOMAR *v.* BHICHOOK SINGH . **22 W. R. 1**

41. ——— *Civil Procedure Code, 1877, s. 111—Mortgage—Compensation for waste.* The usufructuary mortgagee of certain land sued the mortgagor for the money due under the mortgage. The mortgagor alleged the mortgagee had committed waste and was liable to him for compensation which he claimed to set-off. *Held*, that under s. 111 of Act X of 1877 the amount of such compensation could not be set-off. RAGHU NATH DASS *v.* ASHRAF HUSAIN KHAN
I. L. R. 2 All. 252

42. ——— *Claim against deceased father—Right to appropriate property.* Where a widow administering her husband's estate sued to recover certain moveable property wrongly appropriated by her son, who pleaded a set-off on account of a claim against his father:—*Held*, that defendant was rightly referred to a separate suit. MANLY *v.* MANLY . . . **14 W. R. 136**

43. ——— *Civil Procedure Code, 1882, s. 111—Suit by creditor of deceased.* The heirs to *M*, deceased, appointed *A*, one of the heirs, manager of *M*'s estate, with a view to the payment of the debts due by the deceased. A creditor of the deceased sued his heirs to recover his debt and obtained a decree, in execution of which the share of *Z*, one of the heirs, in *M*'s landed estate was sold. The sale-proceeds exceeded *Z*'s share of such debt and she sued the other heirs for contribution in respect of the difference. The defendants claimed a set-off in respect of *Z*'s share of the liabilities of *M*'s estate which had been satisfied by *A* as manager. *Held*, that the set-off claimed could not be entertained in such suit. ABUL HASAN *v.* ZOHRA JAN
I. L. R. 5 All. 299

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SET-OFF—*contd.*

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44. ——— *Act VIII of 1859, s. 121—Co-sharers—Suit for contribution.* In a suit brought against a lessee of a portion of an estate by one of the co-sharers for money alleged to be due as the plaintiff's share of arrears of rent for a certain period, where the claim was admitted: —*Held*, that the defendant was not entitled to set-off under s. 121, Act VIII of 1859, the plaintiff's share of the Government revenue of the whole estate which had been paid by the defendant for the period for which the arrears of rent were alleged to be due. *Held*, also, that there was no such connection between the claim of the plaintiff and the counter-claim of the defendant as would entitle the defendant, as a matter of equity apart from legislative enactment to a set-off. HOSSEINA BIBI *v.* SMITH **13 B. L. R. 440 : 22 W. R. 15**

45. ——— *Suit for contribution—Shares on zamindari and shikmi rights.* Plaintiffs, as being entitled collectively to an 11-anna share of the jumma of a talukh and alleging that they had obtained such portion of their share as the 14-anna talukhdars were liable for, sued the 2-anna sharer for what he ought to have contributed. The lower Appellate Court, finding that the defendant had a 2-anna share in the zamindari, as well as in the shikmi, considered that the one right might be set off against the other, and that the plaintiffs had consequently no claim against the defendant. *Held*, that this conclusion was erroneous, for though there were in a certain sense opposing rights, still they were not mutual rights as between the parties to the present suit. The plaintiffs were entitled to get a 2-anna share of the jumma from the defendant and the 14-anna talukhdars jointly, and the defendant was entitled to get a like share from these 14-anna talukhdars and himself jointly, but the defendant had no right to set off the debt thus due to him against the debt due to the plaintiffs from the same persons. HUREE KISHORE ROY *v.* HUR KISHORE ADHIKAREE . . . . . **23 W. R. 134**

46. ——— *Debts not mutual—Disputed claim for rent in suit for payments made to save estate.* *A* and *B* were the proprietors of a jote, of which *B* leased half of his share to *C* as mirasidar. The zamindar brought a suit for rent of the jote against *A* and *B* and got a joint decree, in execution of which he put up the jote for sale. *C*, in order to save his miras right, paid the amount of the decree before sale, and then sued *A* and *B* for the amount so paid. *Held*, that *C* was entitled to recover, and that a claim for rent by *B* against *C*, but which *C* disputed, could not be admitted as an answer to *C*'s claim in the present suit or as a set-off. It is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties and in the same right. Bengal Regulation VIII of 1819, s. 13, and Bengal Act VIII of 1869, s. 62, discussed. BHOIRUB CHUNDER DOSS *v.* HAFEZUNISSA KHATOON . . . . **2 C. L. R. 414**

47. ——— *Suit for rent—Compensation for damage done in execution of decree.* If the cultivator suffer damage in execution of a decree of the Civil Court, he may sue and claim compensation for such damage; but until such damage has been ascertained and decreed, it cannot be set off against a claim for rent. RAI GOBIND SINGH *v.* SOONDER PAL . **2 Agra, Pt. II, 177**

48. ——— *Claim for rent—Suit for money paid to protect lease.* A claim for rent cannot be pleaded as a set-off in a suit for money paid by the plaintiff on account of revenue to protect a lease in the nature of a mortgage held by him. HEERA LALL *v.* BISHEN SUHAYE . **1 W. R. 297**

49. ——— *Account, suit for—Cross-appeal.* Of two appeals heard together the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other, their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties for damages for the detention of property which had belonged to the estate of the deceased. In the first the plaintiffs appealed; and in the second the defendant, who also, by cross-appeal claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits. *Held*, that, as the first suit was for an account only, and not for the recovery of money rendering it at least doubtful whether a set-off could be pleaded in defence, and as also no issue had been framed or even asked for on the question, it was not open to the defendant to raise it on this cross-appeal. NAN KARAY PHAW *v.* KO HTAW AH. KO HTAW AH *v.* NAN KARAY PHAW **I. L. R. 13 Calc. 124 : L. R. 13 I. A. 48**

50. ——— *Civil Procedure Code, 1882, s. 111—Counter-claim for damages—Costs of preparing a deed—Stamp duty.* In December 1882 the plaintiffs agreed to supply the defendants with machinery for their mill near Calcutta. The defendants, being unable to pay for it in accordance with that agreement, entered into a supplementary agreement with the plaintiffs on the 10th August 1894, whereby it was arranged that the plaintiffs should accept shares in the defendant's company and debentures charged on the property in satisfaction of their claim. The agreement provided that the defendant company should forthwith execute an indenture of trust in favour of trustees to be named by the plaintiffs for the purpose of securing the said debentures, such indenture to be prepared by the plaintiffs' solicitors together with the debentures, at the expense of the company, and to be approved by the company's solicitors. It was lastly provided that this agreement should be treated as forming part of and supplemental to the agreement of December 1892. This agreement was signed by J. Marshall on behalf of the plaintiffs. The indenture and debentures were duly prepared by the plaintiffs and approved by the defendants' solicitors. The plaintiffs, having paid the solicitors' bill of costs

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in respect of the preparation of the indenture and debentures, now sued to recover the amount from the defendants under the terms of the above agreement of 1894. The defendants alleged that the plaintiffs had failed to carry out their part of the agreement of 1882, and contended that they were entitled in this suit to claim damages against the plaintiffs and to set them off against the plaintiffs' claim. *Held*, that the defendant should not be permitted in this suit to claim damages against the plaintiffs for their alleged failure to carry out their part of the contract of 1892. Their counter-claim or set-off did not fall under s. 111 of the Civil Procedure Code (Act XIV of 1882), as it was not a claim for an ascertained sum of money, and, that being so, they could not claim as of right to have it investigated in this suit. Nor was there any equitable ground for admitting the counter-claim, as it could not be doubted that there would be considerable delay in investigating it, and there was no reason why the plaintiffs should have to wait so long for the money to which they were now legally entitled. *Held*, also, that the plaintiffs were entitled to include in their claim the stamp duty paid on the trust-deed. The agreement contemplated that the defendants should pay all the costs incidental to the execution of the deed. DOBSON & BARLOW *v.* BENGAL SPINNING AND WEAVING CO. . . **I. L. R. 21 Bom. 126**

51. ——— **Decretal amount**—*Decretal amount as set-off—Civil Procedure Code (Act XIV of 1882), s. 111, Ill. (d).* In a suit for recovery of arrears of rent, the defendant's claim to set off the amount of a decree obtained by him against the plaintiff was disallowed by the Court below, on the ground that the decree had not been attempted to be enforced :—*Held*, that the lower Court was wrong in not entertaining the claim of set-off raised by the defendant. Ill. (*d*) of s. 111 of the Civil Procedure Code makes it perfectly clear that the Court can entertain such a claim. BHARAT PROSAD SAHI *v.* RAMESHWAR KOER (1903) **I. L. R. 30 Calc. 1066**

52. ——— *Landlord and tenant—Civil Procedure Code (Act XIV of 1882), s. 111—Bengal Tenancy Act (VIII of 1885), s. 67.* In a suit for rent brought by a landlord the tenant defendant claimed a set-off for costs decreed in his favour in a previous rent suit brought by the *benamidar* of the landlord against the defendant and in which the landlord was made a *pro formâ* defendant : *Held*, that the set-off could not be allowed. *Gopi Nath* v. *Bhagwat, I. L. R. 10 Calc. 697 ; Bharat Prosad* v. *Rameshwar, I. L. R. 30 Calc. 1066*, distinguished. TILUK CHANDRA ROY *v.* JASODA KUMAR ROY (1906) . **11 C. W. N. 215**

53. ——— **Debtor can set-off against assignee independent claims against assignor**—In an action by the assignee of a debt, the debtor-defendant is entitled to set off a debt due to him by the assignor at the date of the assignment, even when the amount claimed to be set-off is due under a transaction independent of,

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and unconnected with, the claim assigned to plaintiff. Such right of set-off will not be open to the defendant, if, by his conduct, he has given up his right to proceed against the assignor personally for the debt. ARUNACHELLAM CHETTI *v.* SUBRAMANIAN CHETTI (1906) **I. L. R. 30 Mad. 235**

2. CROSS-DECREES.

1. ——— **Decrees under Act X of 1859.**—*Quære :* Where the provisions of s. 209 of the Civil Procedure Code, 1859, were applicable to decrees passed under Act X of 1859. DE SILVA *v.* AMEER SHAHA . . . **16 W. R. 303**

There is now no distinction in this respect between rent decrees and other decrees.

2. ——— **Award on private arbitration.** .An award of private arbitration *per se* did not come under the provisions of s. 209 of Act VIII of 1859, so as to be set off against a decree of Court. DHEERAJ SINGH *v.* DEEN DYAL SINGH **11 W. R. 144**

3. ——— **Requisites for right**—*Decrees in same Court for execution.* Before cross-decrees can be set off the one against the other, it is necessary that they should be in the same Court for execution. EAST INDIAN RAILWAY COMPANY *v.* HALL . . . . . **3 N. W. 104**

DE SILVA *v.* AMEER SHAHA . **16 W. R. 303**

4. ——— *Requisites for right—Decrees in same Court for execution—Civil Procedure Code, 1859, s. 209.* The provisions of s. 209, Act VIII of 1859, applied only to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which had found their way for execution to the same Court. RAM COOMAR GHOSE *v.* GOBIND NATH SANDYAL . **7 W. R. 480**

Reversing on review, S. C. GOBINDNATH SANDYAL *v.* RAMCOOMAR GHOSE . **6 W. R. 21**

HADOO SIRDAR *v.* JADOO MONEE DOSSEE **17 W. R. 46**

5 ——— *Requisites for right—Decrees in same Court for execution.* The decrees must be under execution at the same time. JUDOO NATH ROY *v.* RAM BUKSH CHUTTANGEE **7 W. R. 535**

6. ——— *Requisites for right—Decrees not in same Court—Act VIII of 1859, s. 209.* Act VIII of 1859, s. 209, which provided for the set-off of cross-decrees, applied only to decrees of the same Court or decrees sent to a Court for execution. Therefore where, on application for execution of a decree in the Court of a Principal Sudder Ameen, it was sought to set-off a decree obtained in the Judge's Court, which had not been sent to the Principal Sudder Ameen for execution:—*Held*, that s. 209, Act VIII of 1859, did

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SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

not apply. GIRISHCHANDRA LAHURY *v.* FAKIR CHAND
B. L. R. Sup. Vol. 503 : 6 W. R. Mis. 72

7. ——— ——— *Requisites for right—Decrees for definite sums—Civil Procedure Code, 1859, s. 209.* In order to admit of a set-off being made when there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite. REZAOOD-DEEN HOSSEIN *v.* FUZLOONISSA **5 W. R. Mis. 12**

8. ——— *Appeal from decree.* A judgment-debtor is entitled to set-off a decree whether the judgment-creditor may or may not intend to object on appeal to the judgment-debtor's decree. HURO PERSHAD ROY CHOWDHRY *v.* SHAMA PERSHAD ROY CHOWDHRY
5 W. R. Mis. 52

9. ——— **Set-off of joint decree**—*Civil Procedure Code (Act X of 1877) s. 246.* A judgment-debtor may set-off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons. HURRY DYAL GUHO *v.* DIN DOYAL GUHO
I. L. R. 9 Calc. 479 : 13 C. L. R. 93

10. ——— *Civil Procedure Code, s. 246.* Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree, under the provisions of s. 246 of the Code of Civil Procedure, to plead such decree in answer to an application for execution of the decree against him singly. RAM SUKH DAS *v.* TOTA RAM
I. L. R. 14 All. 339

11. ——— *Joint decree—Decrees not between same parties—Civil Procedure Code, 1877, s. 246.* *S* and two other persons held a decree for costs against *M* which did not specify the separate interests of each in the decree, and *M* held a decree for money against *S* alone, which he wished to treat as a cross-decree under s. 246 of Act X of 1877. *Held*, that the decree held by *S* and the other persons was not a decree between the same parties as the parties to the decree held by *M*, and *M*'s decree could not therefore be treated as a cross-decree under that section. MURLI DHAR *v.* PARSOTAM DASS . . **I. L. R. 2 All. 91**

12. ——— **Execution by two decree-holders**—*Act VIII of 1859, s. 209.* Where there were cross-decrees, and one of the decree-holders was, by an order of the Court made with the consent of both parties, bound in executing his decree to set-off the amount of the decree against him :—*Held*, that it would be inequitable to allow the other decree-holder to obtain execution in full without setting off the amount decreed against him. HARO SANKER SANDYAL *v.* TARAK CHANDRA BHUTTACHARJEE
3 B. L. R. A. C. 114 W: 11. R. 488

SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

13. ——— *Civil Procedure Code, 1859, s. 209—Attachment.* In April 1877 *M* sued *S* for money, and on the 10th May 1877 *S* sued *M* for money, both suits being instituted in the same Court. In the meantime, on the 9th May 1877, *B* applied for the attachment of the money claimed by *M* in his siut, and obtained an order prohibiting *M* from receiving, and *S* from paying, any sum which might be found in that suit to be due by *S* to *M*. On the 23rd June 1877 *M* obtained a decree in his suit against *S*, and *S* obtained a decree in his suit against *M*, *S*'s decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of *S*'s decree for so much as remained due. At the same time *S* objected to *B*'s attachment, but his objection was disallowed. *Held*, in a suit by *S* against *B* to have the order disallowing his objection set aside and the propriety and legality of the set-off above mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if *B* had followed up that order and attached *M*'s decree against *S*, that step would not have put him in a better position, for the same section being followed, and the decrease being essentially cross-decrees, that for the smaller sum became absorbed in the one for the larger, and attachment could not affect it. BHUJHAWAN LAL *v.* SUKHRAJ RAI . . **I. L. R. 2 All. 866**

14. ——— **Cross-decrees for mesne profits.** Where there are cross-decrees for possession and mesne profits in respect to the same land, the earlier decree comprehending only a part of the land embraced in the latter, each party may take out execution and be entitled to receive wasilat separately. ANUND MOHUN HAJRAH *v.* SBIBO SOONDUREE DABEE . **16 W. R. 256**

15. ——— *Cross-decrees for mesne profits.* In 1827 *S* commenced a suit against *B*, and before judgment applied for and obtained, under Bengal Regulation II of 1806, an attachment of certain immoveable property belonging to the defendant. In 1828 *S* obtained a decree, upon which he did nothing immediately ; but in 1844 he sold the attached property in execution and purchased it himself. Thirteen years after *B* commenced proceedings to set aside that sale, and in 1860 obtained a final decree reversing the sale, restoring to him the possession and awarding him mesne profits. The mesne profits were ascertained, and a third party (*R*) attached the decree in respect of a judgment-debt due to himself from *B*. Upon this *S*, after trying ineffectually to stay *R*'s proceeding, brought a suit claiming to set off the amount of the decree of 1828 against the decree of 1860. *Held*, that whatever equitable right *S* might have in consequence of the situation of the parties, it should have been urged in the suit before decree, and not in execution when rights of third parties had accrued, and that what *R* sought was not the mesne profits attached by *S* under the decree of 1828, but the amount

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SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

decreed to be paid by *S* to *B*. RAM COOMAR GHOSE *v.* GOBIND NATH SANDYAL **12 W. R. 391**

16. ——— Decree not enforceable— A decree which is incapable of being enforced cannot be set-off against a decree which is alive. HURO PERSHAD ROY CHOWDHRY *v.* Fool KISHOREE DOSSEE . . . **16 W. R. 308**

17. ——— Decree barred by lapse of time. A set-off is not admissible, except upon a cross-decree which the decree-holder is seeking to execute, and not upon a cross- decree incapable of execution by lapse of time. A cross-decree must be kept alive by the action of the party entitled under it. ANUND MOHUN SURMA MOJOOMDAR *v.* HURO CHUNDER BHUTTACHARJEE **5 W. R. Mis. 16**

PROSUNNO COOMAR GHOSE *v.* SHAM LAL GUNGOPADHYA . . . . **5 W. R. Mis. 8**

HEMRAJ CHOWDHRY *v.* ASOODUN **5 W. R. Mis. 43**

18. ——— *Civil Procedure Code, 1859, s. 209—Decree barred by limitation.* In a suit for resumption of land, plaintiff obtained a decree for a portion of her claim, with costs in proportion. Subsequently, on application for a review, she obtained a further decree for the rest of her claim. The latter decree was reversed on appeal by the High Court, who gave defendants all costs of the proceeding in proportion. Plaintiff allowed more than three years to elapse from the date of the former decree without applying for execution ; but when defendant applied to execute his decree for costs, she petitioned for a set-off of so much of the costs as had been decreed to her. *Held*, that these two judgments and decrees must be treated as reduced to one, wherein judgment was given in part for the plaintiff and in part for the defendant ; and before issuing a warrant of execution the Court was bound to ascertain how much, on the whole case, was due to the party executing, and to issue a warrant for that sum and no more. *Held*, further, that no question of limitation could arise in respect to the execution of the first decree, which became incapable of execution as soon as the High Court's decree in appeal (which was for a larger sum) was passed ; but that the latter, under s. 209, Code of Civil Procedure, could only be executed to the extent of the difference between the two decrees. NUBO LALL KHAN *v.* MAHARANEE OF BURDWAN . . . . **9 W. R. 590**

19. ——— *Act VIII of 1859, s. 121.* *A*, by deed of zur-i-peshgi, let certain lands to *B*, to secure a sum advanced by him to her and interest thereon. *B* covenanted to pay certain dues annually to *A*. On failure by *B*, *A* obtained a decree against him for the amount. In execution of a decree against *B*, *C* purchased his interest in the sum secured by the deed of zur-i-peshgi, and sued *A* to recover the same. *Held*, that *A* was entitled in such suit to set off the amount of the decree obtained by her against *B*. BHAGWANI KUNWAR *v.* LALA BAIJNATH PRASAD **2 B. L. R. A. C. 84 : 10 W. R. 380**

20. ——— Assignee of decree, right of. Where execution of *A*'s decree against *B* was stayed pending the passing of a decree in *B*'s cross suit :—*Held*, that no subsequent purchase of *B*'s rights and interests in his cross-suit could be set up as a bar to *A*'s rights to attach the whole of the decree in the cross-suit, in execution of his decree against *B*. PEELOO CHOWDHRAIN *v.* COURT OF WARDS . . . . **7 W. R. 219**

21. ——— *Assignment of decree—Act VIII of 1859, s. 209—Act XXIII of 1821, s. 11.* The plaintiffs obtained a decree against *B* in the Subordinate Judge's Court. Some time afterwards *B* recovered a decree in the Munsif's Court against the plaintiffs. The plaintiffs thereupon applied for the attachment of this decree in satisfaction of their own against *B*. Before attachment, however, *B* assigned her decree to *C*. On *C* trying to execute *B*'s decree against the plaintiffs they brought the present suit for a declaration of their right to have a set-off made of the two decrees. *Held*, that such a suit would not lie. RUGHU NANDAN RAIN *v.* SUMESSAR PANDAY **13 B. L. R. 489 : 22 W. R. 235**

22. ——— *Civil Procedure Code, 1859, s. 209.* *A* obtained a decree in a Court of the N.-W. Provinces against *B*. *C*, taking the decree *bonâ fide* by assignment, applied to execute it in the 24-Pergunnahs. *B*, who got a decree against *A* in the 24-Pergunnahs, applied to have the decree set-off against the other decree in the hands of *C*. *Held*, that, in such circumstances, s. 209, Act VIII of 1859, did not apply. ROZEEOODDEEN *v.* JEHANGEER **5 W. R. Mis. 22**

23. ——— *Purchaser of decree—Act VIII of 1859, s. 209.* The purchaser of a decree sought to execute the decree, but was opposed by the judgment-debtor, who sought to set off two other decrees obtained by herself and her two sisters against the judgment-creditor. These decrees were obtained about the date of the purchase, but it did not appear whether previously or subsequently. *Held*, that in neither case could they be the subject of a set-off. KASSIMUNISSA BIBI *v.* HILLS **6 B. L. R. Ap. 125 : 15 W. R. 127**

24. ——— *Purchaser of decree—Act VIII of 1859, s. 209.* *A* and *B*, having obtained a decree for a sum of money against *C* and *D*, sold part of their interest therein to *E*, who afterwards sold the same to *F*. *G* obtained a decree against *F*, and in execution attached and sold *F*'s interest in the decree obtained by *A* and *B*, and *H* became the purchaser of the same. He applied for execution against *C* and *D*. *C* claimed to have set off the amount of a decree obtained by his son *I* against *G*, and which *C* alleged was held by *I* benami for him as a cross-decree within the meaning of s. 209 of Act VIII of 1859. *Held*, that the

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SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

decree could not be set off. TARACHAND GHOSE *v.* ANANDA CHANDRA CHOWDRY
3 B. L. R. A. C. 110 : 10 W. R. 450

25. ——— *Purchaser of decree—Act VIII of 1859, s. 209.* The purchaser of a decree held by *A*, against whom *B* holds a cross-decree, takes it subject to a set-off on account of *B*'s decree. KAIM ALI JAWARDAR *v.* LAKHIKANT CHUCKERBUTTY
1 B. L. R. F. B. 23 : 10 W. R. F. B. 32

NUNDO COOMAR BUKSHEE *v.* KOONJO KISHORE ROY . . . . . **6 W. R. Mis. 73**

DOORGA CHURN NUNDEE *v.* DEBNATH ROY CHOWDHRY . . . . . **18 W. R. 442**

OOPENDRO MOHUN MOOSTAFEE *v.* POORNA CHUNDER BHUTTACHARJEE . . **19 W. R. 85**

RAM CHUNDER *v.* MOHENDRO NATH BOSE
21 W. R. 141

26. ——— *Civil Procedure Code, 1859, s. 209.* *A* got a decree against *B*, who subsequently got a larger decree against *A*, which he sold to *C*. After that *A* executed his decree, and put up *B*'s decree for sale and bought it himself. *C* then took out execution against *A*, who, having unsuccessfully put in a claim under Act VIII of 1859, s. 246, brought a suit to have his claim established, and the sale of *B*'s decree to *C* declared collusive. Both the lower Courts found that the sale was *bonâ fide*. *Held*, that this finding could not be set aside on special appeal, but that, when *C* took out execution, *A* might apply for a set-off under s. 209. SHEO NARAIN SINGH *v.* CHOONEE BHUGGUT
24 W. R. 299

27. ——— *Fraudulent assignment—Rights of assignee.* Where cross-decrees had been obtained and one of them had been assigned, in a suit by the other decree-holder to set aside the assignment as fraudulent:—*Held*, that it was fraudulent, and the right of set-off was unaffected. *Quære:* Whether, had the assignment been a *bonâ fide* one,—*i.e.*, for a valuable consideration,—the assignee would have taken the decree subject to the equities or liabilities of the decree-holder to the judgment-debtor. TALUB HOSSEIN *v.* WALKER
7 W. R. 470

28. ——— *Civil Procedure Code, 1877, s. 246—Execution of cross-decrees—Power of Court executing decree—Bonâ fide purchaser—Presumption of validity of order for sale.* If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied

SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

or not. These are questions to be determined by the Court issuing execution. Where property sold in execution of a valid decree, under the order of a competent Court, was purchased *bonâ fide* and for fair value:—*Held*, that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale. REWA MAHTON *v.* RAM KISHEN SINGH . . **I. L. R. 14 Calc. 18**
L. R. 13 I. A. 106

MOTHURA MOHUN GHOSE MUNDUL *v.* AKHOY KUMAR MITTER . . **I. L. R. 15 Calc. 557**

29. ——— **Stay of execution of decree** *—Civil Procedure Code, 1859, s. 209.* Where a decree for the plaintiff has been obtained in a suit, and a cross-suit is pending, the Court will not stay proceedings in execution of the first suit, or order the proceeds of that decree to be paid into Court to abide the result of the second. MOOLCHUND *v.* RAJNARAIN GHOSE
1 Ind. Jur. N. S. 330

30. ——— *Civil Procedure Code, 1859, s. 209, Procedure under.* When an application to stay execution of a decree is made to a Court in which a suit is pending against a decree-holder, the Court's competency, under s. 209, Act VIII of 1859, to grant the application depended on the decree being its own decree. An application of this nature ought not to be entertained in the absence of an affidavit or satisfactory proof of the complaints alleged in it, without the Court calling for such proof. MITTUN BIBEE *v.* BUZLOOR KHAN
8 W. R. 392

31. ——— *Civil Procedure Code, 1859, s. 209—Execution of cross-decrees.* *S* had against *M* in the Rungpore Court a decree for costs which he removed for execution to the Court of Beerbhoom. On this *M* applied to the latter Court, under s. 209, Act VIII of 1859, for stay of execution pending the decision of another suit which he had brought against *S*. *Held*, that, on the decision of the other suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much as should remain after deducting the smaller sum, which should have been entered on the decree for the larger sum. SHIBCHUNDER SIRCAR *v.* JUGGUT INDUR BUNWAREE GOBIND
12 W. R. 212

32. ——— *Pending suit by defendant in which he has credited sum sued for—Stay of suit.* In a suit brought in a Small Cause Court to recover balance of rent due, the defendant pleaded the pendency of a suit brought by him in the District Munsif's Court against the plaintiff for damages for illegal dispossession, and that he had given credit against the amount of damages for the balance of rent due. *Held*, that the pendency of the suit in the District Munsif's Court was not a bar to the present suit, but that it was open to the Court,

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SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

in its discretion, to postpone the hearing of the present suit until the District Munsif had given his decision. MUTTUKARUPPA KAUNDAN *v.* RAMA PILLAI . . . . . **3 Mad. 158**

33. ——— **Execution of decree**—*Obligation to set off.* Where two parties have to recover sums from each other under the same decree (not cross-decrees), the party entitled to the lesser sum cannot be allowed to take out execution against the party entitled to the larger sum, and the Court is bound to direct a set-off or to enter satisfaction of the smaller sum upon the decree. JUGO MOHUN BUKSHEE *v.* SOORENDRONATH ROY CHOWDHRY . . . . **13 W. R. 106**

34. ——— *Decree in favour of one party with costs in favour of the other—Civil Procedure Code, 1859, s. 209.* When a decree in favour of an appellant describes a set of costs as due by the appellant to the respondent, it means not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and the remainder only recovered under the decree. S. 209, Code of Civil Procedure, had no application in such a case. ISSUR CHANDER MOOKERJEE *v.* MUNMOHUN CHOWDHRY . . . . . **12 W. R. 308**

35. ——— *Civil Procedure Code, 1882, ss. 246, 247—Execution of decree—Cross-decrees—Simple money-decree—Decree enforcing mortgage.* S. 246 of the Civil Procedure Code is applicable to cross-decrees and not to cross-claims under one decree. To make s. 247 of the Code applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case. *Held*, therefore, where a decree for money of a Court of first instance directed that the money should be realizable from certain specific property of the defendant, and exempted his person and other property, and the lower Appellate Court modified this decree by extending it to the person of the defendant, and in second appeal the High Court set aside the lower Appellate Court's decree and restored that of the first Court, directing that the cost of the defendant in the lower Appellate Court and in the High Court should be paid by the plaintiff, that, inasmuch as the plaintiff was only entitled to recover the judgment-debt due to him from the defendant from such specific property, whereas the defendant was entitled to recover the judgment-debt due to him from the plaintiff from his person and property, the provisions of s. 247 were not applicable. KALKA PERSHAD *v.* RAM DIN . **I. L. R. 5 All. 272**

36. ——— *Costs—Two awards of costs in same decree—Execution of decree.* Where a Court makes two different awards of costs in one and the same decree, when it ought to have made a decree only for the difference between them:—*Held*, that execution could only be taken out for the difference between the two amounts awarded. AMJUD ALI KHAN *v.* FAZUL HOSSEIN . . . . . **19 W. R. 187**

37. ——— *Conditional decree—Purchase-money—Costs—Civil Procedure Code, 1882, ss. 214, 221, 247—Decree in suit for pre-sumption.* The decree in a suit to enforce a right of pre-emption directed, in accordance with the provisions of s. 214 of the Civil Procedure Code, that the plaintiff should obtain possession of the property and recover costs of the suit from the defendants (vendor and vendee), on payment of the purchase-money within a fixed time, but that on default of such payment, the suit should stand dismissed. The plaintiff deposited within time the purchase-money with the exception of a sum less than the amount of costs awarded to him. He subsequently applied for delivery of possession of the property in execution of the decree and for the recovery of the costs awarded to him, deducting from such costs the unpaid portion of the purchase-money. *Held*, applying, by analogy of ss. 221 and 247 of the Civil Procedure Code, the equitable doctrine of set-off, that the plaintiff was entitled, when depositing the purchase-money under the decree, to deduct therefrom the sum the decree awarded to him as costs, and that therefore the decree did not become null and void by reason that he had not deposited the full amount of the purchase-money within time. *Degumburee Dabee* v. *Eshan Chunder Sein, B. L. R. Sup. Vol. 938 : 9 W. R. 230 ; Jugo Mohan Bukshee* v. *Soorendro Nath Roy Chowdhry, 13 W. R. 106 ;* and *Brijnath Dass* v. *Juggernath Dass, I. L. R. 4 Calc. 742*, referred to. ISHRI *v.* GOPAL SARAN . . . . . **I. L. R. 6 All. 351**

38. ——— *Civil Procedure Code, 1882, s. 247—Cross-claims under the same decree—Costs under the same decree recoverable in different ways.* S. 247 of the Code of Civil Procedure is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. Thus, where one party to a suit was entitled to recover certain costs by means of the sale of hypothecated property, and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally, it was *held* that s. 247 of the Code applied, and that the costs recoverable personally could be set off against the costs recoverable by sale of the hypothecated property. *Kalka Prasad* v. *Ram Din, I. L. R. 5 All. 272*, dissented from. BHAGWAN SINGH *v.* RATAN . **I. L. R. 16 All. 395**

39. ——— *Civil Procedure Code, 1882, ss. 246, 247—Execution of decree—Parties entitled under same decree to recover from each other.* A plaintiff obtained a decree for the surrender to him of certain mortgaged property on his paying the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover

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SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

the said costs by the arrest of the defendants. *Held*, that the defendants were entitled under s. 247 of the Code of Civil Procedure to set-off the amount payable by them to plaintiff by way of costs against the mortgage amount and value of improvements payable by plaintiff to them. *Bhagwan Singh v. Ratan*, *I. L. R. 16 All. 395*, approved. SANKARA MENON *v.* GOPALA PATTAR . **I. L. R. 23 Mad. 121**

40. ——— *Civil Procedure Code, ss. 246, 247, 411—Cross-decrees in same decree—Recovery by Government of Court-fees in pauper suit.* A plaintiff suing *in formâ pauperis* to recover property valued at R60,000 obtained a decree for R1,439. The Court, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that the plaintiff should pay R1,196 as the amount of Court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the R1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross-suit in the same Court, should be set-off against the R1,439 payable by her to him, with reference to ss. 246 and 247 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his R1,439, or by the defendant for her costs. In appeal from an order allowing the Collector's application, it was contended that the "subject-matter of the suit" in s. 411 of the Code meant the sum which the successful pauper-plaintiff is entitled to get as a result of his success in the suit; but that in the suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether. *Held*, that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favour for R1,439 so as to bring into operation the special rules of ss. 246 and 247 of the Code between him and the defendant. *Held*, also, that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it in the same way as costs are ordinarily recoverable under the Code, *Held*, that the decrees in the suit and the cross-suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to

SET-OFF—*contd.*

2. CROSS-DECREES—*contd.*

the plaintiff had arisen or could be entertained. JANKI *v.* COLLECTOR OF ALLAHABAD **I. L. R. 9 All. 64**

41. ——— *Civil Procedure Code (Act XIV of 1882), ss. 233, 243, 546—Execution of assigned decree—Set-off against assigned decree partly executed.* *A B* had obtained a decree against *K* and *T*. After the decree had been partially satisfied *A B* assigned it to *D*. Prior to the date of the assignment, *K* and *T* had instituted a suit against *A B* and *D*, and ultimately obtained a decree against both of them. *Held*, that *K* and *T* were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to *D*. KRISTO RAMANI DASSEE *v.* KEDAR NATH CHAKRAVARTI . **I. L. R. 16 Calc. 619**

42. ——— *Civil Procedure Code, s. 246—Limitation.* Under two decrees of the Sudder Dewany Adalat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April 1866, pending the appeal, *A* applied for an account of the mesne profits due to him after setting-off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B's* appeal, the application was struck off. In January 1867 *B* applied for the mesne profits of the one-third decreed to him, and the Court found R18,700 to be the amount so due, but, on application by *A* stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B's* appeal. In 1885 *A*, in execution of the Privy Council's decree, applied for R50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the R18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by *A*. *Held*, that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds, and which had never yet been decided, should be re-opened from the point at which it was left in 1866; that if this amount exceeded the R18,000 declared in 1867 to be due to *B*, satisfaction of *A's* claim to that extent should be entered up and the balance recovered from *B*; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity. *Held*, also, that, until the amount due to *A* had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off was therefore not barred by limitation; that the order of January 1867 was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A*, that decision also would

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SET-OFF—*concld.*

2. CROSS-DECREES—*concld.*

be a decree, and that s. 246 of the Code could then be applied. MATADIN *v.* CHANDI DIN
I. L. R. 10 All. 188

43. ——— *Civil Procedure Code, s. 246—Execution of decree—Decree against which set-off is claimed not before the Court for execution.* S. 246 of the Code of Civil Procedure clearly contemplates that, where one decree is sought to be set-off against another, the decree against which the set-off is asked for must be before the Court for execution. *Rewa Mahton* v. *Ram Kishen Singh, L. R. 13 I. A. 106, 110,* referred to. CHAJMAL DAS *v.* LAL DHARAM SINGH (1902)
I. L. R. 24 All. 481

44. ——— *Civil Procedure Code (Act XIV of 1882), ss. 233, 246—Cross-decrees on same day against same parties in different suits—Subsequent transfer of one decree to third party—Petition for execution by transferee decree-holder—Right of transferee subject to equity of cross-decree-holder.* On 3rd February 1900, cross-decrees were passed between *A* and *B* in different suits. *A*'s decree against *B* was for a larger amount than *B*'s decree against *A*. On 25th January 1911, *B* transferred his decree to *C*, but *A* only received notice of the assignment in October 1900. *Held*, that *C* was not entitled to execute the decree against *A*. The transfer from *B* to *C* could take effect against *A* in respect of his cross-decree only after *A* received notice of it. That being so, the decree so transferred, being for a smaller amount than *A*'s, became incapable of execution under the equitable principle enunciated in s. 246 of the Code of Civil Procedure. At the date of the completion of transfer by notice, *B*'s decree was subject to the equity, and, consequently, the right of *C* as the transferee of it was also subject to that equity under s. 233 of the Code. S. 246 of the Code of Civil Procedure is not inapplicable to a case where cross-decrees are passed by the Court whose duty it is to execute them, and neither decree has been transferred for execution to another Court. *Rewa Mahton* v. *Ram Kishen Singh, L. R. 13 I. A. 106*, explained. SINNU PANDARAM *v.* SANTHOJI ROW (1902)
I. L. R. 26 Mad. 428

SETTING ASIDE LEASE.

See LEASE.
See RECEIVER . 12 C. W. N. 1023

SETTING ASIDE EX PARTE DECREE.

See CIVIL PROCEDURE CODE, 1882, s. 108.
3 C. W. N. 846

SETTING ASIDE SALE.

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SETTING ASIDE SALE—*concld.*

——— *Setting aside sale, application for—Agreement with a co-lessee of judgment-debtor and the decree-holder—Dissuading purchaser from bidding—Civil Procedure Code (Act XIV of 1882), ss. 244, 311.* An agreement with the co-lessee of the judgment-debtor and the decree-holder that he would purchase the property and then sell it to the co-lessee for the amount of his decree, in consequence of which the co-lessee refrained from bidding at the sale, is not by itself sufficient to vitiate a sale. *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar, I. L. R. 23 Mad. 227 : L. R. 27 I. A. 17*, explained and followed, *Woopendro Nath Sircar* v. *Brojendro Nath Mundul, I. L. R. 7 Calc. 346*, distinguished. SATISH CHANDRA MUKHERJEE *v.* PORTER (1908)
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SETTLED ACCOUNTS.

——— *Accounts—Settlement of accounts by passing a promissory note—No fraud or coercion used—Waiving of examination of accounts by plaintiff of his free will—Accounts not to be re-opened.* The plaintiff and defendant had mutual dealings and accounts. In settling these accounts the plaintiff of his own free will and accord and without any fraud practised or undue influence exerted by the defendant claimed his right to an examination of the accounts for the purpose of ascertaining the balance due and agreed to treat a gross sum of R3,556 as due from him and accordingly executed a promissory note for that amount. The plaintiff then sued for a declaration that the promissory note in question was fraudulent and had been obtained from him by undue influence and was good only to the extent of such sum as might be found due on taking an account between the parties. At the trial the allegations of fraud and undue influence on the part of the defendant and want of free consent on the part of the plaintiff were held not proved. *Held*, that, on the principle enunciated by the Privy Council in *McKeller* v. *Wallace, 5 Moo I. A. 372*, the promissory note must be treated either as the result of a settled account or as a settlement by compromise. In either case, it could not be re-opened. MAGNIRAM *v.* LAXMINARAYAN (1908)
I. L. R. 32 Bom. 353

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11 B. L. R. 144

1. CONSTRUCTION.

1. ——— Agreements made at time of settlement, duration of. *Held*, on the construction of an "ikrarnamah" and settlement "roobkari," that it was binding on the plaintiffs only for the currency of settlement. In general engagements made at the time of settlement ought to be considered *primâ facie* as intended to subsist only for the time of settlement. DIAL SINGH *v.* JAWAHIR SINGH . . . . 2 Agra 108

IKRAM ALI KHAN *v.* LUDWA . 2 Agra 113

2. ——— Effect of settlement—*Duration of, and right created by, settlement—Transfer of proprietary right.* Where a settlement of a talukh, although it ran for twenty years only, was with a person professing to be a proprietor :—*Held*, that the settlement conferred a proprietary right, and not a limited interest ; and that the plaintiff's vendor, having been admitted to a share in the settlement with a maliki allowance, became a co-sharer in the proprietary interest, which proprietary right had been transferred to the plaintiffs by their purchase. POGOSE *v.* AOZAN BIBEE
18 W. R. 274

3. ——— *Settlement by Government of land on which stood a hât—Calculation for purpose of settlement—Tools—Hât—Reg. XXVII of 1793.* A settlement of land (on

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SETTLEMENT—*contd.*

1. CONSTRUCTION—*contd.*

which stood a hât) by the Government to a private person, such settlement being arrived at by taking into calculation the profits of the hât, does not amount to a grant of the tolls, but of the land only; the reason for looking at the tolls being to ascertain the value of the land. Such a settlement therefore does not imply a monopoly which will enable the holder to restrain other persons from setting up another hât close by. RAKHAL DAS ADDY *v.* DURGA SUNDURI DASI. DURGA SUNDURI DEBI *v.* RAKHAL DAS ADDY
I. L. R. 17 Calc. 458

4. ——— *Summary Settlement Act (Bom. Act VII of 1863)—Nature of settlement under that Act—Settlement made and sanad issued under a mistake—Quit-rent paid by inamdars to Government under such settlement—Refund—Void agreement—Contract Act (IX of 1872), ss. 20, 65—Sanad, meaning and effect of.* Under the Bombay Summary Settlement Act (Bombay Act VII of 1863), a settlement in respect of the village of Mankol was effected in 1864 between the Government and the plaintiffs, who were the inamdars, and a sanad was granted to the plaintiffs, under the terms of which a certain yearly quit-rent was payable by them to Government in respect of the said village. At the time of the settlement the plaintiffs believed that they were the superior holders of all the lands in the village, including certain wanta lands. It subsequently appeared, however, that the wanta lands were the property of certain girassias, who were in possession as owners, and that the plaintiffs were not the holders of these lands within the meaning of s. 32 of Bombay Act VII of 1863. The Government, however, required the plaintiffs to pay the entire quit-rent of the village for the Samvat years 1939-1940, as fixed by the sanad. The plaintiffs paid under protest and brought this suit to recover the amount (R400-12-6) paid in respect of the wanta lands. *Held*, that the plaintiffs were entitled to a refund of the quit-rent paid in respect of the wanta lands. A settlement under Bombay Act VII of 1863 is an agreement effected by proposal and acceptance (see s. 2), and is subject to the ordinary rules applicable to contracts. Here both parties entered into the settlement in the belief that the plaintiffs were the superior holders of all the lands in the village. There was therefore a common mistake as to a matter of fact which both parties must have regarded at the time as essential to the agreement, it being made so by the Act itself under which they assumed to contract. Such a mistake under s. 20 of the Contract Act (IX of 1872) renders the agreement void. The settlement as to the wanta lands might be treated as distinct from that which applied to the remaining lands of the village, the former being void, and the plaintiffs being therefore entitled to a refund of the quit-rent paid in respect of such lands under s. 65 of the Contract Act. A sanad issued under Bombay Act VII of 1863 merely declares what by s. 6 of

SETTLEMENT—*contd.*

1. CONSTRUCTION—*concld.*

the Act is stated to be the effect of the settlement to which both the Government and the holders of the land have consented; but it is by virtue of the settlement itself as provided by the Act that Government are entitled to demand payment of such rent. SECRETARY OF STATE FOR INDIA *v.* SHETH JESHINGBHAI HATHISANG
I. L. R. 17 Bom. 407

2. RIGHT TO SETTLEMENT.

1. ——— **Claim to settlement after resumption**—*Beng. Reg. II of 1819—Ex-lakhirajdar—Limitation.* Long possession gives no title to a settlement, unless the party claiming a settlement has put forward his claim when the lands were resumed, and the notice has issued to parties to assert their claims to such settlements, and has thus complied with the requirements of the law. GOLACK CHANDRA CHOWDHRY *v.* ALI MOLLAH
8 B. L. R. 528 note

2. ——— **Claim to permanent settlement after expiration of temporary one**—*Forfeiture of right by conduct.* When a temporary settlement expires, whether the holder thereof had been the proprietor of the land within the meaning of the old regulations or a stranger, the proprietor is entitled to come forward and to claim as of right from the Government a permanent settlement of the land, unless he has by his own conduct forfeited that right. WATSON & Co. *v.* BROJO SOONDUREE DABEE . . . . . **10 W. R. 395**

On remand an order was made declaring the plaintiff entitled to the permanent settlement instead of the defendants, and confirmed on special appeal, subject to the proviso that such declaration would not entitle her to dispossess them if they were in possession as patnidars. WATSON & Co. *v.* BROJO SOONDUREE DEBIA . **17 W. R. 376**

3. ——— **Purchase of zamindari rights during maafi grant**—*Rights on expiry of maafi grant.* An auction-purchaser of the rights and interest of one of several zamindars who at the time of the purchase held only certain nankar land in lieu of their zamindari right during the continuancy of the maafi grant by Government to another party stands in the place of the zamindar, not in respect of the nankar land only, but in respect of all the right to settlement as zamindar after the maafi grant comes to an end. GOKUL PERSHAD *v.* RUGHONATH . . . . . **3 Agra 245**

4. ——— **Right among co-sharers**—*Arrangement for collection and receipt by one co-sharer—Effect on rights of others on expiration of settlement.* Where at the time of settlement it was arranged that one co-sharer should make the collections and other co-sharers should receive money allowance and such arrangement was to last for the term of settlement only:—*Held*, that after the expiry of the settlement such co-sharers were, if the revenue authorities thought fit, entitled to be

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SETTLEMENT—*contd.*

2. RIGHT TO SETTLEMENT—*contd.*

allowed to engage for their shares. KOONWER SINGH *v.* SHIB DYAL . . **3 Agra 297**

5. ———— **Right on resumption**—*Suit to set aside settlement.* In a suit by a person claiming certain lands which have been resumed by the Government, the plaintiff is entitled, on the allegation that he is the rightful owner of the lands, and that the defendant obtained a settlement by false allegations of ownership and of possession, to an adjudication of his right to a settlement. It is not discretionary with the Collector under such circumstances to settle with any person he pleases for the land, nor is such settlement, if made, final as regards all claims. MAHOMED ISRAILE *v.* WISE
13 B. L. R. F. B. 118 : 21 W. R. 327

6. ———— *Ghatwali tenures —Suit against Government for settlement—Limitation.* A ghatwali tenure was resumed by the Government under Bengal Regulation II of 1819. After the resumption, *H N*, the former holder of the tenure, claimed settlement as proprietor. The Government denied his title, but offered him a lease on his giving security. On his failure to find security, the Government in 1841 made a temporary settlement with *J S*, who entered into possession of the land. No malikana was reserved to or ever paid to *H N*. In 1862 the Government settled the land permanently with *J S*. The heir of *H N* then brought a suit in the Civil Court, praying that this settlement should be set aside, and for a declaration of his right to have a settlement concluded with him. *Held*, that, supposing *H N* ever to have had any legal right to a settlement as proprietor, the suit to enforce such right was barred by limitation, he having been effectually dispossessed, and the cause of action, if any, having accrued in 1841. *Note.*—The Court appeared to consider that in fact *H N* never had any right to maintain an action in the Civil Court to compel the Government to make a settlement with him. JOY MUNGUL SINGH *v.* POKHARUN SINGH. GOVERNMENT *v.* POKHARUN SINGH . **7 W. R. 465**

7. ———— **Right to settlement of person whose tenure is not cancelled**—*Lease by Government after purchase at sale for revenue.* *A* was the owner of a talukh in a zamindari which was purchased by the Government at a auction-sale for arrears of revenue. The Government did not cancel the talukh, but settled it with *A* for twelve years. When the term was expired, the Government refused to make a new lease with *A*, and instead leased it for a year to *B*. *Held*, that the refusal of the Government to settle the land with *A* in no way affected his right to a settlement on the expiration of the lease to *B*. AHSANOOLLAH *v.* KRISTO GOBIND DOSS
2 C. L. R. 592

8. ———— **Owner of parent estate**—*Accretion to estate—Estates separately numbered.* Certain lands accreted to an estate, No. 667, and were temporarily settled as a separate estate No. 3148. During the currency of this settlement, the owner sold his rights and interests in 667 to the

SETTLEMENT—*contd.*

2. RIGHT TO SETTLEMENT—*concld.*

plaintiff and in 3148 to the defendants. On the expiry of the temporary settlement, the plaintiff, as owner of the parent estate, sued to establish his right to the permanent settlement of 3148. *Held*, that the suit would not lie, and that the plaintiff had no claim to have a settlement of 3148. KHUB LAL *v.* GHINA HAZARI
2 B. L. R. A. C. 339

9. ———— **Right to pottah of waste lands**—*Alleged failure to cultivate or pay assessment.* The plaintiff sued, as the mirasidars of a village, to establish their right to the grant of a pottah of certain waste land of the village which had been granted to some of the defendants. The Collector, who was made a defendant, stated that the hookumnamah rules of the district directed that land should be given to mirasidars on their tendering sufficient security, and that the plaintiffs on previous occasions had received lands for which offers had been made by others in consideration of the plaintiff's preferential right, but that they had failed to cultivate the lands or pay the assessment in breach of their agreements. *Held*, that the plaintiffs were entitled to the relief sought for. COLLECTOR OF MADRAS *v.* RAMANUJA CHARIYAR. KULLAPPA NAIK *v.* RAMANUJA CHARIYAR . . . . . **4 Mad. 429**

10. ———— **Right of ex-lakhirajdar**—*Resumption by Government—Limitation.* An ex-lakhirajdar whose lands have been resumed by Government under Regulation II of 1819 has no absolute right to a settlement. When a party claims a right to a settlement as being an ex-proprietor, and his claim is rejected, he must, to avoid being barred by limitation, sue within three years for a declaration of his right. BHIKU SINGH *v.* GOVERNMENT
8 B. L. R. 529 note : 13 B. L. R. 119 note 10 W. R. 296

See KRISHNA CHANDRA SANDYAL CHOWDHRY *v.* HARISH CHANDRA CHOWDHRY . **8 B. L. R. 524**

S.C. KRISTO CHUNDER SUNDYAL *v.* KASHEE KISHORE ROY CHOWDHRY . **17 W. R. 145**

11. ———— **Right of shikmi talukhdars** —*Tenants of lakhirajdars—Resumption by Government of lakhiraj tenures.* Shikmi talukhdars under lakhirajdars, whose lands have been resumed by Government, cannot sue for a settlement: they can only claim to have their shikmi rights upheld. GRISH CHUNDER ROY *v.* BOYDONATH DEY
W. R. 1864, 262

3. EVIDENCE OF SETTLEMENT.

1. ———— **Evidence necessary to establish creation of taluks**—*Shikmi talukhdars —Registration of tenure.* The registration of a talukh, or of the sanads creating it, is not absolutely necessary to prove the creation of the talukh before the decennial settlement. The omission of any mention of such a talukh in the decennial or quinquennial settlement, and the inclusion of the

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SETTLEMENT—*contd.*

3. EVIDENCE OF SETTLEMENT—*contd.*

lands in the decennial settlement as part of the zamindari for which the jumma is assessed, does not afford any strong inference against the evidence of the talukh being only a shikmi talukh paying rent to the zamindar; the talukhdars were not required to mention it, nor was it necessary for the zamindar to do so. Discussion of the evidence requisite to establish the existence of an old shikmi talukh. WISE *v.* BHOOBUN MOYEE DEBIA . **3 W. R. P. C. 5 : 10 Moo. I. A. 165**

2. ——— **Evidence of loss of proprietary right**—*Possession of sir land.* The possession of a share in an estate on settlement may or may not be accompanied by the possession of *sir* land; and the fact of a sharer holding no *sir* land is not of itself sufficient to show that he had lost all proprietary right in the village. TOOLSEE RAM *v.* NAHAR SINGH . . . . . **3 N. W. 43**

3. ——— **Settlement of noabad talukh in Chittagong**—*Power of Government to make settlement—Waste lands—Resumption—Kabuliat, effect of—Acceptance of kabuliat by the landlord—Ratification—How far the acts of Government officers bind the Government—Reg. III of 1822, s. 5, cl. 1—Reg. VII of 1822, s. 7, cl. 1—Evidence—Presumption of due performance of official acts—Acquiescence—Acceptance of rent after term of settlement.* The plaintiff sued the Secretary of State for India in Council for the declaration that a certain noabad mehal of his in the district of Chittagong was a permanent talukh, not resumable by the Government. He based his claim on two grounds: (i) that the mehal existed from before the time of the Decennial Settlement, and the settlement of 1800 confirmed the permanent right of the talukhdar in the same; and (ii) that, at any rate, a kabuliat executed in 1836 by his predecessors in title with the approval of the Collector had the same effect. In defence, it was alleged (1) that the mehal was not in existence at the time of the Decennial Settlement, and the settlement of 1800 was a temporary one; and (2) that the kabuliat was never accepted by the Government, but that, on the contrary, the Government passed distinct orders that the settlements of 1836 were for thirty years only, which order was duly published by an istahar to the effect. It was found on the evidence that the talukh was not shown to have been in existence before 1800, and the settlement proceedings of that year and the variation of rent from time to time did not support the plaintiff's contention. *Held*, that the kabuliat of 1836 was merely an offer on the part of the talukhdar for the time being and was not binding on the Government, its terms not having been accepted either by the Government or by any duly authorised officer thereof; that both by law and by the special instructions issued for the guidance of settlement officers, no settlement could be binding on the Government unless confirmed by the Governor General in Council. There being no proof given by either party as to whether the istahar above mentioned was or was not duly

SETTLEMENT—*contd.*

3. EVIDENCE OF SETTLEMENT—*concld.*

published:—*Held*, that the publication of the istahar must be presumed, having regard to the presumption in favour of the due performance of official acts. *Held*, also, that, even assuming that the officers of the Government induced by their act and conduct a belief in the talukhdar that the kabuliat had been accepted by the Government, or that a permanent settlement had been sanctioned by the Government, that did not amount to a ratification of the kabuliat, inasmuch as such conduct of the officers was in violation of their duty as such officers and in direct contravention of the express orders of the Government. *Held*, also, that the acceptance by the Government of rent at the old rate from the talukhdar for a long time after expiration of thirty years did not amount to an acquiescence in the terms of the kabuliat. Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State. PROSUNNO COOMAR ROY *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 26 Calc. 792 3 C. W. N. 695**

4. MODE OF SETTLEMENT.

1. ——— **Procedure on making fresh settlement**—*Beng. Reg. VII of 1822, s. 14—Refusal to accept new settlement—Time to remove house.* Where the Collector had issued due notice of enhancement under s. 14, Bengal Regulation VII of 1822, of the jumma of lands situate in a town and subject to that Regulation, and the tenant refused to accept a revised setlement, under such circumstances he was *held* to be entitled to a reasonable time within which to remove a house standing upon the lands in question. RAM CHAND BERA *v.* GOVERNMENT . . . **6 C. L. R. 365**

2. ——— **Power of Collector to alter settlement**—*Recognition of title by settlement officer—Beng. Reg. VII of 1822, s. 20.* Where the plaintiff's title was recognised by the settlement officer in 1836, who assigned an allowance of 5 per cent. on the Government demand:—*Held*, that the Collector had no power in subsequent years during the pendency of this completed settlement to interfere with the arrangement of the settlement officer, except to the extent allowed by s. 20, Regulation VII of 1822. S. 20, Regulation VII of 1822, did not confer on the Collector the power of remodelling the arrangements completed by the settlement officer under s. 10 of the Regulation; nor could the notification of Government extend to revenue officers an authority that the law did not allow to them. HIMMUT SINGH *v.* COLLECTOR OF BIJNOUR **2 Agra 258**

3. ——— **Power of Collector to assign lands for cultivation**—*Bhadgari tenure. Held*, that any interference by the Collector to assign of his own authority lands in a bhagdari village to a tenant for cultivation is irregular and unauthorized. RAIJI NAROTTAM *v.* PURUSHOTTAM GIRDHAR **2 Bom. 244 : 2nd Ed. 233**

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SETTLEMENT—*contd.*

5. SUBJECTS OF SETTLEMENT.

1. ——— **What passes by settlement**—*Right of julkur—Beng. Reg. XI of 1825, s. 4.* A settlement dol includes all that ordinarily passes as assets of the settlement, but not what is exclusively reserved as the right of the State, *e.g.*, the right to the julkur of large navigable rivers, which, according to cl. 2, s. 4, Regulation XI of 1825, never passes to private individuals with whom Government makes settlements. COLLECTOR OF JESSORE *v.* BECKWITH . . **5 W. R. 175**

2. **Non-mirasi lands left waste by pottahdar**—*Claim of former occupant.* Non-mirasi land left waste by a pottahdar may be granted by the Collector, without reference to the claim of the former occupant. GENNU REDDI *v.* ASAL REDDI . . . **1 Mad. 12**

3. ——— **Waste lands**—*Lands held on raiyatwari settlement—Raiyat's right of occupation.* Lands held on the terms of an ordinary raiyatwari settlement, with annual pottah, and left waste by the pottahdar, may be legally granted by the revenue authorities. The raiyat has an indefeasible right of occupation only so long as he pays the Government assessment. KUMARADEVA MUDALI *v.* NALLATAMBI REDDI . . **1 Mad. 407**

6. EFFECT OF SETTLEMENT.

1. ——— **Effect on rights of third parties**—*Sanad granted by settlement officers, effect of—Bom. Act II of 1863.* Sanads granted by settlement officers under Bombay Act II of 1863 do not prejudice the rights of third persons. PUJU BIN KADAN *v.* MALHARI BIN RANA **1 Bom. 171**

2. ——— **Effect on ex-maafidar**—*Status of maafidar after settlement of resumed maafi.* An ex-maafidar, with whom a sub-settlement has been made of the resumed maafi, is presumably not a hereditary cultivator, but his position is that of a proprietor subject to payment of Government revenue. HUMEED-OOL-LAH KHAN *v.* PRAN SOOKH **3 Agra 280**

3. ——— **Effect on maafidar**—*Settlement with maafidar—Payment of revenue.* Where a plot of maafi land was on resumption settled with the ex-maafidar, who engaged for the Government revenue for the term of settlement, and the settlement was made under s. 5, Regulation XIII of 1825, and paragraph 151, circular order, Sudder Board of Revenue, as provided by s. 5, Regulation XXXI of 1803 :—*Held*, that they were in possession as owners, and on the expiry of the settlement the mere fact of its having expired would not deprive them of the right of being assessed with revenue as proprietors of maafi land, for where there has been a grant of soil, and possession taken and long continued thereunder, the ownership thereof vests in the grantee, although the grant as to exemption from payment of revenue may

SETTLEMENT—*contd.*

6. EFFECT OF SETTLEMENT—*contd.*

be invalid and subject to assessment. TOOLSEE RAM *v.* NARAIN SINGH . . **3 Agra 265**

4. ——— *Resumed maafi lands, settlement of—Adverse possession.* Where owing to the refusal of the original possessor of a resumed maafi land to fulfil the revenue engagements the settlement was made with a stranger:—*Held*, that such settlement could not confer upon him any right adverse to the original possessor after the expiration of that settlement, when the original possessor is entitled to claim settlement. MAHOMED ATA-OOLLAH *v.* MAHOMED MOHIB-OOL-LAH . . . . . **1 Agra 231**

5. ——— **Liability for rent**—*Beng. Reg. VII of 1822—Holder of resumed lakhiraj.* The holder of resumed invalid lakhiraj land, within a Government khas mehal, was bound to pay rent according to the settlement of the revenue authorities under Regulation VII of 1822, until he sued in the Civil Court to set aside that settlement, or sued under Act X of 1859 for a mitigation or re-settlement of rent. HURO PERSHAD CHOWDHRY *v.* SHAMA PERSHAD ROY CHOWDHRY . **6 W. R., Act X, 107**

6. ——— **Lakhirajdar in Assam**—*Holder of resumed grant—Right of ejectment.* Whatever might have been his position under former Governments a lakhirajdar in Assam is entitled to manage his lands in any manner he pleases consistently with existing regulations, and, as holder of a resumed grant which has been settled with him, to eject a tenant who has no right of occupancy or lease of any kind. JULLOW SURMA PATWAREE *v.* MADHUB RAM ATOI BOORHA BHUKUT **16 W. R. 202**

7. ——— **Effect of resumption and setlement of lakhiraj**—*Invalid lakhiraj.* Assessment of revenue by Government upon invalid lakhiraj land after resumption does not confer a new estate on the lakhirajdar, and does not cancel or extinguish a mokurari lease granted by the lakhirajdar previously to the settlement and during the time he was in possession of the land as lakhiraj. PRATAB NARAYAN MOOKERJEE *v.* MADHU SUDAN MOOKERJEE . **8 B. L. R. 197 : 16 W. R. 35**

8. ——— **Abadkari talukhdar**—*Acceptance of farming leases—Sale of Government right.* A Government settlement, whether permanent or farming, so far from destroying the rights of a talukhdar, always preserves them if there be really a dependent tenure. Neither the acceptance of farming leases by the talukhdar *qua* farmer, subject to the Government proprietary right, nor the sale of that Government right, in any way, *ipso facto*, extinguishes any talukhdari right existing in the abadkari talukhdar in that capacity, if otherwise valid. HURO PERSHAD BHUTTACHARJEE *v.* BHYRUB CHUNDER MOJOOMDAR . **8 W. R. 391**

9. ——— **Settlement with several persons**—*Presumption as to equality of rights.* In the settlement of a talukh after resumption by Government with thirteen persons, it is not to be

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SETTLEMENT—*contd.*

6. EFFECT OF SETTLEMENT—*contd.*

presumed that all thirteen persons had equal rights, simply because the settlement was made with all of them jointly, particularly where the settlement proceedings show that the question of the extent of the shares was in dispute, and that the settlement was made jointly with the whole without prejudice to title. GOOROO CHURN PODDAR *v.* HAFEEZA BIBEE **7 W. R. 366**

10. ——— *Omission to settle boundaries and proportion of assessment which each cultivator ought to pay—Liability to pay revenue individually.* In a suit against a Collector for an illegal seizure and subsequent usurpation of plaintiff's shares in an Agraharam village for non-payment of trivari due from other tenants of the village and to recover the increased trivari imposed by the Collector:—*Held*, that the fact of pottahs having been issued separately to each tenant, stating the share of land occupied, without defining the holding by boundaries and the proportionate amount of assessment which the cultivator is to pay for it, though affording cogent evidence of the distinct liability of each for the amount of trivari stated in his pottah and no more, is not conclusive evidence of such individual liability. ELLAIYA *v.* COLLECTOR OF SALEM . **3 Mad. 59**

S.C. affirmed on appeal to Privy Council. BRETT *v.* ELLAIYA **12 W. R. P. C. 33 : 13 Moo. I. A. 104**

11. ——— **Settlement with talukhdar after his refusal to re-settle at increased rent**—*Waiver of refusal to pay enhanced rent.* Where, upon a talukhdar's refusal at the end of the period of his settlement to re-settle with Government at an increased rate, the jumma was put up to auction, after which the Government did re-settle with the talukhdar upon the former conditions and the former description of the nature of the taluk, it was *held* that Government renewed the contract, and placed the talukdhar in exactly the position in which he would have stood had he never refused to pay the increased rent. OGNEE COOMAR ROY *v.* KUMOLA KANT ROY **11 W. R. 38**

12. ——— **Private rights**—*Limitation—Right of action as proprietor.* Certain land having been settled by Government for a period of ten years, one *S* bought the benefit of that settlement at an auction-sale for arrears of rent, and afterwards sold his rights to one *M*. On the expiration of the temporary settlement, Government effected a permanent zamindari settlement with *M*. In the following year (1865) the zamindari title was sold, and the purchaser now (1869) sues to recover possession of certain specified land. The lower Appellate Court, finding that none of the persons above mentioned had possession within twelve years immediately preceding the filing of the plaint, considered the suit barred. *Held*, that the question was one solely of a private right, and that the plaintiff did not stand in the position of Government in regard to the statute of limitations. *Held*, also,

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6. EFFECT OF SETTLEMENT—*concld.*

that the plaintiff's claim was traceable solely through *M*, from whom he bought; that at the time of settlement Government has nothing more than a right of action by virtue of its being proprietor, and not the right of action *S* had as auction-purchaser; and only the former right passed by the settlement. RUGHOONATH SURMAH *v.* GOBIND CHUNDER ROY . . . . **14 W. R. 170**

13. ——— **Re-settlement of land by Government after High Court decision dealing with the land**—*Beng. Reg. XI of 1825—Act XXXI of 1858. Quære:* Whether a re-settlement of land by the Government as the ruling power, with persons entitled to such settlement under Bengal Regulation XI of 1825 and Act XXXI of 1858, confers upon the settlers, the owners of the old settlement, a fresh right, when made subsequent to a judgment of the High Court dealing with such land. MODHU SUDAN KUNDU *v.* PROMODA NATH ROY . . **I. L. R. 20 Calc. 732**

7. EXPIRATION OF SETTLEMENT.

1. **[Revocation] of sanad**—*Bom. Act VII of 1863, s. 7—Jurisdiction of Civil Court.* Where a sanad by way of summary settlement of land revenue has been granted by Government under Bombay Act VII of 1863, Government cannot reform or set it aside without the assent of all parties interested therein. To do so would be an assumption by Government of the function of a Civil Court. A Civil Court cannot, on the ground that Government has, by mistake, granted such a sanad to a person not the owner of the land, reform or set aside the sanad. S. 7 of Bombay Act VII of 1863 renders the quit-rent, fixed by the sanad, binding alike on Government and on the rightful owner of the land, but the latter may recover the land from the grantee of the sanad, subject to the quit-rent, fixed by the sanad, payable to Government; and such grantee will be declared to have taken the sanad as a trustee for the rightful owner. Where Government had granted seven sanads to certain garasis in respect of lands, part of which had been previously sold by the garasis and Government had attempted to revoke and cancel those sanads, and had subjected the lands to a full assessment on the ground that the garasis were not entitled to any of the said lands and that the sanads had been granted by mistake:—*Held*, that such attempted revocation, cancellation, and re-assessment were void and of no effect, and that the grantees were entitled to hold the lands on the terms mentioned in the sanads, but, so far as regarded the sold portion of the said lands, in trust for the vendees thereof and their heirs, representatives, and assigns. *Quære:* Whether a Civil Court can give relief, either by reforming or cancelling such sanads against mistakes, other than those relating to ownership, which may be found to exist in the sanads. DALSANG BHAVSANG *v.* COLLECTOR OF KAIRA **I. L. R. 4 Bom. 367**

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SETTLEMENT—*contd.*

7. EXPIRATION OF SETTLEMENT—*concld.*

2. ——— Liablity to ejectment—*Dependent talukhdars.* Dependent talukhdars readmitted to temporary settlements for a certain number of years are not liable to ejectment at the close of those settlements. HUROGOBINDO DOSS *v.* KALA CHAND SHAHA . **6 W. R., Act X, 26**

3. Dispossession—*Dependent talukhdars—Cause of action.* When a dependent talukhdar, holding under a temporary settlement, has that settlement placed in abeyance by the Collector taking the collections into his own hands khas, the Collector's act is not one of dispossession from which limitation can count, but limitation will reckon from the date when the purchaser, at a sale after the Collector had ceased to hold khas, had himself made collections, and so created cause of action by dispossession of the former talukh. MYENOODDEEN *v.* RAMMONEE CHOWDHRAIN **7 W. R. 182**

4. ——— Shikmi talukhdari right—*Payment in lieu of shikmi talukhdari right.* Where a shikmi talukhdar accepted from Government a pottah which admitted him to be a person having a right to a settlement and gave him as a separate and distinct allowance under the head of expenses (in addition to the usual allowance for collections, etc.) the allowance which had, under the previous settlement, been made to him under the head of malikana: —*Held*, that, if he had notice and accepted the payment because he knew that his right as malik of the shikmi talukh was no longer recognized, then the shikmi talukhdari right came to an end at that time. MAINOODDEEN *v.* NUBO COOMAREE DEBIA **24 W. R. 247**

8. MISCELLANEOUS CASES.

1. ——— Permanent lease made by proprietor pending resumption. Where the proprietor of resumed lakhiraj land leases it for valuable consideration, and at a stipulated jumma, while the settlement proceedings are under reference to the higher revenue authorities for confirmation, he cannot afterwards turn round upon the lessee and plead that he had no power to grant a permanent lease, on the ground that the settlement with him was temporary, and not permanent. AMEER ALI *v.* AMEEROONISSA BEGUM . . . . . **11 W. R. 11**

2. ——— Landlord and tenant—*Effect of settlement proceedings.* A land-owner, seeking to bind his tenants by the settlement proceedings, should show distinctly, that they were parties to the enquiry held by the Collector into the nature and extent of their holdings. ALI AHMAD *v.* DOORGA ROY . . . . . **22 W. R. 455**

3. ——— Right of tenants to deduction for cost of collection—*Beng. Reg. VII of 1822, s. 9.* Where tenants who were aymadars voluntarily signed a jummabundi drawn up under Regulation VII of 1822, s. 9, specifying the amounts

SETTLEMENT—*concld.*

8. MISCELLANEOUS CASES—*concld.*

of rent payable by them to the Government farmers with whom the settlement was made:—*Held*, that the tenants were not entitled to a deduction from such specified rents on account of costs of collection. WATSON & CO. *v.* MOHENDRO NATH PAUL **23 W. R. 436**

4. ——— Powers of Revenue Boards—*Resumption—Cancelment of settlement.* A settlement of a resumed lakhiraj estate being made by the Collector with the plaintiff, "subject to the orders of the Board of Revenue," the Board, or the Commissioner acting under rules laid down by them, may cancel the settlement at any time. HARLAL TEWARI *v.* COLLECTOR OF BHAUGULPORE **3 B. L. R. Ap. 82 : 12 W. R. 9**

5. ——— Settlement of a Government khas mehal—*Enhancement of rent—Reg. VII of 1822—Beng. Act III of 1878—Beng. Act VIII of 1879, ss. 10, 14.* In order to make the enhanced rent, stated in a jummabundi settled under Regulation VII of 1822, binding upon a tenant, there must be either an assent to that enhancement or else a compliance with the provisions of the rent law with reference to enhancement of rent in force at the time of such enhancement. *D'Silva* v. *Raj Coomar Dutt, 16 W. R. 153; Enayetoollah Meah* v. *Nubo Coomar Sircar, 20 W. R. 207;* and *Reazooddeen Mahomed* v. *McAlpine, 22 W. R. 540,* followed. The rent of a Government khas mehal can only be enhanced by the same process as the rent on any private estate. AKSHAYA KUMAR DUTT *v.* SHAMA CHARAN PATITANDA . **I. L. R. 16 Calc. 586**

SETTLEMENT AWARD.

See ACT XIII OF 1848.

SETTLEMENT OFFICER.

See COURT-FEE . **12 C. W. N. 917**

See LIMITATION ACT, 1877, SCH. II, ART. 130 (1871, ART. 130). **I. L. R. 1 Bom. 586**

See MADRAS FOREST ACT, s. 4. **I. L. R. 17 Mad. 193**

See PUBLIC OFFICER. **I. L. R. 14 Bom. 395**

See RECORD OF RIGHTS. **I. L. R. 35 Calc. 176**

See SERVICE TENURE. **I. L. R. 1 Bom. 586**

See SONTHAL PERGUNNAHS SETTLEMENT REGULATION. **I. L. R. 18 Calc. 146**

——— act or order of—

See BENGAL TENANCY ACT, s. 104. **I. L. R. 20 Calc. 579**
I. L. R. 23 Calc. 257

See DECREE—CONSTRUCTION OF DECREE —HINDU WIDOW. **I. L. R. 17 Calc. 246**

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SETTLEMENT OFFICER—*contd.*

——— act or order of———*concld.*

See KHOTI SETTLEMENT ACT, SS. 20 AND 21 . . I. L. R. 18 Bom. 244

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See LIMITATION ACT, 1877, SCH. II, ART. 14 . . I. L. R. 18 Bom. 244

See RES JUDICATA—COMPETENT COURT—REVENUE COURTS. I. L. R. 23 Calc. 257

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See GUJARAT TALUKHDARS ACT, S. 10. I. L. R. 16 Bom. 408

——— decision of—

See ARBITRATION—ARBITRATION UNDER SPECIAL ACTS—N.-W. P. LAND REVENUE ACT . I. L. R. 18 All. 172

See BENGAL TENANCY ACT, SS. 104 (2), 107 . . . 11 C. W. N. 1028

See KHOTI SETTLEMENT ACT, SS. 17 AND 20.

See RES JUDICATA . 11 C. W. N. 939

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, S. 622. I. L. R. 21 Calc. 935

——— entry in record of—

See KHOTI SETTLEMENT ACT, S. 17.

——— jurisdiction of—

See BENGAL TENANCY ACT, SS. 101, 106. I. L. R. 32 Calc. 518

See JURISDICTION. I. L. R. 32 Calc. 162

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See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL.
I. L. R. 16 Calc. 596
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I. L. R. 22 Calc. 477
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——— power of—

See BENGAL TENANCY ACT, SS. 101 TO 115.
I. L. R. 20 Calc. 577
I. L. R. 21 Calc. 378
I. L. R. 27 Calc. 364

See BENGAL TENANCY ACT, S. 102.
I. L. R. 21 Calc. 38
I. L. R. 22 Calc. 244

See BENGAL TENANCY ACT, S. 103.
I. L. R. 19 Calc. 641 ; 643

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——— statement of facts by—

See EVIDENCE ACT, 1872, S. 35.
I. L. R. 21 Bom. 695

——— suit to set aside order of—

See SONTHAL PERGUNNAHS SETTLEMENT REGULATION . I. L. R. 13 Calc. 245
I. L. R. 15 Calc. 765
I. L. R. 18 Calc. 146

1. ——— Duty of settlement officer —*Entries in wajib-ul-urz.* A settlement officer should not receive for entry in the wajib-ul-urz of a village a mere expression of the views of a proprietor or enter it upon the records relating to the village, the wajib-ul-urz being intended to be the official record of local customs. UMAN PARSHAD *v.* GANDHARP SINGH . . I. L. R. 15 Calc. 20
L. R. 14 I. A. 127

2. ——— Power of settlement officer —*Question of payment and right to possession between mortgagor and usufructuary mortgagee.* The duty of the settlement officer is to record the names of those whom he finds in possession of right, or whom he finds to have been wrongfully dispossessed of right within a certain period ; but it is not his duty to determine the question whether the mortgagor in a usufructuary mortgage is entitled to possession by reason of the satisfaction of the debt out of the usufruct. BHYRO RAI *v.* GOLAB SINGH 3 Agra 303

3. ——— *Powers of, in making entry in jummabandi.* A settlement officer is bound to record in the jummabandi the existing rights of cultivators, and cannot impose an enhanced rent without notice on those entitled. If he enters a higher rate in spite of protest, such entry does not conclude the tenant from pleading non-liability. LEDLIE *v.* DOORGA MONEE DOSSEE. WATSON & Co. *v.* DOORGA MONEE DOSSEE 21 W. R. 410

4. ——— *Act XIV of 1863 —Application under Act X of 1859, s. 28.* The powers which the Government was authorized by Act XIV of 1863 to confer on settlement officers were limited to powers for the decision of suits of the nature mentioned in s. 23 of Act X of 1859 or in Act XIV of 1863, and there was no authority given to Government to invest settlement officers with any other of the powers which were vested in a Collector by Act X of 1859, consequently an application under s. 28 of that Act could not be entertained by a settlement officer. THAKOOREE *v.* DHULEEP SINGH . . . 2 N. W. 261

5. ——— *Act XIV of 1863, s. 8—Resumption and assessment.* The powers given by s. 8 of Act XIV of 1863 to a settlement officer, for the decision of suits of the nature mentioned in s. 23 of Act X of 1859, or in Act XIV of 1863, did not give him power to try a right to resume and assess. JEYCHUND *v.* KADHOREE 2 N. W. 2 44 : Agra F. B. Ed. 1874, 222

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SETTLEMENT OFFICER—*concld.*

6. ——— *Power to refer case to another officer for trial—Act X of 1859, s. 150—Act XIV of 1863, ss. 8 and 10.* An officer employed in making or revising settlements of land revenue and invested by the local Government with the powers described in s. 8, Act XIV of 1863, was not thereby empowered to refer a suit, which he had jurisdiction to try by virtue of the provisions of the abovementioned section, to another officer for trial. The powers in s. 8 of Act XIV of 1863 were the powers spoken of in s. 150 of Act X of 1859, and were distinct from the powers given to a Collector by the second clause of s. 162. S. 10 of Act XIV of 1863 enacted that, if a suit for enhancement of rent be brought before any officer empowered under s. 8 to hear the same, such suit should be heard and determined by such officer and it was not provided that he might refer it for trial and decision to another. PUNCHUM SINGH *v.* HOORMUTOONNISSA . . . **5 N. W. 64**

7. ——— *Power to increase rent—Consent of raiyats.* Where increased rent is imposed in the course of settlement proceedings, the Collector's jummabundi must show the consent of all the raiyats before they can be held to be bound by it. REAZOODDEEN MAHOMED *v.* MCALPINE . . . **22 W. R. 540**

8. ——— *Power of, in Sonthal Pergunnahs—Reg. III of 1872—Reference in settlement cases. Quœre:* Whether, having regard to Regulation III of 1872 and the notification by the Lieutenant-Governor, dated 7th May 1872, a valid reference can be made in a settlement case in the Sonthal Pergunnahs by a settlement officer. TARINI PROSAD MISSER *v.* MAHAMMAD CHOWDHRY **6 C. L. R. 555**

SHANARS OR NADARS.

See HINDU LAW—WORSHIP.
I. L. R. 31 Mad. 236

SHARE.

——— in an estate; registration of—

See LAND REGISTRATION ACT (BENGAL ACT VII OF 1876), ss. 42, 44, 78.
I. L. R. 30 Calc. 880

——— relinquishment of—

See MAHOMEDAN LAW.
I. L. R. 31 Bom. 271

SHARES.

See SHARE-HOLDER.

See SHARE WARRANTS.

See COMPANY.

——— agreement relating to sale of—

See STAMP ACT, 1879, SCH. I, ART. 5.
I. L. R. 13 Mad. 255
I. L. R. 14 Bom. 316

——— assignment of—

See INSOLVENCY—ORDER AND DISPOSITION . . **I. L. R. 2 Bom. 542**

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——— cancellation of—

See COMPANY—POWERS, DUTIES, AND LIABILITIES OF DIRECTORS.
I. L. R. 20 Bom. 654

——— "holding shares," meaning of—

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.
I. L. R. 17 Bom. 197

——— sale of—

See CONTRACT—CONTRACTS FOR GOVERNMENT SECURITIES OR SHARES.
2 Bom. 260, 267, 272; 2nd Ed. 246; 253; 253
3 Bom. O. C. 9, 69; 79
1 Ind. Jur. N. S. 17

——— transfer of—

See COMPANY—TRANSFER OF SHARES, AND RIGHTS OF TRANSFEREES.

——— transfer of, registration of—

See BANK OF BENGAL.
I. L. R. 3 Calc. 392

1. ——— **Transfer of shares**—*Blank transfer—Cause of action.* Shares in the National Bank were sold by the allottee, and a transfer in the form required by the articles of association of the Bank was executed, but no name was inserted as transferee. The purchaser pledged them with the I. P. L and China Bank, and deposited with them the blank transfer. This Bank applied to the National Bank without producing a letter from the pledgor to register their lien, and on its refusal sold the shares to the plaintiff and delivered to him the transfer, also in blank. The plaintiff inserted his own name in the transfer, and requested the National Bank to register the shares in his name. In an action against the National Bank to recover the price of the shares:—*Held*, that they were justified in refusing to register. *Held*, also, that the plaintiff, having received back from his vendors the price of his shares, had no cause of action. KNOWLES *v.* NATIONAL BANK OF INDIA
2 B. L. R. O. C. 158

2. ——— *Transfer by way of pledge—Right of transferee to have transfer registered and to have dividends.* *A* and *B*, proprietors of indigo factories, sold them to the *E. B. Company*, receiving in part payment 1,000 fully paid up shares of the company, which was a company registered under Act XIX of 1857, *A* and *B* covenanting to indemnify the company from all loss and to guarantee a dividend of 8 per cent. for the term of two years. *A*, being indebted to *C*, deposited the shares with him as a security for the debt. *C* gave notice of this to the company before he made the advance to *A*, and the company assented to the deposit. *A* and *B* afterwards became jointly indebted to the company in respect of the covenant and guarantee. *Held*, that *C* was entitled to have the deposit of the shares registered in the books of

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SHARES—*contd.*

the Company, and to be paid dividends upon them. PIETSCH *v.* EASTERN BENGAL INDIGO COMPANY **1 Ind. Jur. N. S. 278**

But where the deposit by *A* was accompanied by a contract with a power of sale of the shares, but nothing was said about receiving the dividend:—*Held*, that, under the contract of *A*, *C* could not receive the dividend, though he could under a contemporaneous general power of attorney from *A*. ROYAL BANK OF INDIA *v.* EASTERN BENGAL INDIGO COMPANY . **1 Ind. Jur. N. S. 281**

3. _____ *Blank transfers—Tenders.* On the 19th April plaintiff sold to defendants sixty shares in the N Bank, to be delivered and paid for on Thursday, April 26th. The sold note was as follow: "Baboo Lall Mohun Mullick. Sold by your order, and on your account, to Messrs. Pyary Chand Mittra and Sons (Metcalfe Hall) sixty shares in the N Bank at R4 premium per share. (Signed) Sree Coomar Sircar, Broker." The bought note exactly corresponded. On the 23rd April plaintiff received from defendants the following: "With reference to the sixty N Bank shares sold by you, we shall thank you to send us three transfer deeds on Friday next, *viz.*, two for twenty-five shares each and one for ten shares." On the 26th April plaintiff sent to defendants sixty N Bank shares, some standing in the name of *H* and some in the name of *P*, accompanied by transfer, all executed by *P* alone. These shares were all returned by the defendants, with the following memorandum: "The accompanying shares in the N Bank purchased for delivery to-day are not in order." Later on the same day, the 26th, plaintiff took personally to defendants the same sixty shares with transfers, executed some by *H* and some by *P*, the name of the transferor corresponding number by number with the name in the shares. On this, as on the previous occasion, the name of the transferee was left blank. These shares were also rejected by the defendants as not in order. Plaintiff then, on April 27th about 1 P.M., had the shares registered in his own name, and, within two hours afterwards, sent them to the defendants with corresponding transfers, and with the following letter: "In compliance with request in your memorandum of the 23rd instant, I now send you the sixty shares N Bank, with three transfer deeds, and will feel obliged by your paying the amount to the bearer." The defendants declined to receive the shares, and they were re-sold at a loss. The plaintiff never had any personal interest whatever in the shares, either on the 26th or 27th April, and was a mere benami holder for *H* and *P*. The articles of association of the N Bank required transfers to be in the form F appended to Act XIX of 1857. The transfers tendered by plaintiff were on each occasion in that form. The defendants swore that the "Friday, the 27th April, mentioned in their memorandum of the 23rd April, was inserted by accident, instead of Thursday," the 26th April, and that they consequently rejected the tender on the 27th. *Held*, (i) that the contract, as it stood on the bought and sold notes, was a contract by the vendor (as in *Stephen* v. *De Medina*) that "in consideration of such a sum I will execute any proper conveyance which you tender me." (ii) That the memorandum of April 23rd, coupled with the fact of the vendor having made tenders of transfers of the shares, was evidence enough to show that the vendor bound himself to tender a proper conveyance to his vendees. (iii) That the document of conveyance must be complete at the time of tender, or capable of being then made complete. (iv) The transfers, with a blank for the name of the transferee, were incomplete and insufficient, the vendor showing no authority from *H* and *P*. (v) That the Court below must deal with the question of fact, whether or no the mention of Friday, the 27th, instead of Thursday, the 26th, was a mistake; and *Semble*, that, if the defendants had received the blank transfers and acted upon them the waiver would have rendered them complete. LALL MOHUN MULLICK *v.* PEARY CHAND MITTER **1 Ind. Jur. N. S. 383**

SHARES—*concld.*

4. _____ **Sale of shares for future delivery**—*Refusal of purchaser to accept—Readiness and willingness to deliver—Pledge of shares to third person.* Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares. *Semble*: The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so. DAYABHAI DIPCHAND *v.* MANIKLAL VRIJBHUKAN **8 Bom. A. C. 123**

5. _____ *Equitable assignment of right to sue—Readiness and willingness to deliver—Tender—Constructive tender.* A contract for the delivery of shares at a future day is a contract that can be assigned in equity, and the assignee of such a contract can, in his own name, maintain a suit to recover damages for its breach in the Civil Courts in India. In such a suit the plaintiff would be subject to any equities that might subsist between his assignor and the defendant. In order to support an allegation of readiness and willingness to deliver, an actual tender is not in all cases necessary, *e.g.*, a tender will be dispensed with where the defendant has refused to perform the contract, or where, on the day for the performance of it, he has absconded, and, having closed his place of business, has left no agent or other person to represent him. DAYABHAI DIPCHAND *v.* DULLABHRAM DAYARAM . **8 Bom. A. C. 133**

SHAREHOLDER.

See PRESIDENCY BANKS ACT.
I. L. R. 31 Bom. 319

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SHAREHOLDER—*concld.*

———— interests of, in estate—

See CONTRIBUTION, SUIT FOR
I. L. R. 35 Calc. 303

———— liability of—

See COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.

right of—

See COMPANY—MEETINGS AND VOTING.
I. L. R. 15 Bom. 164

See COMPANY—RIGHTS OF SHAREHOLDERS.
I. L. R. 19 Bom. 1
L. R. 21 I. A. 139

———— right of, to inspect register and take extracts therefrom—

See MANDAMUS. I. L. R. 32 Bom. 486

SHARE-WARRANTS.

———— stamp on—

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—COMPANIES ACT.
I. L. R. 20 Calc. 676

SHEBAIT.

See BENGAL TENANCY ACT, s. 15.
10 C. W. N. 42

See CONTRACT ACT, s. 70.
9 C. W. N. 421

See DEBUTTER . 10 C. W. N. 1000
13 C. W. N. 805

See EVIDENCE ACT (I OF 1872), s. 90.
I. L. R. 33 Calc. 571

See EXECUTION OF DECREE.
I. L. R. 35 Calc. 364

See HINDU LAW—
ENDOWMENT—DEBUTTER.
DEALING WITH AND MANAGEMENT OF, ENDOWMENT.
5 C. W. N. 273
10 C. W. N. 825; 1000

ALIENATION OF ENDOWED PROPERTY . . 6 C. W. N. 663

WILL—CONSTRUCTION OF WILLS—ESTATES, ABSOLUTE OR LIMITED.
I. L. R. 2 8 Calc. 71

See LETTERS OF ADMINISTRATION
10 C. W. N. 432

See PARTIES—PARTIES TO SUITS—IDOL.
6 C. W. N. 178
I. L. R. 32 Calc. 582

See PROBATE AND ADMINISTRATION ACT, s. 3 . . 10 C. W. N. 322

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES.
6 C. W. N. 178

See WILL . I. L. R. 32 Calc. 1032
9 C. W. N. 1021

SHEBAIT—*concld.*

———— alienation of shebaitship inter vivos—

See HINDU LAW. I. L. R. 36 Calc. 975

———— appointment of—validity—

See WILL . I. L. R. 31 Calc. 166

———— power of, to bind the estate—

See DEBUTTER ESTATE.
I. L. R. 34 Calc. 249

———— representation by—

See HINDU LAW . I. L. R. 34 Calc. 828

See RECEIVER, SALE BY.
11 C. W. N. 489

———— right of suit in—

See LIMITATION ACT, s. 7.
8 C. W. N. 809

———— *Decree—Interpretation of decree—Shebait's position.* Where a suit for the recovery of possession of immoveable property was instituted against P, who defended the suit as a *shebait* and signed and verified his written statement as such, alleging that the lands were *debutter*, and where the decree was passed against him as such with a direction that the mesne profits should be realized from the defendant:—*Held*, that the decree must be taken to have been passed against the defendant as *shebait* and not in his personal capacity and that the *debutter* property was liable to make good the claim for mesne profits and consequently to be attached and sold in execution of the decree. Powers and duties of a *shebait* explained. PRAMADA NATH ROY *v.* POORNA CHANDRA ROY (1908).
I. L. R. 35 Calc. 691
s.c. 12 C. W. N. 550

SHERI LANDS.

See ENHANCEMENT OF RENT.
I. L. R. 29 Bom. 415

See LAND REVENUE CODE.
I. L. R. 29 Bom. 415

SHERIFF.

———— liability of—

See ESCAPE FROM CUSTODY.
6 Moo. I. A. 467

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . . I. L. R. 2 Bom. 258

———— sale by, under writ of fieri facias

See HIGH COURT, JURISDICTION OF—CALCUTTA—CIVIL . 24 W. R. 366
8 C. L. R. 4

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . . I. L. R. 1 Calc. 55
I. L. R. 3 Calc. 806
L. R. 5 I. A. 116
I. L. R. 6 Calc. 356

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SHERIFF—*contd.*

1. ——— **Right of poundage**—*Satisfaction of decree after attachment, but before sale.* Certain immoveable property of the defendant was attached in execution of a decree which had been partly satisfied by the proceeds of a previous sale in execution. Before any proceedings for sale were taken under the attachment, the defendant paid the balance and satisfied the plaintiff's claim in full. *Held*, that the Sheriff was entitled to poundage upon the amount so paid in satisfaction of the debt and satisfaction of the decree was ordered to be entered, and the attachment withdrawn, subject to the payment of such poundage. ROYCHURN DUTT *v.* AMEENA BIBI . **I. L. R. 2 Calc. 385**

PEARSON *v.* MADHUB CHUNDER GHOSE **I. L. R. 2 Calc. 387 note**

2. ——— **"Debt levied by execution"** —*Ambiguity in document—Usage—Discharge of defendant, effect of, on Sheriff's right.* In the suit brought in the Bombay Court of Small Causes to recover Sheriff's poundage on the amount endorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested *H*, who applied to the High Court under s. 273 of Act VIII of 1859, and was ordered to be discharged from custody, the Judge found for the defendants with costs, subject to the opinion of the High Court. *Held*, (i) that the words "debt levied by execution" used in the table of fees for the Recorder's Court, and continued in the subsequent tables, being ambiguous, the rule applies that "if an instrument be an ancient one and its meaning doubtful, the acts of its author may be given in evidence, in aid of its construction;" (ii) that as the Sheriff is the officer of the Court, and his fees are received under its authority, it was unnecessary to refer the case back to the Small Cause Court in order that evidence of usage might be taken; (iii) that having regard as well to the usage and practice of the Supreme Court as to the liability of the Sheriff at the time the old tables of fees were settled, the words used must be construed as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and (iv) that if the Sheriff's right accrues upon his executing the warrant, the subsequent discharge by the Court of the defendant from custody ought not to divest him of it. VINAYAK VASUDEV *v.* RITCHIE, STEUART & Co. . . . **4 Bom. O. C. 139**

3. ——— **Compromise after attachment of property and before sale.** Where property is attached by the Sheriff after judgment, and the parties come to a compromise before the Sheriff sells any of such property, the Sheriff is only entitled to poundage on the amount received by the execution creditor in compromise of his claim. *In the matter of* BOMBAY JOINT STOCK CORPORATION. *In re* SHERIFF OF BOMBAY **6 Bom. O. C. 22**

4. ——— **Sale by Sheriff**—*Civil Procedure Code (Act XIV of 1882), s. 244, cl. (c), ss. 287, 311, 313—Belchamber's Rules and Orders of High Court, Calcutta, 382—386—Deficiency in area of land—Application by purchaser to set aside sale or for compensation.* A purchaser at an execution sale of immoveable property held by the Sheriff applied to set aside the sale or for compensation on the ground of deficiency in the area of the land sold. *Held*, that such an application in relation to sales held by the Sheriff was not sanctioned by any provisions of the Civil Procedure Code, and s. 313 did not apply. *Held*, also that, as the interest of the purchaser was adverse to the interest of the judgment-debtor, the former was not the representative in interest of the latter, and therefore s. 244 of the Civil Procedure Code did not apply. *Ishan Chunder Sircar* v. *Beni Madhub Sirkar, I. L. R. 24 Calc. 62*, applied. Sales by the Sheriff differ from sales by the Registrar of the Original Side of the High Court. The rule of the Court governing sales by the Registrar direct that compensation shall be allowed for errors and misstatements, if capable of compensation, while no such condition is imposed on sales by the Sheriff. RAM NARAIN *v.* DWARKA NATH KHETTRY **I. L. R. 27 Calc. 264 4 C. W. N. 13**

SHIAHS.

See MAHOMEDAN LAW **I. L. R. 30 All. 153**

See TRUSTEE . **I. L. R. 34 Calc. 118 11 C. W. N. 297**

——— **vendor—**

See MOHAMEDAN LAW. **I. L. R. 32 Calc. 982**

SHIAH LAW.

See MAHOMEDAN LAW—SUCCESSION. **I. L. R. 32 Bom. 540**

SHIKMI INTEREST.

See MERGER . **I. L. R. 33 Calc. 1212**

SHIKMI TALUKDARS.

See SETTLEMENT—EVIDENCE OF SETTLEMENT. **3 W. R. P. C. 5: 10 Moo. I. A. 185**

See SETTLEMENT—RIGHT TO SETTLEMENT **W. R. 1864, 262**

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See SHIP, ARREST OF.

See SHIP, REGISTERING OF.

See SHIP, SALE OF.

——— **at anchor, duty of—**

See SHIPPING LAW—COLLISION. **I. L. R. 24 Calc. 627 L. R. 24 I. A. 129**

——— **loss of—**

See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 13 Bom. 15 I. L. R. 22 Bom. 189**

——— **measurement of—**

See MERCHANT SHIPPING ACT, ss. 24, 26. **I. L. R. 14 Bom. 170**

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SHIP—*concld.*

——— seaworthiness of—

See BILL OF LADING . **8 W. R. 35**
I. L. R. 13 Bom. 571
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See CONTRACT—CONDITIONS PRECEDENT.
2 B. L. R. O. C. 127

See INSURANCE—MARINE INSURANCE.
5 Moo. I. A. 361
Cor. 5 : 2 Hyde 107

——— Collision—*Negligence—Wrongful act—Side lights, want of—Navigation.* Where one ship, by gross negligence, *viz.*, by not carrying any lights, placed another ship in a position of extreme danger, and in the moment of emergency the sarang of the latter gave an order to "starboard" instead of to "port-the-helm," which resulted in a collision:—*Held*, that under the circumstances the latter ship was not guilty of such negligence as would make her responsible for the collision. *The "Bywell Castle," 4 P. D. 219*, and *The Owners of the "Tasmania" v. Smith, 15 App. Cas. 223*, referred to. INDIA GENERAL STEAM NAVIGATION COMPANY *v.* JAGAT CHANDRA KUNDU (1904) . . **I. L. R. 31 Calc. 36**

SHIP, ARREST OF.

See ADMIRALTY OR VICE-ADMIRALTY JURISDICTION . **I. L. R. 29 Calc. 402**

See ARREST—CIVIL ARREST . **1 Hyde 253**

See COSTS—SPECIAL CASES—ADMIRALTY OR VICE-ADMIRALTY.
I. L. R. 17 Calc. 84

See SALVAGE . **I. L. R. 17 Calc. 84**

——— ——— Deposit of security with Marshal—*Application for arrest of deposit in another action—Admiralty Court, practice of.* The ship *M*, having been arrested in an action promoted by the master of the ship *N* for damage caused by a collision, in which the *N* with her cargo was totally lost, deposited with the Marshal of the Court certain Government paper as security to answer the alleged damage, on which the *M* was released. The cargo of the *N* had been insured, and on the loss thereof the Insurance Company paid the amount of the policy, and instituted proceedings against the *M* in respect of the loss of the cargo. *Held*, the Court had no power to grant an application by the Insurance Company for the arrest of the security in the hands of the Marshal, so as to make it answerable in their action. TRITON INSURANCE COMPANY *v.* "MOORHILL." *In re* "MOORHILL"
15 B. L. R. Ap. 3

SHIP, REGISTERING OF.

——— British ship—*Stat. 3 & 4 Vict., c. 56—Act X of 1841—Ship built in foreign port.* A ship built in a foreign port in India in 1817, within the limits of the Company's charter, by foreigners, and which sailed under foreign flags until 1838, when it was then and thereafter owned by and belonged to British subjects, resident at Bombay, *held* to be entitled, under the proclamation of the Governor General in Council under 3 & 4 Vict., c. 56, and the Act X of 1841 of the Legislative Council of India, to be registered at Bombay as a British ship, for the purpose of trade within the limits of the Company's charter. CRAWFORD *v.* SPOONER
4 Moo. I. A. 179

SHIP, SALE OF.

See BOTTOMRY BOND . **5 B. L. R. 258**
6 B. L. R. 323

1. ——— Sale in execution of decree—*Form of transfer—Merchant Shipping Act, s. 55—Mandamus to Registrar to register transfer—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree.* The transfer of a ship should be in the form, or as near the form as may be laid down by the Merchant Shipping Act; therefore where a ship sold in execution was transferred by the Clerk of the Court, in a form usual in sales in execution, but quite irregular, having reference to the Merchant Shipping Acts, the Court refused a mandamus to order the Registrar to register the transfer. *Quære:* Whether a ship can be sold in execution of a decree of the Calcutta Small Cause Court, and whether the Clerk of the Small Cause Court can execute a transfer of a ship, supposing she is saleable, in execution of that Court's decree. *In the matter of the ship* "SHAH CALLANDER" . . . **1 Ind. Jur. N. S. 263**

2. ——— Transfer of a ship—*Merchant Shipping Act (25 & 26 Vict. c. 63), s. 3—Equitable title—Destruction after agreement for sale—Suit to recover purchase-money.* The defendant agreed to purchase a ship from the plaintiff, but the sale was not completed in the manner prescribed by the Merchant Shipping Acts. The ship was delivered to the defendant in pursuance of the agreement and subsequently foundered in port owing to accidental causes. The plaintiff sued to recover the balance of the purchase-money. *Held*, that the plaintiff was not entitled to recover RAMANADAN CHETTI *v.* NAGOODA MARACAYAR
I. L. R. 21 Mad. 395

3. ——— *Contract between British subject and non-British subject as to registered ship in Calcutta—Merchant Shipping Acts, ss. 53, 55—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree—Form of transfer to purchaser.* *A*, not a British subject, contracted with *B*, a British subject, for the purchase of a ship which was registered in the port of Calcutta in the name of *C* (also a British subject). *A* and *B* entered into the contract as if both had been British subjects. *Held*, that, on the evidence, the parties contracted with reference to the Merchant Shipping Act, and that the intention was that a title under that Act should be given. *Held*, also, that, although it turned out that *A*'s nationality prevented the possibility of his being registered as owner, this did not affect of the liability taken upon himself by *B* to have himself put on the register as owner, or his liability to put *A* in a position to have a change of

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SHIP, SALE OF—*concld.*

ownership noted in the register under s. 53 of the Merchant Shipping Act. *Held*, further, that *B* not having had himself put on the register as owner, and not having put *A* in a position to have a charge of ownership noted under s. 53, and *B* having declined to take any further steps towards attaining either of these objects, *A* was entitled, although he had got possession of the ship, to rescind the contract, and to recover back a portion of the purchase-money which he had paid, and also to recover damages for the breach of contract. The Calcutta Court of Small Causes had power to seize and sell a vessel in execution of a decree of that Court, and the bailiff who sells the vessel is the person who ought to execute the bill of sale to the purchaser. A British ship having, in execution of a decree of the Calcutta Court of Small Causes, been sold to a person qualified to be the owner of the British ship:—*Held*, that it was necessary that the transfer to the purchaser should be by bill of sale as prescribed in s. 55 of the Merchant Shipping Act, and the mere sale and delivery to the purchaser did not pass a title to him. ESAU AHMED *v.* JASSIM BINSAFF
2 Ind. Jur. S. N. 251

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——— contract for—

See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 12 Bom. 50**
I. L. R. 13 Bom. 15
I. L. R. 16 Bom. 389
I. L. R. 17 Bom. 129
I. L. R. 18 Bom. 299
I. L. R. 22 Bom. 189
I. L. R. 18 Mad. 63

See SALE OF GOODS.
I. L. R. 17 Bom. 62

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—DAMAGES FOR BREACH OF CONTRACT.
I. L. R. 19 Mad. 304

——— meaning of—

See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 17 Bom. 129**

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . **I. L. R. 17 Bom. 129**

1. ——— **Consignment of goods**—*Bills of exchange—Presumption of payment of—Sale of goods.* The plaintiffs in London and the defendant in Calcutta had dealings, which consisted in the defendant shipping jute cuttings and rejections to the plaintiffs in certain quantities, and within certain limits as to price, the defendant drawing bills on the plaintiffs in respect of such goods, which the plaintiffs accepted. The plaintiffs alleged that there was an agreement between them and the defendant that in case of shipments in excess of the limits given by the plaintiffs they should at their option receive the goods on their own account, or treat them as consignments on account of the defendant, but the defendant denied there was any

SHIPMENT—*concld.*

such arrangement. The defendant made several shipments in excess of the plaintiff's limits and the plaintiffs treated them as consignments on the defendant's account, selling them on defendant's account and forwarding him account sales, and drawing bills on the defendant for any balance due to them in the transactions, which bills the defendant refused to pay. In an action brought by the plaintiffs for the balance due to them from the defendant in respect of the shipments which had been treated by the plaintiffs as consignments in the defendant's account, the defendant admitted he had sold the bills and received the money for them; they were produced by the plaintiffs, the acceptors. *Held*, that the bills being produced by the acceptors after due date, and the defendant having received a notice of dishonour, and no demand for payment of the bills, the presumption was that they had been paid by the plaintiffs. In exercising their option of treating shipments in excess of their limits as on their own account or as consignments on account of the defendant, the plaintiffs were entitled to treat each shipment separately, and were not compelled to decide on an average of the shipments taken all together. SHEARMAN *v.* FLEMING . **5 B. L. R. 619**

2. ——— *Bills of lading fraudulently signed—Title of endorsees for value against holder of mate's receipts who has not paid.* The plaintiffs agreed with the defendant *K M* to purchase and ship cotton on account of *K M* and to retain the mate's receipts for the cotton so shipped until the purchase-money should be paid by *K M*. Under this agreement the plaintiffs shipped 609 bales on board the *Teresa*. Before the greater part of the 609 bales had been shipped, and before paying for the same, *K M*, without production of the mate's receipts, induced the master of the ship to sign bills of lading for the said 609 bales, and endorsed over the bills of lading for 310 of such bales to *J C & Co.*, *bonâ fide* endorsees for value without notice. In a contest between the plaintiffs, holders of the mate's receipts and *J C & Co.*, endorsees for value of the bills of lading of the said 310 bales, it was held that the plaintiffs were entitled to the possession of the 310 bales to the exclusion of *J C & Co.* RAJARAM GOVINDRAM *v.* BROWN
7 Bom. O. C. 97

SHIPPING DOCUMENT.

See LETTER OF CREDIT.
I. L. R. 25 Bom. 706

SHIPPING LAW.

1. ——— **Certificates**—*Suspension or cancelment of certificate—Act I of 1859, ss. 201, 202.* The local tribunal in India, appointed under ss. 201 and 202 of Act I of 1859, can suspend or cancel the British certificate of a master or mate, and for that purpose its report need not be confirmed by the local Government. *Ex parte* HURST. *In the matter of Steamship* "JASON" . . **1 Mad. 270**

2. ——— **Collision**—*Collision in port & Port Rules, 1856—Liability of ship for damage.* The ship *T* having got adrift in a dark night, in-

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SHIPPING LAW—*contd.*

consequence of a collision, the harbour-master tried to anchor her, but failing to do so, as her cable jammed, finally brought her up inside the ship *A*, which was moored off the Howrah side of the Hooghly, this being the only berth the *T* could then secure. The next flood swung both ships, and the *T* fouled the *A*, damaging her, and causing her to part her cables, in consequence of which she suffered further damage from subsequent collisions. The owners of the *A* sued the *T* for the whole damage done. The defence was that the promovents, by adopting certain precautions, might have prevented the accident; that the *T*, being in charge of the port authorities, was not liable, and that no care or skill on her part could have prevented the accident. The *T* did not allege a liability of any of the vessels subsequently collided with. *Held*, that liability for damages occasioned by collision rests, *primâ facie*, on the colliding vessel. That a ship in port is bound to be prepared for such exigencies only as might be expected to arise from the circumstances she knew to surround her, that is, a ship is protected by the port rules from liability for damage only when it is due to the acts or omissions of the officials in charge of her. *Held*, also, that the ship is liable for all the consequences occasioned by an accident that results from any defect in her equipment, or want of care or skill of her crew, etc. *In the matter of the* "THALATTA" . . **Bourke Ad. 1**

Held, on appeal, that an accident to the gear of a ship does not of itself alone render her liable for damages for a collision of which it is a remote occasion; and that a ship at anchor in the port should keep a look-out, and be ready to take all reasonable means for her own safety in an emergency. "THALATTA" *v.* "ANNE" . **Bourke A. O. C. 87**

3. ——— *Liability of ship for fault of pilot—Port Rules, 1856—Act XXII of 1855.* The ship *H*, in charge of a pilot (acting as harbour-master), when proceeding across the bow of the ship *I S*, which was at anchor, to take up a clear mooring, came into collision with and slightly damaged her, and this suit was for the damage so occasioned. Both sides relied on Act XXII of 1855 and the Port Rules of 1856, the plaintiff contending that the officer in charge was not such officer as the said Act and Rules referred to; and the defendant that he was. The suit was dismissed with costs. *Held*, that a ship is *primâ facie* liable for damages occasioned by a collision resulting from an error in judgment of the officer in charge of her. *Held*, also, that a vessel is exempted from liability for the fault of a pilot in charge of her,—first where a master is authorized to employ a pilot, and is exempted from responsibility if he elects to do so; and, secondly, where the employment of a pilot is compulsory, and the owners of the vessel so employing him are relieved from responsibility for his misconduct; that the legislation regarding the employment of pilots and other officers in the port of Calcutta is contained in Act XXII of 1855 and the Port Rules of 1856; that where no special requisition is made by the port authorities, under rules 2 and 7, a ship may move at her discretion in the port; and that

SHIPPING LAW—*contd.*

it is unlawful, under s. 12 of Act XXII of 1855, to moor a vessel in the port without having a port officer on board to take command of the ship. *In the matter of the* "HANOVER". **Bourke Ad. 15**

4. ——— *Collision from bore in the river—Inevitable accident.* The ship *Thames* was lying a mere hulk, waiting for repair when a board drifted her stern foremost up the river, and she came into collision with another ship. No negligence was proved against the master, and the accident was *held* to be inevitable and no costs were decreed on either side. ABDOOLA ROHOMAN MOOSAN *v.* "THAMES" . **Bourke Ad. 21**

5. ——— *Moving vessel in harbour—Act XXII of 1855—Negligence of pilots—Bombay Harbour Rules—Lights on vessels, duty to carry or show.* The taking of a steam-vessel in a trial trip from Mazagon to the sea and back again is a moving of such vessel within the meaning of s. 12 of Act XXII of 1855. For such a trip, therefore, the employment of a pilot is compulsory. Where the employment of a pilot is compulsory on board a vessel, and such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew and partly that of the pilot, the owners are not exempted from liability. If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them. Rules of Bombay harbour with regard to the showing of lights by vessels in the harbour considered. Independently of special regulation or legislation, there is no general obligation by maritime law on sailing vessels, either under way or at anchor, to carry a light throughout the night, although, for the sake of avoiding a misfortune, it may, under particular circumstances, become their duty to carry or show a light. Although that is so, yet the Court will go some way to treat the dark boat as the wrong-doer; and if a vessel be either under way or at anchor at night in a channel, fair way, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or show a light in order to indicate her position when other vessels are approaching her, and in sufficient time to enable them to avoid her. MUHAMMAD YUSUF *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY **6 Bom. O. C. 98**

6. ——— *Admiralty suit—Both vessels to blame—Suit for damages by owners of cargo—Costs.* The owners of cargo on board the *H* sued the owners of the steam-ship *S* for damages resulting from a collision which occurred between the *H* and the *S*. The Court found that both vessels were to blame for the collision. *Held*, following the English authorities, that the plaintiffs could only recover from the defendants half of the

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SHIPPING LAW—*contd.*

damages which they had sustained. *Held*, also, following the *City of Manchester*, *5 P. D. 221*, that in such suit each party should bear their own costs. OOKERDA POONSEY *v.* STEAM-SHIP "SAVITRI" . . . **I. L. R. 10 Bom. 408**

7. ——— *Damage by ship under way colliding with another at anchor—Burden of justifying—Duty of ship at anchor.* Where a ship under way comes into collision with another at anchor in a proper place, and showing at night an anchor light, it is obvious that the burden of justifying is heavily cast on the ship under way. At the same time there is an obligation on the anchored ship to keep a competent watch, to show an anchor light, and to do everything to avert a collision and lessen the damage from it. If, as was the case here, the damaged ship is placed in a difficulty entirely by the erroneous course or conduct of the other, and is obliged to take a step on the instant, she is entitled to claim from a Court a favourable consideration for her action, even if that should afterwards appear not to have been the best possible. A steam-ship, entering the fairway of a river with the tide flowing, collided with the promovent's tug at anchor in a proper place, and showing an anchor light. Near the tug was a pilot brig, astern of which the steam-ship wanted to round, attempting to pass between the tug and the brig. She could, however, have taken a course astern of both. At the approach of the steam-ship both the anchored vessels, heading against the tide, hove on their anchors, and drifted back. The justification set up by the owners of the steam-ship was that she was misled by the pilot brig's drifting, the anchor light of the latter having been kept up. Blame to a third ship, if blame there were, was held to be no excuse for the colliding ship, as against the tug's complaint. The main charge against the tug was that she did not slack away chain as soon as there was danger, but hove on her anchor. It was found, however, that if the tug were already drifting when the collision took place, there was no reason to suppose that by slacking away chain at the earliest possible moment the collision would have been averted or lessened in force. On the other hand, the facts against the impugnants' steam-ship were: (i) that her course could, without difficulty, have been directed so that by going astern of the tug from the port side instead of crossing her bows, all risk of collision would have been avoided; (ii) that there was a want of sufficient look-out on board the steam-ship, especially as regarded the tug; (iii) that there was possibly also a miscalculation on the part of the steam-ship of the room to pass, with reference to the force and set of the tide. She was accordingly alone held to blame, and her owners liable in damages. MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGATION CO. . . **I. L. R. 24 Calc. 627**
L. R. 24 I. A. 129
1 C. W. N. 329

8. ——— **Jettison**—*Right to general average contribution—Right of shippers of jettisoned cargo—Default of master—Right of shipowner—Remedies of shippers—Lien on cargo saved in consequence of jettison.* In jettison of part of a general cargo, the right of those entitled to contribution, and the corresponding obligations of the contributors, originating in the actual presence of a common danger, not in the causes of it, are mutually perfected whenever the goods of some of the shippers (not being wrong-doers, or those responsible for the latter) have been advisedly sacrificed, and the property of others has been thereby preserved. Such exceptions as that recognized where the average loss has been occasioned by the ship's being unseaworthy [*Schloss* v. *Heriot*, *14 C. B. (N. S.), 59*], and as that made in the refusal of contribution to shippers of deck-cargo when jettisoned, are in truth but limitations on the above rule, which have been introduced from equitable considerations. Where a ship was stranded owing to the negligence of her master, and thereby ship and cargo were placed in a position of such danger as to make it necessary, to jettison part of the cargo in order to save the remainder and the ship:—*Held*, that innocent owners of the jettisoned cargo were entitled to general average contribution; but that the owners of the ship were not entitled (their legal relations to the shippers not having been varied by contract). The rules of Maritime Law as to the rights and remedies in a case of jettison are: *first*, each owner of jettisoned goods becomes a creditor of the ship and cargo saved; and, *secondly*, he has a direct claim against each of the owners of the ship and cargo, for a *pro rata* contribution towards his indemnity. Contribution can be recovered by the owner of jettisoned goods either by direct suit or by enforcing through the ship-master, who is his agent for this purpose, a lien on each parcel of goods saved, belonging to each separate consignee, for a due proportion of his claim. STRANG, STEEL & CO. *v.* SCOTT & CO. . . **I. L. R. 17 Calc. 362**
L. R. 16 I. A. 240

9. ——— **Maritime lien**—*Sale of cargo to repair ship.* The captain of an English ship, being unable to raise funds on a bottomry-bond to repair damage caused to the ship by stress of weather, sold portion of the cargo for such purpose and repaired the ship. In a suit by the owners of the cargo against (1) the captain, who was one of the owners of the ship, (2) a mortgagee of the ship, and (3) the agent of the latter in whose name the ship was registered, to recover the value of the cargo sold:—*Held*, (i) that the owners of the cargo were not entitled to a personal decree against either the mortgagee or his agent, inasmuch as the captain was not their agent to pledge their credit for moneys required for repairs; (ii) that the owners of the cargo were not entitled to a maritime lien on the ship which would take precedence of the mortgage. MUTHAYA *v.* MUTHAYA . . . **I. L. R. 5 Mad. 334**

10. ——— *Authority of captain to bind owners for repairs of ship.* The authority of the captain of a ship to bind her owners for repairs, and anything incidental thereto, can only exist by reason of his being their special agent for

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SHIPPING LAW—*concld.*

the purpose, which he will be presumed to be only in particular cases of neccssity. BAYLEY *v.* TARUKNAUTH PORAMANIC . . **Bourke O. C. 263**

11. ———— *Master's lien on ship for wages—Act I of 1859, s. 58.* The master of a ship has by Statute (Act I of 1859, s. 58) a lien upon the ship for the recovery of wages due. *In the matter of the Barque* "ANNE" **2 Hyde 273**

12. ———— *Master's lien on ship for wages—Repairs, lien for—Act I of 1859, ss. 55, 56.* The *Persia*, on a return voyage from Jedda to Singapore, was driven into Bombay harbour through stress of weather. The owner, resident at Singapore, though frequently applied to, omitted to furnish funds to repair her, or to pay the wages of the mariners; and the master being unable to raise funds for these purposes on the credit of the ship or owner, on the application of the mariners, the ship was, in order to levy their wages, sold by the Magistrate under the provisions of ss. 55 and 56 of Act I of 1859. The master, who had been engaged at Singapore, then brought a suit on the admiralty side of the High Court, to recover out of the surplus proceeds of the ship his wages up to the time when he could return to Singapore, and his passage-money to that port. *Held*, that he was entitled to recover such wages and passage-money. *In re the* "PERSIA." *Ex parte* GARDNER **6 Bom. O. C. 138**

13. ———— *Lien on ship for repairs in port—Ship in dock.* A ship in the river cannot be said to be delivered over to the possession of those who execute repairs; consequently no lien arose for repairs done. *Secus:* If the ship had been under repair in a dock belonging to the plaintiffs. SHIB CHUNDER DASS *v.* COCHRANE **Bourke O. C. 388**

SHIPPING ORDER.

1. ———— Construction of order—"*Ready to receive cargo.*" The words "ready to receive cargo" inserted in a shipping order mean that the ship, on the day named in the shipping order, shall be ready to receive a full cargo by whomsoever offered, and not merely ready to receive the quantum of cargo mentioned in the shipping order. TAYLOR *v.* BROOKE . . **1 Bom. Ap. 48**

2. ———— *Measurement—Right to have measurement taken.* Where a shipping order authorized the receipt of "300 bales of cotton not exceeding 52 cubic feet measurement at the screw house," the fair meaning of the contract was taken to be, considering that it was a mercantile contract and looking at the surrounding circumstances, that the measurement by which the parties were to be bound was a measurement at the screw house; and that, if the agent of the defendants was present there and passed the bales as of the proper measurement or waived the right to measure and did not measure, the defendants could not afterwards insist upon a right to measure or go into an enquiry of what was the size of the bales. SCHILLIZI & Co. *v.* COX, STEEL & Co. . . **17 W. R. 545**

SHROFFS, USAGE OF.

See HUNDI, LIABILITY ON.
I. L. R. 1 Bom. 23

SHUDRA.

See SUDRA.

SIGNATURE.

———— acknowledgment of, by testator—

See WILL—ATTESTATION.
I. L. R. 1 Bom. 547

———— alteration of contract after—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY PARTY.

———— appearance of—

See PROBATE—PROOF OF WILL.
I. L. R. 19 Calc. 65
L. R. 18 I. A. 132

———— cancellation of—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY THE COURT
I. L. R. 3 Bom. 242

———— comparison of—

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—EVIDENCE, MODE OF DEALING WITH.
Marsh. 322
22 W. R. 272

———— forged—

See HUNDI—ENDORSEMENT.
5 C. W. N. 313

———— of jailor—

See CIVIL PROCEDURE CODE, 1882, S. 87
4 B. L. R. O. C. 51

———— of Judge—

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION AND POWER OF COURT, ETC.
I. L. R. 23 Calc. 480

———— of Magistrate, warrant without—

See PENAL CODE, S. 186.
I. L. R. 23 Calc. 896

———— of plaint—

See CIVIL PROCEDURE CODE, 1882, S. 432.
I. L. R. 25 All. 635

See PLAINT—VERIFICATION AND SIGNATURE . . . **5 C. W. N. 91**

———— of warrant of arrest—

See WARRANT OF ARREST—CIVIL CASES.
6 C. W. N. 845

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SIGNATURE—*contd.*

———witness to bond of—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY PARTY.
I. L. R. 7 Bom. 418
I. L. R. 12 Calc. 313
I. L. R. 15 Bom 44
I. L. R. 15 Mad. 70

——— on blank paper—

See DEED—EXECUTION.
6 C. W. N. 329

——— proof of—

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—SIGNATURE.
1 Mad. 164
I. L. R. 11 Bom. 690

See EVIDENCE ACT, s. 73 . 21 W. R. 6

——— sufficiency of—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY PARTY.
8 B. L. R. 305
11 W. R. 216

See DOCUMENT I. L. R. 30 Calc. 433

——— to memorandum of association, effect of—

See COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS.
I. L. R. 12 Bom. 647
I. L. R. 14 Bom. 196

See LIMITATION ACT, 1877, s. 19 (1871, s. 20)—ACKNOWLEDGMENT OF DEBTS
I. L. R. 1 All. 683
I. L. R 6 Calc 340
I. L. R. 3 All. 347
1 Mad 358
13 C L R 112
I. L. R. 5 Bom. 88, 89
I. L. R 5 Calc. 303
L. R. 7 I. A. 8
I. L. R. 18 Bom. 586

See MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.
I. L. R. 16 All. 59

See PRACTICE—CRIMINAL CASES—SIGNATURE OF MAGISTRATE.
I. L. R. 6 Mad. 396

See WARRANT OF COMMITMENT.
I. L. R. 5 Mad. 369

See WILL—ATTESTATION. 21 W. R. 84

See WILL—EXECUTION .
I. L. R. 25 Calc. 911

1. ——— Signature of Rajah—*Title without name.* A signature of a Rajah of the ancient Nuddea family was *held* to be valid, even though it did not contain the name of any particular individual. GUNEE BISWAS *v.* SREEGOPAL PAUL CHOWDHRY . . . . 8 W. R. 395

SIGNATURE—*concld.*

2. ——— Signature of Magistrate—*Lithographed stamp of signature.* A Magistrate ought not to use a lithographed stamp of his signature. QUEEN *v.* DEDAR NUSHYO 14 W. R. Cr 81

3. ——— *Transfer of Property Act (IV of 1882), ss. 59 and 123—Mortgage—Signature of mortgagor—Mortgagor's name signed by the scribe of the document, at the request and in the presence of an illiterate mortgagor—Signature held to be good—Maxim—Qui facit per alium facit per se—Construction of Statutes.* It is not imperatively required by s. 59 of the Transfer of Property Act, 1882, that a mortgage, where the principal money secured is R100 or upwards, shall be signed by the mortgagor with his own hand, or by an agent specially appointed in that behalf. If the mortgagor is illiterate, it is a good signature if, in the presence and at the request of the mortgagor, some other person signs the mortgagor's name on his behalf as executant of the document. So *held* by STANLEY, *C.J.*, and KNOX, BLAIR and BANERJI, *JJ.* (AIKMAN, *J.*, *dissentiente*), overruling the decision in *Moti Begam* v. *Zorawar Singh, All. Weekly Notes (1899) 196. Per* AIKMAN, *J.*—Whether or not the autograph signature of the executant is required to any particular document, is usually a question of construction, to be decided separately in each case. In the case of a mortgage executed in accordance with the provisions of s. 59 of the Transfer of Property Act, 1882, the law requires the personal signature of the mortgagor. In the course of the judgments the following authorities were referred to—*Hyde* v. *Johnson, 2 Bing. N. C. 776; Spencer* v. *Metropolitan Board of Works, L. R. 22 Ch. D. 142; The Queen* v. *The Justices of Kent, L. R. 8 Q. B. 305; In re Whitley Partners, Ld., L. R. 32 Ch. D. 337; Luchmee Buxsh Roy* v. *Runjeet Ram Panday, 20 W. R. C. R. 375; Beedoobhoosun Bose* v. *Enaet Moonshee, 8 W. R. 1; Ex parte Wallace, 14 Q. B. D. 22; Commissioners for Special Purposes of the Income Tax* v. *Pemsel, [1891] A. C. 531;* and *Crawford* v. *Spooner, 6 Moo. P. C. 1.* DEO NARAIN RAI *v.* KUKUR BIND (F B., 1902) . . . I. L. R. 24 All. 319

SIKHS.

——— application of the Probate Act to—

See PROBATE AND ADMINISTRATION ACT (V OF 1881) . .7 C. W. N. 895

See PROBATE AND ADMINISTRATION ACT (V OF 1881), s. 2.
I. L. R. 31 Calc. 11

SIMILARITIES CALCULATED TO DECEIVE.

See TRADE-MARK.
I. L. R. 34 Calc. 495

SIMPLE MORTGAGE.

See MORGAGE.

See SALE IN EXECUTION OF DECREE.
I. L. R. 40 Mad. 500
5 C. W. N. 63

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"SIR" LAND.

——— Description of—*Entry in revenue records, effect of.* The mere entry in the revenue records of land as *sir* will not make it *sir* land. *Sir* land is land which at some time or other has been cultivated by the zamindar himself, and which, although he may, from time to time, for a season, demise to shikmas, he designs to retain as resumable for cultivation by himself or his family whenever his requirements or convenience may induce him to resume it. BUDLEY *v.* BUKHTOO
3 N. W. 203

SISTER'S DAUGHTER.

See HINDU LAW—INHERITANCE.
12 C. W. N. 453

SISTER'S DAUGHTER'S SON.

See HINDU LAW . **12 C. W. N. 453**

SLANDER.

See DEFAMATION. **I. L. R. 13 Mad. 34**
I. L. R. 34 Calc. 48

See LIBEL . . **I. L. R. 14. Bom. 97**

See LIMITATION ACT, 1877, SCH. II, ARTS. 24 AND 25 . **I. L. R. 24 All. 368**

See PARTIES—ADDING PARTIES TO SUITS —PLAINTIFFS . **I. L. R. 1 Mad. 383**

See RIGHT OF SUIT—WITNESS.
I. L. R. 15 Calc. 264
I. L. R. 10 All. 425

See WITNESS—CIVIL CASES—PRIVILEGES OF WITNESSES.
I. L. R. 15 Calc. 264
I. L. R. 10 All. 425
I. L. R. 11 Mad. 477

——— of title—

See CAUSE OF ACTION. **10 C. W. N. 107**

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.
I. L. R. 1 Mad. 65

See TRADE-MARK.
I. L. R. 34 Calc. 495

1. ——— Action for slander—*Misjoinder—Special damage.* An action for slander cannot be brought jointly against several defendants: separate actions should be brought against each. *Quære:* Whether words implying "you are a drunkard, thief, cheat, and the paramour of your sister-in-law, you bastard," applied to a Brahmin, are actionable *per se* without allegation of special damage. NILMADHUB MOOKERJEE *v.* DOOKEERAM KHOTTAH . . . . **15 B. L. R. 161**

2. ——— *Misjoinder—Special damage.* An action for slander may be brought jointly against several defendants where the words spoken are not actionable *per se*, but only become so by reason of the special damage, which is the result of the conjoint action of all the defendants. WOOZEERUNNISSA BIBEE *v.* MAHOMED HOSSEIN
15 B. L. R. 166 note

SLANDER—*contd.*

3. ——— *Omission to give courtesy title in petition.* The omission of a mere courtesy cannot be taken to be equivalent to slandering or libelling a man, and is not an actionable wrong. SITARAMA KRISHNA RAYADAPPA RANGA RAZ *v.* SANYASI RAZU PEDDA BALIYARA SIMHULU . . . . . **3 Mad. 4**

4. ——— *Slander and assault—Special damage.* Special damages are not necessary to be proved in a case of slander and assault. HOSSEIN *v.* BAKIR ALI
W. R. 1864, 302

5. ——— *Verbal abuse—Hindus—Special damage.* In a suit between Hindus in the Bombay mofussil, damages may be recovered for mere verbal abuse without proof of actual damage resulting therefrom to the plaintiff KASHIRAM VALAD KRISHNA *v.* BHADU BAPUJI
7 Bom. A. C. 17

6. ——— *Damages for verbal abuse.* Damages cannot be claimed for mere verbal abuses or threatening language. PHOOLBASEE KOER *v.* PARJUN SINGH . **12 W. R. 369**

7. ——— *Verbal abuse—Special damage.* While *C* was giving his evidence in open Court, in a suit of *A* against *B*, *A*, with the object of inducing the Judge to disbelieve *C's* testimony, said to the witness that he was a drunkard. *Held*, that the words were actionable without proof of special damage. SRIKANT ROY *v.* SATCORI SHAHA . . . . **3 C. L. R. 181**

See SREENATH MOOKERJEE *v.* KOMUL KURMOKAR
16 W. R. 83

KALI KUMAR MITTER *v.* RAMGATI BHUTTACHARJI . **6 B. L. R. Ap. 99 : 16 W. R. 84 note**

KANOO MUNDLE *v.* RAHUMOOLLAH MUNDLE.
W. R. 1864, 269

GHOLAM HOSSEIN *v.* HUR GOBIND DASS
1 W. R. 19

TUKEE *v.* KHOSHDEL BISWAS . **6 W. R. 151**

OSSEEMOODDEEN *v.* FUTTEH MAHOMED
7 W. R. 259

GOUR CHUNDER PUTEETUNDEE *v.* CLAY
8 W. R. 256

8. ——— *Defamation—Action for abuse, no special damage being alleged—Damages, measure of.* The rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India. If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained. *Semble:* An action will not lie for vulgar abuse or hasty expressions, but for malicious or culpable oral defamation an action will lie. Vindictive damages should not be awarded, and a distinction should be

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SLANDER—*contd.*

drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered and in the former to a sum sufficient to establish his innocence of the charges made. PARVATHI *v.* MANNAR
I. L. R. 8 Mad. 175

9. ——— *Cause of action—Defamation—Verbal abuse—Special damage.* A suit to recover damages for verbal abuse of a gross character may be maintained without proof of consequential damage. IBIN HOSEIN *v.* HAIDAR
I. L. R. 12 Calc. 109

10. ——— *Defamation—Damages—Consequential damage.* A suit for damages for defamation of character involving loss of special position and injury to reputation will lie without proof of special damage. *Parvathi* v. *Mannar, I. L. R. 8 Mad. 175,* and *Srikant Roy* v. *Satcori Shaha, 3 C. L. R. 181,* followed. TRAILOKYA NATH GHOSE *v.* CHUNDRA NATH DUTT
I. L. R. 12 Calc. 424

11. ——— *Cause of action—Damages for insult, loss of reputation, and mental pain by the use of abusive language—Suit for libel and slander—Special damage. Held,* by the majority of the Full Bench (MACLEAN, *C.J.*, MACPHERSON, HILL, and JENKINS, *JJ.*, GHOSE, *J.* dissenting), that the mere use of abusive and insulting language, such as sala (wife's brother), haramzada (base born or bastard), soor (pig), baper beta (son of the father, that is, ironically, bastard), apart from defamation, is not actionable irrespective of any special damage. *Per* GHOSE, *J.*—A case like the present should be decided according to the principles of justice, equity and good conscience, and therefore it is but just and right that a person thus vilified, who has suffered from insult and mental pain, should be entitled to maintain an action irrespective of any special damage. GIRISH CHUNDER MITTER *v.* JATADHARI SADUKHAN . . . **I. L. R. 26 Calc. 653**
3 C. W. N. 551

12. ——— *Defamation—Action for slander—Special damage—Damages for mental distress alone, not recoverable—Cause of action—Presidency Town—English Law of Slander, rules of—Charter of 1726—Limitation Act (XV of 1877), Sch. II, Art. 24.* In an action for damages against the defendant, for having falsely and maliciously used slanderous words imputing unchastity to the plaintiff, no special damage was alleged in the plaint, nor any actual damage proved at the trial:—*Held,* that, as the words were not *per se* actionable, and as no damage in fact was alleged or proved, the action must be dismissed, with costs. The decision of the majority of the Full Bench in *Girish Chunder Mitter* v. *Jatadhari Sadukhan, I. L. R. 26 Calc. 653,* approved and followed. *Parvathi* v. *Mannar, I. L. R. 8 Mad. 175,* discussed. *Kashiram Krishna* v. *Bhadu Bapuji, 7 Bom. H. C. A. C. 17; Jogeshwar Sharma* v. *Dinaram Sharma, 2 C. W. N. 123 (Notes);* and *Dawan Singh* v. *Mahip Singh, I. L. R.*

SLANDER—*concld.*

10 All. 425, 456, distinguished. Damages are not recoverable for mental distress *alone,* caused to the plaintiff by slanderous words conveying insult. *Wilkinson* v. *Downton,* [*1897*] *2 Q. B. 57; Lynch* v. *Knight, 9 H. L. C. 577, 598,* referred to. By the Common Law of England, introduced into Calcutta by the Charter of 1726, a person injured by slanderous words can recover damages in an action, when actual damage has been caused. *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee, 9 Moo. I. A., 387; 426 Ratcliffe* v. *Evans,* [*1892*] *2 Q. B. 524,* referred to. The rules of the English Law of slander discussed, and held to be applicable to this case. BHOONI MONEY DOSSEE *v.* NATOBAR BISWAS (1901)
I. L. R. 28 Calc. 452
s.c. 5 C. W. N. 659

13. ——— *Suit for damages, maintainability of, in the Civil Court—Slander—Words spoken not defamatory to the person bringing the action.* A suit for damages for an alleged slander will not lie in the Civil Court at the instance of any person, when the words complained of are neither defamatory of him nor have they caused him any injury. *Per* HARINGTON, *J.*—A witness is not entitled to claim privilege for a slanderous statement wantonly made, which is neither an answer to any question addressed to him in examination or cross-examination, nor has any connection at all with the case under trial. GIRWAR SINGH *v.* SIRAMAN SINGH (1905) . **I. L. R. 32 Calc. 1060**
s.c. 9 C. W. N. 847

SLAUGHTER-HOUSE.

See NUISANCE—UNDER CRIMINAL PROCEDURE CODES . **7 B. L. R. 499, 516**
25 W. R. Cr. 72

1. ——— **Offence of using unlicensed slaughter-house**—*Beng. Act VII of 1865, s. 7—Slaughter-house license—Transfer of slaughter-house.* *R* was fined by the Deputy Magistrate for using an unlicensed slaughter-house. He subsequently gave an ijara or lease to *A* to carry on the business. *R* was prosecuted again for evading the law by "slaughtering cattle or allowing cattle to be slaughtered" without a license. He was fined R200 by the Deputy Magistrate. On appeal to the Sessions Judge, he was acquitted. On the motion of the Municipal Commissioners for a rule to set aside the order of the Sessions Judge, it was *held* (*per* JACKSON, *J.*) that *R*, by giving a lease to *A*, had parted with his interest, and had ceased to have any power to allow or disallow the slaughtering of cattle; that s. 7 provides penalties only, and does not describe an offence or relate to a conviction. It is quite another question whether the act itself is an offence irrespective of s. 7, and whether *R* could be dealt with as an abettor. *Per* MITTER, *J.* (dissenting).—The Judge has found that the lease was given by *R* with the avowed object of continuing the slaughter-house, and admittedly for the express purpose of evading the law; the case therefore falls within the express words of the section, "or

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SLAUGHTER-HOUSE—*concld.*

allows cattle to be slaughtered." *In the matter of the petition of the* MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA
6 B. L. R. Ap. 28 : 14 W. R. Cr. 67

2. ——— *Beng. Act VII of 1865, s. 1—Servant of licensee.* No person is liable to any penalty under s. 1, Bengal Act VII of 1865, except a person who, without a license, uses a place or building as a slaughter-house, either by letting it out for such purpose or by employing servants and others for the purposes of killing cattle therein ; but a person who may be the mere servant of a butcher killing cattle in a particular slaughter-house, or a butcher resorting accidentally or occasionally to a slaughter-house for the purpose of killing, and killing an ox or sheep there, does not use the place as a slaughter-house within the meaning of s. 1, Bengal Act VII of 1865. MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA *v.* ZAMIR SHAIKH . . . **16 W. R. Cr. 4**

3. ——— **Notice to licensees of slaughter-house**—*Beng. Act VII of 1865.* The length of notice to be given to persons holding licenses for carrying on slaughter-houses under Bengal Act VII of 1865 must be determined in each case according to its own particular circumstances. *In re* HALDANE . . . **6 W. R. Cr. 77**

SLAVERY.

See SLAVERY (CRIMINAL CASES).

See UNLAWFUL COMPULSION.
I. L. R. 19 Calc. 572

1. ——— **Act V of 1843**—*Mahomedan law—Succession—Willa—Emancipated slaves.* Assuming that, by the *willa* rule of the Mahomedan law, the heirs of the master who emancipates a slave are entitled to the property of which the emancipated slave dies possessed to the exclusion of his natural heirs, the effect of s. 3, Act V of 1843, which enacts "that no person who may have acquired property by inheritance shall be dispossessed or prevented from taking possession thereof on the ground that the person from whom the property may have been derived was a slave," is to abrogate the rule of the Mahomedan law, and to secure the succession of the heirs of the emancipated slave, as if he had never been a slave. The provisions of the Act apply not only where the person whose property is claimed has been emancipated after the passing of the Act, but also where he has been emancipated before its passing. The exclusion of the natural heirs of an emancipated slave in favour of the heirs of his emancipator is a disability arising out of the status of slavery similar in its nature to the exclusion, under the Mahomedan law, of the natural heirs of an emancipated slave by a master or his heirs ; and since the general scope and object of Act V of 1843 is to remove all such disabilities, the Civil Courts are bound, in constructing it, to give it the widest remedial application which its language permits, and cannot consequently limit it to those cases only in which the person from whom property is inherited was a slave at the time of his death,

SLAVERY—*concld.*

when the words of the statute allow of its being applied to the property of any one who had at any time been a slave. UJMUDDIN KHAN *v.* ZIA-UL-NISSA BEGUM
I. L. R. 3 Bom. 422 : 5 C. L. R. 11
L. R. 6 I. A. 137

In the same case, in the Court below, it was *held* that the effect of Act V of 1843 is to prevent the enforcement of any rights which would, if that Act had not been passed, have arisen out of the status of slavery ; and a suit, brought by the heir of the master of a slave girl, emancipated by and married to such master, in his lifetime, to recover, as such heir, property in the hands of persons descended from her, is one the cognizance of which is barred by s. 2 of the Act. AJMUDDIN KHAN *v.* ZIA-UNNISSA BEGUM . . . . . **12 Bom. 156**

2. ——— **Spiritual slavery of disciple to guru**—*Act V of 1843—Agreement to become slave.* This was a suit brought in 1881 by the head of an adhinam for declarations that a muth was subject to his control ; that he was entitled to appoint a manager ; that the present head of the muth was not duly appointed and his nomination by his predecessor was invalid ; and for delivery of the possession of the moveable and immoveable properties of the muth to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the muth. The muth was founded by a member of the adhinam. Many previous heads of the muth had agreed to be "slaves" of the head of the adhinam, but for over sixty years the head of the adhinam had exercised no management over the endowments belonging to the muth, and in a suit (compromised) of the year 1854 the present pretensions of the adhinam had been denied *in toto*. *Held*, that the agreement of the head of the muth to become the "slave" of his guru could have no legal operation since 1843, and that the adverse possession of the defendant from that year was fatal to any claim of the plaintiff under such agreement. GIYANA SAMBANDHA PANDARA SANNADHI *v.* KANDASAMI TAMBIRAN
I. L. R. 10 Mad. 375

SLAVERY (CRIMINAL CASES).

1. ——— **Treating kidnapped girl as slave.** If, knowing a girl has been kidnapped, a person wrongfully confines her, and subsequently detains her as a slave, he is guilty of two separate offences punishable under the Penal Code. Slavery is a condition which admits of degrees, and a person is treated as a slave if another asserts an absolute right to restrain his personal liberty and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or a jailor. QUEEN *v.* SIKUNDUR BUKHUT . . . **3 N. W. 146**

2. ——— **Penal Code, s. 370**—*Buying or disposing of girl as a slave.* *R*, having obtained possession of *D*, a girl about eleven years of age, disposed of her to a third person, for value, with intent that such person should marry her, and such person

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SLAVERY (CRIMINAL CASES)—*concld.*

received her with that intent. *Held*, that *R* could not be convicted of disposing of *D* as a slave under s. 370 of the Penal Code. *Queen* v. *Sikundur Bukhut, 3 N. W. 146*, remarked upon. EMPRESS OF INDIA *v.* RAM KUAR . **I. L. R. 2 All. 723**

3. _____ *Meaning of term.* *S* transferred to *A* for R25 his rights in the person of *B*, a girl of thirteen years. In a document in which the transaction was recorded, *B* was described as a vellati or slave girl purchased by *S* from *P*. *Held*, that *A* was guilty of buying *B* as a slave within the meaning of s. 370 of the Penal Code. AMINA *v.* QUEEN-EMPRESS . **I. L. R. 7 Mad. 277**

4. _____ **Obligation of Judge to try charge of.** The Sessions Judge was held bound to try the accused upon his commitment by the Deputy Magistrate on a charge, under s. 370, Penal Code, of having detained a woman against her will as a slave. QUEEN *v.* FIRMAN ALI **16 W. R. Cr. 73**

SMALL CAUSE COURT.

See CIVIL PROCEDURE CODE, 1882, s. 223. **I. L. R. 31 All. 1**

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See REVIEW . **I. L. R. 29 All. 468**

_____ *Suit of the nature cognizable in the Court of Small Causes—Execution of decree—Second appeal.* No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes. *Shyama Charan Mitter* v. *Debendra Nath Mukerjee, I. L. R. 27 Calc. 484*, followed. NARAYAN *v.* NAGINDAS (1905) . **I. L. R. 30 Bom. 113**

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1. LAW OF SMALL CAUSE COURTS, MOFUSSIL.

1. ——— **Law of Civil Courts**—*Matters of contract between Hindus.* In all matters of contract and dealing between Hindus, the law applicable in Civil Courts of the country governs Courts of Small Causes. WOODOY CHAND HALDER *v.* GOOROO CHURN MOJOOMDAR . **13 W. R. 148**

2. ——— **Rules and orders in Military Code.** *Held*, that the rules and orders in the Military Code are not binding on a Small Cause Court. RAICHAND MANGAL *v.* ABDULLA AMRUDDIN KOTVAL . . . . . **5 Bom. A. C. 99**

2. JURISDICTION.

1. ——— **General cases**—*Act XI of 1865, s. 12—Act XLII of 1860, s. 6.* Small Cause Courts have sole jurisdiction within their local limits, therefore an action for cattle, or the value of cattle, cannot lie in a Civil Court having jurisdiction within the local limits of a Small Cause Court jurisdiction. ANONYMOUS . . **2 W. R. S. C. C. Ref. 5**

2. ——— *Suits cognizable by village Munsif under Mad. Reg. IV of 1816, s. 5.* A Small Cause Court had concurrent jurisdiction to try suits for a sum not exceeding R10, cognizable by a Village Munsif under s. 5, Regulation IV of 1816. PARASOORAMA PILLAY *v.* RAMASAWMY *alias* COOLLA RAMASAWMY . . **5 Mad. 45**

3. ——— *Village Courts Act (Mad. Act I of 1889), s. 13—Civil Procedure Code, s. 15—Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif.* The term "Court of lowest grade" in the Civil Procedure Code, s. 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter. MIRKHAN *v.* KADARSA **I. L. R. 13 Mad. 145**

4. ——— *Suits cognizable by District Munsif in jurisdiction of Small Cause Court.* A suit was brought in the Small Cause Court to recover two sums of money, one cause of action being for money lent and the other for goods sold and delivered. The amount of both claims was within the jurisdiction of the Small Cause Court, but the pecuniary claim in each case was cognizable by the District Munsif on the Small Cause Court side. *Held*, that the Small Cause Court had jurisdiction to entertain the suit. ARUNACHELLAM CHETTY *v.* GANGATHARAM AIYAN **5 Mad. 287**

5. ——— *Suit not cognizable against some of the defendants.* A suit is not cognizable by a Small Cause Court unless it is cognizable by it as against all the defendants. PARSHOTAM LAKHMIRAM *v.* PEMA HARJI **I. L. R. 21 Bom. 121**

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2. JURISDICTION—*contd.*

6. ——— *Suit for sum on bond the whole amount of which is beyond jurisdiction.* A Small Cause Court can try a suit for an amount within its jurisdiction, notwithstanding that it is upon a bond the amount of which is beyond its jurisdiction. SUKEE MONEE DEBIA *v.* HUREEMOHUN MOOKERJEE . **6 W. R. Civ. Ref. 6**

7. ——— *Suit on kabuliat under which more than R500 are payable.* That jurisdiction of a Small Cause Court, in a suit on a kabuliat for damages not exceeding R500, is not affected because damages exceeding that sum may be payable under the same kabuliat. SMITH *v.* GOPAL SHEIKH . . **3 W. R. S. C. C. Ref. 14**

8. ——— *Suit for portion of sum due under agreement.* Where the plaintiff sued for a portion of grain in the nature of net rent which had fallen due, that amount being within its jurisdiction, although the whole amount payable from first to last under the agreement would be in excess of its jurisdicton. *Held*, that the suit was cognizable by a Court of Small Causes. NARASIDAVUR *v.* MARANA KAUNDAN . **2 Mad. 440**

9. ——— *Suit for interest on bond for more than R500.* Where a suit was brought for interest amounting to less than R500, due upon a bond for R1,000, not then payable:—*Held*, that a Court of Small Causes had jurisdiction to try the case, the plaintiff having had a separate and complete cause of action upon the bond entitling him to recover the annual interest as it accrued due. The fact that forgery of the bond is set up as a defence makes no difference. ANANTHA NARAINAPPAIYAN *alias* ASVATA AIYAN *v.* GANAPATY AIYAN . . . . **2 Mad. 469**

CHETU NARAYANA PILLAY *v.* AYAMPERUMAL AMBALOM . . . . . **4 Mad 447**

10. ——— *Suit for profits of land—Prayer for account—Question of title.* The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes. By merely asking, in the alternative, for an account of the profits, a suit cognizable by a Small Cause Court cannot be converted into one of a different nature. NARAYAN BHASKAR *v.* BALAJI BAPUJI . . . **I. L. R. 21 Bom. 248**

11. ——— *Separate causes of action each within Munsif's jurisdiction.* Several claims, each of which separately is within the Small Cause Court jurisdiction of a District Munsif, may be joined together and form the basis of a suit in the Small Cause Court. As where there was an agreement that defendant should occupy land for two years and deliver a certain quantity of paddy at four specified periods; in a suit for rent:—*Held*, that, though the plaintiff might have sued for each instalment of rent as it fell due, the aggregate of such unpaid instalments should be deemed to be one cause of action. CHOCKALINGA PILLAI *v.* KUMARA VIRUTHALAM . . . . **4 Mad. 334**

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

12. ——— *Act XI of 1865—Act IX of 1850, s. 34—Cause of action, dividing.* There is no provision in the Mofussil Small Cause Courts Act (XI of 1865) similar to s. 34 of the Presidency Small Cause Court Act (IX of 1850), which forbids a plaintiff's dividing any cause of action for the sake of bringing two or more suits in the Small Cause Courts of the Presidency. UMED DHOLCHAND *v.* PIR SAHEB JIVA MIYA **I. L. R. 7 Bom. 134**

13. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 23—Civil Procedure Code, s. 586—Suit of the nature cognizable by Courts of Small Causes.* A suit is none the less a suit cognizable by a Court of Small Causes because that Court may have exercised the discretion conferred on it by s. 23 of the Provincial Small Cause Courts Act, and returned the plaint to be presented to a Court having jurisdiction to determine a question of title raised therein. *Kali Krishna Tagore* v. *Izzat-an-nissa Khatun, I. L. R. 24 Calc. 557,* followed. SADA SHANKAR *v.* BRIJ MOHAN DAS **I. L. R. 20 All. 480**

14. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 16—Small Cause suit wrongly tried on regular side—Regular appeal preferred against decree—No question of jurisdiction raised—Civil revision petition raising question of jurisdiction—Discretion of High Court to interfere or not according to the merits.* Petitioner presented this civil revision petition to set aside a decree, which had been passed against him by a District Munsif and upheld in the District Court, on the ground that the suit was one of a nature cognizable by a Small Cause Court, whereas it had been tried as a regular suit. Petitioner (who was defendant in the suit) had raised no objection before the Munsif to the mode of trial ; nor had he done so in his grounds of appeal to the District Court. *Held,* with refence to s. 16 of the Provincial Small Cause Courts Act, that, even assuming that the case was one of a nature cognizable by a Small Cause Court, the High Court was not bound to set aside the decrees of the lower Courts, but had a discretion to interfere or not, according to the merits of the case. *Suresh Chunder Maitra* v. *Kristo Rangini Dasi, I. L. R. 21 Calc. 249,* approved and followed. *Ramasamy Chettiar* v. *Orr, I. L. R. 26 Mad. 176,* not followed. PARAMESHWARAN NAMBUDIRI *v.* VISHNU EMBRANDRI . **I. L. R. 27 Mad. 478**

15. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 32 (2)—Small Cause suit—Jurisdiction extended pending suit.* A suit to recover R81-4 was filed in the Court of a Subordinate Judge, who was at the time invested with the jurisdiction of a Court of Small Causes to the extent of R50. Later the jurisdiction of the Subordinate Judge as a Court of Small Causes was raised to R100 and subsequently to this the suit was decided by him as a regular suit and the claim was allowed. On appeal by the defendant the District Judge held that no appeal lay on the ground that the suit was triable and must be taken to have been tried by the Subordinate Judge in the extended jurisdiction vested in him as a Judge of the Court of Small Causes. *Held,* on an application by the defendant under s. 622 of the Civil Procedure Code (Act XIV of 1882), that the appeal lay to the District Judge. Under s. 32 (2) of the Provincial Small Cause Courts Act (IX of 1887), it was necessary that the Judge should, before the institution of the suit, be invested with a Small Cause Court jurisdiction entitling him to hear the particular suit. *Hari Kamayya v. Hari Venkayya, I. I. R. 26 Mad. 212,* followed *Balchand* v. *Balaram, 5 Bom. L. R. 398,* explained. SAMBHU DHANJI *v.* RAM VITHU (1904) . **I. L. R. 27 Bom. 244**

16. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 35—Munsif, jurisdiction of—Munsif exercising Small Cause Court powers—Civil Procedure Code (Act XIV of 1882), s. 25—Civil Courts Act (XII of 1887), s. 17—Appeal.* When a Munsif vested with the powers of a Court of Small Causes is transferred and is succeeded in office by a Munsif vested with such powers, and the Court of Small Causes is in consequence abolished, the successor has jurisdiction under s. 35 of the Provincial Small Cause Courts Act and s. 17 of the Civil Courts Act (XII of 1887) to try in his ordinary civil jurisdiction all the suits pending on the files whether they be suits falling within the ordinary civil jurisdiction of the Court of his predecessor, or within its jurisdiction as the Court of Small Causes, which has been abolished. No order of transfer under s. 25 of the Code of Civil Procedure is necessary to enable the successor to try the suits ; and any order purporting to fall under that section, if made, has not the effect of giving to the successor jurisdiction to try as a Small Causes Court suits which have been pending in the abolished Court of Small Causes. The successor can try such suits only in his ordinary civil jurisdiction and this decision in such case is open to appeal. *Mangal Sen v. Rup Chand, I. L. R. 18 All. 324,* dissented from. DULAL CHANDRA DEB *v.* RAM NARAIN DEB (1904) . . . **I. L. R. 31 Calc. 1057**

17. ——— *Suit brought in the Court of First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause.* A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having

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SMALL CAUSE COURT, MUFUSSIL —*contd.*

2. JURISDICTION—*contd.*

arisen whether the suit was a small cause :—*Held*, that the First Class Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as small cause. NARAYAN RAVJI *v.* GANGARAM RATANCHAND (1909) **I. L. R. 33 Bom. 664**

18. ——— **Account**—*Suit by gomashta for excess expenses.* A suit by a gomashta for excess expenses incurred by him over and above the amount of rents collected by him was *held* to be cognizable in the Small Cause Court, notwithstanding that the nature of the defence might render it necessary to investigate the accounts of the mehal. PROSUNNO CHUNDER ROY *v.* SREENATH SREEMANEE **7 W. R. 422**

19. ——— *Suit to recover balance of account by tehsildar.* A suit to recover the balance of nikasi papers furnished by defendant in his capacity of tehsildar, there being an allegation in the plaint that the defendant verbally promised to pay part of the sum claimed under the circumstances mentioned therein, was *held* not to be cognizable by a Court of Small Causes. SRISHTEEDHUR BOSE *v.* SHAMA CHURN GHOSE **14 W. R. 53**

See GRANT *v.* RAM TONOO BHOOMICK **10 W. R. 83**

20. ——— *Act XI of 1865, s. 6—Suit for balance due on account of rents.* A suit for a balance due on account of rents collected from the plaintiffs' zamindaris by the defendants' father acting as agent of the plaintiffs is a suit in which money is claimed as due on a contract within the meaning of s. 6, Act XI of 1865. Where the amount claimed in such a suit does not exceed R500, it is cognizable by a Small Cause Court notwithstanding it may be necessary to go into the accounts of both parties to determine what is due. DYEBUKEE NUNDUN SEN *v.* MUDHOO MUTTY GOOPTA . **I. L. R. 1 Calc. 123 : 24 W. R. 478**

21. ——— *Suit against guardian and manager of property for rents collected by him—Trustee bound to account.* In a suit to recover, from the guardian of a minor and the manager of his property who had granted to himself, benami, a farming lease of the minor's property, rents collected by him for which he did not account :—*Held*, that the defendant could not be considered simply as an agent to collect plaintiff's rents, but was bound as a trustee to account for the proceeds of the property, and that the claim was therefore not cognizable in a Small Cause Court. RAM JOY MOJOOMDAR *v.* KEDAR NARAIN ROY **25 W. R. 75**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

22. ——— *Suit by principal against agent—Question of accounts.* A suit by a principal against an agent for adjustment and investigation of disputed items of account which could not be determined within six weeks, and which charged the agent with colluding with judgment-debtors, was *held* to be properly triable by the Civil Court, and not by the Small Cause Court. KRISHNA KINKUR ROY *v.* MADHUB CHUNDER CHUCKERBUTTY . . . **21 W. R. 283**

23. ——— **Act XL of 1858, s. 3**—*Defending suit without certificate.* A Court of Small Causes, constituted under Act XI of 1865, is competent, under s. 3, Act XL of 1858, to allow any relative of a minor to institute or defend a suit in his behalf without a certificate of administration, where it has jurisdiction in relation to the subject-matter of the suit. KHANTO BEWAH *v.* NUND RAM NATH . . . . **15 W. R. 369**

24. ——— **Alternative relief**—*Act XI of 1865, s. 6.* In a suit by *A*, asking that *B* might be ordered to fill up an excavation or to pay him R25 as damages for the same, it appeared that there was no ground for the first relief sought. *Held*, that the suit was cognizable by the Court of Small Causes. NANDA KUMAR BANERJEE *v.* ISHAN CHANDRA BANERJEE **1 B. L. R. A. C. 91 : 10 W. R. 130**

25. ——— **Arbitration**—*Civil Procedure Code, s. 327.* When a matter had been referred to arbitration without the intervention of any Court, a Small Cause Court in the mofussil had jurisdiction to entertain an application, under s. 327 of Act VIII of 1859, to file the award, provided it related to a debt not exceeding the amount cognizable by such Court, and the defendant resided within its jurisdiction. ELAM PARAMANICK *v.* SOJAITULLAH **1 B. L. R. A. C. 43 : 10 W. R. 85**

BRIDGE *v.* EDALJI MANCHARJI. VITHAL AMBARAM *v.* DAYABHAI MURLIDHAR . **10 Bom. 54**

GANGAPPA *v.* KAPINAPPA . **5 Mad. 128**

26. ——— *Arbitration award Act—XI of 1865, s. 6—Liability arising under an award.* A liability arising under an award is not one of such a nature as to fall within the terms used in the Small Cause Court Act to denote the claims cognizable by such Court. GUNESHEE *v.* CHOTAY LAL . . . . **3 N. W. 117**

DURJAN SINGH *v.* SIBIA . **7 N. W. 329**

27. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 24—Civil Procedure Code, ss. 525, 526—Suit to recover money under an award—Application to file award.* A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a subordinate Court on the Small Cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. *Held*, on reference by the District Judge to the High Court, that the suit was cognizable by a Court of Small Causes, and accordingly that the order made by the Subordinate Judge returning the plaint was wrong. SIMSON *v.* MCMASTER
I. L. R. 13 Mad. 344

28. ——— **Army Act**—*Army Act (44 & 45 Vict., c. 58), s. 144—Proviso—Jurisdiction—Suit against a soldier—Execution.* A suit for recovery of a debt will lie in a Small Cause Court as a Civil Court against a soldier in Her Majesty's service up to judgment, under proviso to s. 144 of the Army Act (Stat. 44 & 45 Vict., c. 58), however small may be the amount of the debt. The question whether the defendant is a soldier or not arises only when the plaintiff seeks to execute his decree. KISANDAS BUDHMAL *v.* HALPIN
I. L. R. 10 Bom. 218

29. ——— *Army Act (44 & 45 Vict., c. 58), ss. 148 and 151—Courts of Request, their jurisdiction—Court of Small Causes, power of—Construction of s. 151, cl. 1, of the Army Act.* The Army Act (44 & 45 Vict., c. 58) gives jurisdiction to a Court of Small Causes in all actions of debt and personal actions against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of R400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court. *Held*, also, that the words "within the jurisdiction" in s. 151, cl. 1, referred to "actions," and not to "persons." SHERE ALI *v.* PRENDERGAST **I. L. R. 13 Calc. 143**

30. ——— *Army Act of 1881, ss. 144, 151—Civil Procedure Code, s. 468—Jurisdiction of Small Cause Courts over soldiers.* A sued a soldier to recover a debt not amounting to £30. *Held*, that the suit was cognizable by a Court of Small Causes. *Semble:* The commanding officer of the defendant was bound to cause the summons of the Small Cause Court to be served on him. MAHOMED *v.* AGGAS
I. L. R. 10 Mad. 319

31. ——— **Attachment**—*Attachment of immoveable property before judgment.* A Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it. A Small Cause Court therefore cannot grant an attachment before judgment of immoveable property. MARTHAMMA *v.* KITTU SHEREGARA . . **6 Mad. 91**

32. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 35 (k)—Jurisdiction to award defendant damages for attachment on insufficient grounds—Civil Procedure Code*

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

(Act XIV of 1882), s. 491—Applicability to Small Cause Courts. A Court of Small Causes has jurisdiction to award damages, under s. 491 of the Civil Procedure Code, to a defendant whose property has been attached on insufficient grounds. IBRAHI ROWTHEN *v.* SANGARAM SHETTY (1902)
I. L. R. 26 Mad. 504

33. ——— **Cess**—*Suit to recover arrears of cess.* A suit brought to recover arrears of a cess is not a suit of the nature cognizable by small Cause Courts. KASIM ALI *v.* SHADEE . **3 N. W. 21**

34. ——— *Act XI of 1865 s. 6—Suit for zamindari dues and cesses.* The plaintiff claimed from the defendants, as joint decree-holders, a fourth share of the proceeds realized by auction-sale through the Court of the Munsif of certain houses, situate on land subject to a village-custom whereby a proprietary due of the above amount was recognized and payable to the zamindar of the said land. The Division Bench of the High Court having referred to the Full Bench the question whether claims for such zamindari dues or cesses were in the nature of suits cognizable by a Court of Small Causes:—*Held*, by the Full Bench, that the claim as brought did not fall within any of the classes of suits cognizable by the Courts of Small Causes. *Aliter*, if the due was payable in virtue of a contract. NANKU *v.* BOARD OF REVENUE
I. L. R. 1 All. 444

35. ——— *Suit to recover road cess—Road Cess Act (Beng. Act X of 1871).* A suit to recover road-cess and public works cess is not a claim for money on a bond or other contract, but is a claim created and made recoverable by a special enactment of the Legislature, and does not fall within the provisions of s. 6 of the mofussil Small Cause Court Act. DAVID *v.* GRISH CHUNDER GUHA . **I. L. R. 9 Calc. 183 : 11 C. L. R. 305**

36. ——— *Act XI of 1865—Jurisdiction—Water-cess—Payment by landholder—Implied contract by tenant to recoup.* If a landholder pays to Government water-cess which his tenant is legally bound to pay, a Small Cause Court, constituted under Act XI of 1865, has jurisdiction to decide a suit brought by the landholder against the tenant to recover the amount so paid by the landholder. VENKATRAMAYA *v.* VIRAYA
I. L. R. 8 Mad. 4

37. ——— **Claim to property seized in execution**—*Act XI of 1865, s. 6—Title, question of.* A Small Cause Court had no jurisdiction to entertain a suit by a decree-holder to establish his judgment-debtor's title to property seized in execution which had subsequently been released to a claimant under s. 246, Act VIII of 1859, and to recover the value of the property from the successful claimant. RAM DHUN BISWAS *v.* KEFAL BISWAS
1 B. L. R. S. N. 10 : 10 W. R. 141

38. ——— *Suit to establish right to personal property and to recover value of it.*

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

A suit on the part of an unsuccessful claimant to establish his right to personal property and to recover the value of the same is not cognizable by a Small Cause Court. MOOZDEEN GAZEE *v.* DINOBUNDHOO GOSSAMEE . . **13 W. R. 99**

This latter case is not to be taken as extending the rule laid down in *Ram Dhun Biswas v. Kefal Biswas, 1 B. L. R. S. N. 10*, in suits by unsuccessful claimants under s. 246, Act VIII of 1859. PUNJU *v.* OODOY. . . . . **18 W. R. 337**

See WOOMESH CHUNDER BOSE *v.* MUDDUN MOHUN SIRCAR . . . **2 W. R. 44**

and ANONYMOUS . **2 W. R. S. C. C. Ref. 5**

39. ——— *Civil Procedure Code, 1877—Owner to recover moveable property under R500.* The plaintiff was owner of moveable property attached in execution of a decree, and, his claim to such property having been rejected under s. 246 of Act VIII of 1859, he brought this suit to recover possession. *Held*, that the suit was cognizable by a Mofussil Court of Small Causes. *Quære:* Whether the new Civil Procedure Code (Act X of 1877) prevents or allows a suit, like the present, to be brought in a Court of Small Causes. NATHU GANESH *v.* KALIDAS UMED **I. L. R. 2 Bom. 365**

40. ——— *Suit to establish right to property attached under decree—Jurisdiction—Civil Procedure Code, 1877, s. 283—Act XI of 1865, s. 12.* A suit brought by a defeated claimant, under s. 283 of Act X of 1877, to establish his right to, and to recover possession of, certain moveable property attached in execution of a decree of a Small Cause Court is within the jurisdiction of, and must therefore, under Act XI of 1865, s. 12, be instituted in a Small Cause Court. GORDHAN PEMA *v.* KASANDAS BALMUKUNDAS **I. L. R. 3 Bom. 179**

41. ——— *Attachment of moveable property—Suit to establish right—Civil Procedure Code, s. 283.* A suit under s. 283 of the Civil Procedure Code by a party against whom an order under s. 281 has been passed to establish his right to moveable property attached in execution of a decree passed by a Civil Court, and for such property, the same being less than R500 in value, is not a suit cognizable in a Court of Small Causes. ILAHI BUKSH *v.* SITA . . **I. L. R. 5 All. 462**

42. ——— *Claim for personal property and to set aside order disallowing objection to its attachment—Jurisdiction—Act XI of 1865, s. 6.* A suit to recover moveable property attached in execution of a decree and damages for its wrongful attachment and to set aside the order disallowing an objection to its attachment is not a suit cognizable in a Court of Small Causes. MAKUND LAL *v.* NASIRUD-DIN . **I. L. R. 4 All. 416**

43. ——— *Suit for personal property—Suit to establish right—Civil Procedure Code, s 283—Act XI of 1865, s. 6.* A person who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under ss. 278 to 281 of the Civil Procedure Code, sued, the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held*, that the suit could not properly be regarded as a suit "for personal property or for the value of such property" within the meaning of s. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of s. 283 of the Civil Procedure Code, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of s. 283, and therefore the suit was not one cognizable in a Court of Small Causes. *Janakiammal* v. *Vithenadien, 5 Mad. 191; Kandeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo, 8 Mad. 36; Gordhan Pema* v. *Kasandas Balmukundas, I. L. R. 3 Bom. 179; Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram, I. L. R. 4 Bom. 503; Balkrishna v. Kisansingh, I. L. R. 4 Bom. 505 note;* and *Radha Kishen* v. *Chotey Lall, 3 N. W. 155*, dissented from. GODHA *v.* NAIK RAM **I. L. R. 7 All. 152**

44. ——— *Suit to recover moveable property wrongly attached—Suit to set aside order of Munsif.* A suit brought by an owner to recover moveable property of which he has been dispossessed by an attachment order may, when the value of the property is less than R500, be maintained in a Court of Small Causes, it being a suit for personal property. A suit "to have sold by auction certain property in respect of which the plaintiff obtained a decree for a right of lien," and also "to set aside the miscellaneous order passed by the Munsif," is not cognizable by a Court of Small Causes. RADHA KISHEN *v.* CHOTEY LALL **3 N. W. 155**

BALMOKUND *v.* LEKHRAJ . **3 N. W. 156 note**

45. ——— *Suit to establish right to personal property seized in execution of decree.* A suit to establish the plaintiff's right to the exclusive possession of personal property, of which the plaintiff and her husband had been dispossessed by actual seizure in execution of a decree against the plaintiff's husband, is cognizable by a Small Cause Court. JANAKIAMMAL *v.* VITHENADIEN **5 Mad. 191**

46. ——— *Act XI of 1865, s. 6—Suit as to title to property taken in execution.* A suit brought by a decree-holder to have it decided whether moveable property taken in execution is or is not the property of his judgment-debtor is not a suit cognizable by a Court of Small Causes. JETHABHAI BHAICHAND *v.* BAI LAKHU **6 Bom. A. C. 27**

47. ——— *Personal property—Suit by decree-holder.* A suit by a decree-holder to establish his right to attach and sell moveable property as belonging to his judgment-debtor

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

is not a suit for personal property within the meaning of s. 6 of Act XI of 1865, and a mofussil Court of Small Causes has no jurisdiction to entertain it even though the value of the property be such as to fall within its pecuniary limit. CHHAGANAL NAGARDAS *v.* JESHAN RAV DALSUKHRAM
I. L. R. 4 Bom. 503

BALKRISHNA *v.* KISANSING.
I. L. R. 4 Bom. 505 note

48. ——— *Suit by owner for personal property.* The defendant, who was farmer of revenue, attached a buffalo for arrears due from a third party. In a suit brought by the plaintiff for a declaration that the defendant was not entitled to attach the buffalo :—*Held*, that the suit should be filed in the Court of Small Causes inasmuch as it was a suit by the owner to recover personal property, and fell within the ruling in *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram*, *I. L. R. 4 Bom. 503*. PAGI PARTAP HAMIR *v.* VARAJLAL MULCHAND . . . **I. L. R. 8 Bom. 259**

49. ——— *Suit to declare moveable property not liable to attachment—Civil Procedure Code, 1882, s. 283.* Certain moveable property having been attached in execution of a Small Cause decree passed by the Court of a Subordinate Judge, a claim thereto was preferred by *M* and rejected. *M* then brought a suit in the District Munsif's Court for a declaration that the property was his and was not liable to be sold in execution. The suit was dismissed on the ground that it was cognizable by a Court of Small Causes. *Held*, that *M* was not bound to sue for recovery of the property, and that the suit was not cognizable by a Small Cause Court constituted under Act XI of 1865. MAHOMED KOYA *v.* KASMI
I. L. R. 9 Mad. 206

50. ——— *Civil Procedure Code (Act X of 1877), ss. 280, 281, and 283—Goods sold under execution.* S. 283 of the Civil Procedure Code enable a party, against whom an order has been made in execution-proceedings, to bring a suit to establish his rights, whatever they may be ; but it says nothing as to the nature of the suit or the Court in which it is to be brought. Whether the party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced. Where goods have been illegally seized and sold in execution, a suit by the owner thereof against the purchaser for the goods or their value will lie in a Small Cause Court, if the value of the goods is within the amount limited by law for the jurisdiction of such Court ; but if the plaintiff makes the decreeholder and the judgment-debtor parties to the suit and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court. SHIBOO NARAIN SINGH *v.* MUDDEN ALLY. NATABAR NANDI *v.* KALIDASS PALI
I. L. R. 7 Calc. 608 : 9 C. L. R. 8

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

51. ——— *Suit for value of sheep wrongly attached and sold in execution of decree.* Where plaintiff's sheep had been attached in satisfaction of a decree against a third party, and the second defendant had purchased the property at the Court sale :—*Held*, that a suit merely to recover the sheep or their value is cognizable by a Small Cause Court. KUNDEME NAINE BOOCHE NAIDOO *v.* RAVOO LUTCHMEEPATY NAIDOO . **8 Mad. 36**

52. ——— *Suit for property wrongly seized in execution—Civil Procedure Code (Act XIV of 1882), ss. 278-283—Attachment of same property in execution of decrees obtained by different creditors—Claim made in one suit to attached property under s. 278—Order made under s. 281—Suit by claimant to establish right.* The first and second defendants obtained a decree in suit No. 1548 of 1897 against *R*, described as the owner of the Wahalan Mills, and attached property on the mill premises. Twelve other creditors also brought twelve other similar suits and obtained decrees against other persons, who were also described as owners of the Wahalan Mills, and attached the same property. In suit No. 1548 of 1897 *R M* (the present plaintiff), under s. 278 of the Civil Procedure Code, claimed the property. His claim was disallowed, and he was ordered to bring a suit under s. 283. No claim or order was made in the case of the other twelve suits. *R M* now sued in pursuance of the above order to recover his property, and he included as defendants not merely those defendants (Nos. 1 and 2) who had been plaintiffs in suit No. 1548 of 1897, but also those who had been plaintiffs in the twelve other suits, and who had attached the property in execution of their decrees. It was objected that no suit would lie against the latter, as in their suits no claim had been made to the goods which they had attached and no order made under s. 281, Civil Procedure Code. *Held*, that the Court of Small Causes had jurisdiction to try the suit. In substance the suit was a suit for goods, though, as a matter of form, the decree might contain a declaration. A suit for the release of goods wrongfully seized is not a declaratory suit under s. 42 of the Specific Relief Act (I of 1877), that although the value of the property claimed by the plaintiff was admittedly over R2,000, the Court of Small Causes had jurisdiction. The plaintiff was entitled to abandon part of his claim. RAGHUNATH MUKUND *v.* SAROSH KAMA . **I. L. R. 23 Bom. 266**

53. ——— Compensation for acquisition of land—*Provincial Small Cause Courts Act (IX of 1889), Sch. II, Arts. 11 and 14—Claim for compensation awarded under Land Acquisition Act —Interpleader suit—Civil Procedure Code, 1882, ss. 470 and 622—Jurisdiction of Munsif—Superintendence of High Court.* Land having been compulsorily acquired under the Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at R468. A conflict,

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

having arisen as to the right to receive the compensation, and the District Court having declined to determine it under Land Acquisition Act, s. 15, an interpleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under s. 622, Civil Procedure Code. *Held*, that the interpleader suit was not within the jurisdiction of a Provincial Small Cause Court and was rightly brought on the ordinary side of the District Munsif's Court, and consequently, where the petitioner's remedy was by way of second appeal, the petition for revision was not admissible. TIRUPATI RAJU *v.* VISSAM RAJU . . . **I. L. R. 20 Mad. 155**

54. _____ **Contract**—*Suit for breach of contract on failure to register.* A suit to recover money paid as the price of land in consequence of vendor's failure to complete the bargain by registration of the deed of sale is maintainable in a Court of Small Causes, being substantially a suit for breach of contract for sale of land. CHAROO KHAN *v.* DOORGAMONEE . . . **9 W. R 498**

55. _____ *Suit for value of produce not paid under contract.* Where a cultivator is a mere servant of the landlord, a suit for damages will lie against him in the Small Cause Court. If the cultivator is a tenant to whom the landlord has sub-let the land, a suit for non-fulfilment of his contract by the tenant will not lie in the Small Cause Court, but in the Revenue Courts under Act X of 1859. SREENATH DUTT *v.* DWARY DHALLIE . . . **2 W. R. S. C. C. Ref. 2**

56. _____ *Suit for payment in kind.* A suit to recover a quantity of rice (or its value R300) in return for some paddy which had been taken by the defendant under contract was *held* to be cognizable by the Small Cause Court within the meaning of Act XXIII of 1861, s. 27. DOM KUMAR *v.* SOORJO DUTT SURMAH **22 W. R. 259**

57. _____ *Hindu son's liability for family debt.* The manager of a Hindu family, having borrowed money for a proper and necessary purpose, —his son's marriage,—gave a bond to secure the debt. *Held*, that a suit against the father and son to recover the money lent was cognizable by a Court of Small Causes under Act XI of 1865. PUNA KARUPPANA PILLAI *v.* VIRABADRA PILLAI . . . . **I. L. R. 6 Mad. 277**

58. _____ *Suit against sons in undivided family to enforce debt incurred by father.* A suit against the undivided sons of a deceased Hindu father to enforce payment of a debt incurred by the latter is within the jurisdiction of a Small Cause Court, and that jurisdiction is not ousted by a plea that the debt was contracted for immoral purposes. GOPAL KRISTNA SASTRI *v.* RAMAYYANGAR . . . **I. L. R. 4 Mad. 233**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

59. _____ *Civil Procedure Code, s. 586—Mofussil Small Cause Courts Act (XI of 1865), s. 6—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father.* In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. *Held*, by the Full Bench, that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. *Held*, further, by the Divisional Bench, that the decree against the sons was bad. NARASING *v.* SUBBA . . . **I. L. R. 12 Mad. 139**

60. _____ *Share of trees cut by tenants—Second appeal.* A suit by a zamindar for one-fourth of the price of trees cut by tenants, is, when based upon contract, one of the nature cognizable in a Court of Small Causes, and consequently, where the amount claimed is under five hundred rupees, no second appeal lies in such a suit. The principle laid down in *Nanku* v. *Board of Revenue, I. L. R. 1 All. 444*, followed. HARI SINGH *v.* BALDEO SINGH . . . **I. L. R. 2 All. 905**

61. _____ *Suit for share of produce of trees—Landlord and tenant—Wajib-ul-urz—Jurisdiction of Revenue Court—Second appeal.* A suit by a landholder against a tenant for R130, being the value of a moiety of the produce of a grove of mango trees held by such tenant, such amount being claimed in virtue of an agreement recorded in the wajib-ul-urz, and not in virtue of any custom or right is not cognizable in the Revenue Court, but is cognizable in a Court of Small Causes and consequently no second appeal in the suit will lie. SARNAM TEWARI *v.* SAKINA BIBI **I. L. R. 3 All. 37**

62. _____ *Act X of 1859, s. 10—Suit for share of value of crops.* The plaintiff as burghadar, to whom the defendant had sublet his jote land, for the purpose of raising crops of kalai, under a contract to share the produce between themselves, sought to recover from the defendant R7-14 as the value of his share of the crops which he (the defendant) appropriated to his own use. The defendant denied the existence of any such contract, and contended that an action of this nature would lie only in the Revenue Court, and not in the Small Cause Court. *Held*, that the plaintiff's claim was not one for a sum exacted in excess of rent within the meaning of s. 10 of Act X of 1859, and consequently the suit would lie in the Small Cause Court. GARIBULLA PARAMANICK *v.* FAKIR MOHOMED KOLU **1 B. L. R. S. N. 13 : 10 W. R. 203**

63. _____ *Suit on contract.* Plaintiffs, having obtained a sum from defendants on a bond, let certain land to them in ijara for a

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

term of years on condition that the latter, after realizing rents from the raiyats, would give credit on account of interest on the said bond, pay rent due to plaintiff's landlord, and pay the balance to plaintiffs. Having failed in the engagements, defendants were sued in the Small Cause Court. *Held*, that the suit was a suit on a contract, and was cognizable by the Small Cause Court. NOBIN CHUNDER VODRO *v.* KEDAR NATH CHUCKERBUTTY . **16 W. R. 228**

64. ——— *Suit against co-contractor—Suit for money due on a contract.* Plaintiff, defendant, and another party had jointly and separately contracted with Government to do certain work, depositing security and stipulating that a percentage upon the worth of the work done should be retained in the hands of Government to meet the contingency of the Government incurring expense in case of failure on the part of the contractors. The contract was completed by one of the contractors, who received the amount which had been deducted as above, and gave a joint receipt for the same. *Held*, that there was nothing in law to prevent plaintiff from recovering from defendant his share of the said amount. Such a suit was not one for money due on a contract, and was not cognizable by a Small Cause Court. NARAIN DOSS *v.* RAM COOMAR MYTEE . . **15 W. R. 513**

65. ——— *Act XI of 1865, s. 6—Contract, suit on.* The word "contract" in s. 6, Act XI of 1865, was intended to include a suit to recover money received by the defendant to a share of which the plaintiff is entitled; the foundation of the claim being that the defendant, with regard to the portion of the money which belonged to the plaintiff, received it for, and on behalf of, the plaintiff, upon an implied contract to pay it over to him. SUNKUR LALL PATTUCK GYAWAL *v.* RAM KALEE DHAMIN . . . **18 W. R. 104**

66. ——— *Act XI of 1865, s. 6—Suit to recover arrears of annuity from endowed property.* In a suit by a widow of one of the descendants of the grantee of a varshasan or annual allowance paid from the Government treasury for the performance of religious service in a Hindu temple to recover arrears due to her husband's branch of the family from another descendant who had received the whole stipend:—*Held*, that this was not a suit for money due on a contract or "for personal property or otherwise" within the meaning of s. 6 of Act XI of 1865, cognizable by a Court of Small Causes in the mofussil. KESHAVBHAT *v.* BHAGIRTHIBAI . **3 Bom. A. C. 75**

67. ——— *Suit to recover share in varshasan—Claim on implied contract.* Suit to recover a share in a *varshasan* payable by the Gaekwar's Government and received by the defendant as the eldest member of the original grantee's family is cognizable by a Court of Small Causes in the mofussil, the claim being one on an implied contract, *viz.*, a contract by the defendant to pay to the plaintiff money received by the

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defendant to the use of the plaintiff. *Sunkar Lall, Pattuck Gyawal v. Ram Kalee Dhamin, 18 W. R. 104*, followed. *Keshav Bhat* v. *Bhagirthi Bai, 3 Bom. A. C. 75*, overruled. RATAN SHANKAR REVASHANKAR *v.* GULAB SHANKAR LALSHANKAR **10 Bom. 21**

See BHIMRAV JIVAJI *v.* BHIMRAV GOVIND **11 Bom. 194**

68. ——— *Suit to recover share of annual allowance.* A suit to recover a share of arrears of a varshasan or annual allowance paid by the Gaekwar of Baroda to the defendant, in which the plaintiff alleged he was entitled to a third share, is maintainable in a Court of Small Causes. RATANSHANKAR REVA SHANKAR *v.* GULABSHANKAR LALSHANKAR . . . **4 Bom. A. C. 173**

69. ——— *Act XI of 1865, s. 6—Suit for money borrowed by servant on understanding it would be repaid by master.* A servant borrowed on account of his master a sum of money which was partly spent in satisfaction of his master's debt and partly taken by the latter and spent for his own private purposes. No re-payment having been made by the master, the lenders took out a decree against the servant, who then sued the master to recover the money. *Held*, that there was a legal presumption that the money was advanced on account of the defendant on the understanding that it would be repaid; and that the action was one for debt within the meaning of s. 6 of the Small Cause Courts Act XI of 1865. RASH MONEE DEBIA *v.* RAJARAM SIRCAR . . . . **15 W. R. 86**

70. ——— *Act XI of 1865, s. 6—Suit for money on implied contract.* Plaintiff took a lease from defendant, and a bakijai setting forth a certain sum (R473-10) as due from the tenants on account of rent, and on the faith of the bakijai paid that sum to the defendant. He then sued the tenants for the same, and was met with pleas either of payment to the defendant or of payment by assignment for the defendant's debts. He then sued defendant for a refund. *Held*, that the claim was for money due under an implied contract for the repayment of a sum under R500, and cognizable by a Small Cause Court under Act XI of 1865, s. 6, cl. 4. WUZEER MULLICK SIRCAR *v.* NITUMBINEE DEBEE . . **18 W. R. 484**

71. ——— *Implied contract—Contract to indemnify against claim of superior landlord.* If *A* buys a tenure at a public auction benami in the name of *B*, he impliedly contracts to indemnify *B* against the claims of the superior landlord, and a suit by *B* against *A* to recover the amount of a decree obtained against him by the superior landlord will lie in a Small Cause Court. KADARESSUR MOOKERJEA *v.* GOOROO CHURN MOOKERJEA . . . . **2 C. L. R. 388**

72. ——— *Second appeal—Relation resembling contract—Contract Act, s. 70—Act XI of 1865, s. 6.* On the death of *K*, a dispute

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

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KRISHNA CHAKRAVATI *v.* RAM KUMAR CHAKRAVATI. BUNNIJAN BIBI *v.* MAHAMMAD HOSSAIN
I. L. R. 7 Calc. 605 : 9 C. L. R. 90

93. ——— *Suit for share of revenue paid by mortgagee.* A suit by a mortgagee to compel a mortgagor to repay him the amount of Government assessment, which he has been compelled to pay when in occupation of the mortgaged property, is an obligation in equity to repay, and is not cognizable by a Court of Small Causes. VITHOBA BIN KESHAVSHET *v.* SHABAJIRAV
5 Bom. A. C. 122

94. ——— *Suit to recover money paid to co-sharers as excess of rent.* A suit to recover money alleged to have been paid in excess of plaintiff's share of rent on account of his co-tenant, was *held* to be a suit for contribution, and as such not cognizable by the Small Cause Court. PITAMBUR CHUCKERBUTTY *v.* BHYRUBNATH PALEET
15 W. R. 52

95. ——— *Suit cognizable by Revenue Court—Suit to recover money paid to prevent sale for arrears of rent.* The plaintiff sued to recover money paid in order to prevent his lands from being sold at the instance of the defendant for non-payments of arrears of rent under Madras Act VIII of 1865, the plaintiff's allegation being that no rent was due to the defendant. *Held*, that the Small Cause Court had no jurisdiction, because the suit was cognizable before a revenue officer. SHAUNKARA SUBBIEN *v.* VELLAYAN CHETTY
5 Mad. 179

96. ——— *Suit by surety against principal for recovery of money paid on his account—Suit for contribution.* A suit by a surety for recovery of a sum not exceeding R500, which he had to pay on account of his principal, is cognizable by a Small Cause Court. A suit for contribution is not cognizable by a Small Cause Court, unless there is a contract, express or implied, between the parties. SHABOO MAJEE *v.* NOORAI MOLLAH. JONEEP *v.* NABOO. BHARUT CHUNDER DUTT *v.* DENGAR GOPE **B. L. R. Sup. Vol. 691 : 7 W. R. 386**

97. ——— *Suit by one surety against another for contribution—Act XI of 1865, s. 6.* A suit by one surety against another for contribution, where the sureties are bound by the same instrument, is a suit on an implied contract, and therefore within the jurisdiction of a Court of Small Causes. *Govinda Muneya Tiruyan* v. *Bapu, 5 Mad. 200*, and *Ratan Shankar* v. *Gulabshankar, 10 Bom. 21*, followed. HARI TRIMBAK *v.* ABASHAHEB . . **I. L R. 4 Bom. 321**

98. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 2, 41, 42 and 44—Suit for costs paid by one of two persons jointly liable.* *N C* granted a lease of three plots of land to *B S*. The heirs of the former lessee brought a suit against *N C* and *B S* to recover possession of the same three plots of land. The suit was decreed with costs; and the costs, amounting to to R80 and annas 5, were recovered from *B S* alone. Thereupon *B S* brought this suit against *N C.* in the Court of Small Causes at Pubna for the recovery of that amount. *Held*, that the suit was one which did not come under Art. 2, 41, 42, or 44 of Sch. II, Act IX of 1887, and was cognizable by the Small Cause Court. BISVA NATH SHAH *v.* NABA KUMAR CHOWDHARY . . **I. L. R. 15 Calc. 713**

99. ——— *Suit for share of costs of repairs of channel—Provincial Small Cause Courts Act (IX of 1887), s. 15, and Sch. II, Art. 41.* The plaintiff sued to recover from the defendant R227, being his share of the cost of repairing a channel which was the property of the plaintiff and defendant. *Held*, that the suit was cognizable by a Court of Small Causes. FISCHER *v.* TURNER. . . **I. L. R. 15 Mad. 155**

100. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Small Cause Court—Jurisdiction—Suit for contribution arising out of satisfaction of a joint decree for costs.* *Held*, that a suit by one of several joint judgment-debtors, who had satisfied a joint decree for costs, for contribution against the other joint judgment-debtors, was not a suit exempted from the jurisdiction of a Court of Small Causes. *Bisva Nath Shah* v. *Naba Kumar Chowdhury, I. L. R. 15 Calc. 713*, followed. BHAIRON *v.* RAM BARAN (1905)
I. L. R. 28 All. 292

101. ——— **Copyright**—*Jurisdiction of Presidency Small Cause Courts—Copyright Acts (XX of 1847 and XII of 1876), s. 1—District Courts.* As the class of cases provided for by s. 7 of the Copyright Act (XX of 1847) was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in s. 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the mofussil was transferred to the jurisdiction of the mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865. But Sch. I of Act XII of 1876, amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts. *In the matter of the petition of* HAMEEDOOLLAH. HAMEEDOOLLAH *v.* MAHOMED ASGHUR HOSSEIN
I. L. R. 6 Calc. 499 : 7 C. L. R. 471

102. ——— **Costs**—*Suit for costs incurred in suit to compel registration of document.* An action lies in a Small Cause Court for recovery of costs incurred by the plaintiff in a suit to compel registration of a document. CHENGULVA RAYA MUDALI *v.* THANGATCHI AMMAL . **6 Mad. 192**

103. ——— **Crops**—*Standing crops—Immoveable property—Suit for enforcement of lien—Provincial Small Cause Courts Act, Sch. II, Art. 6.* Standing crops are immoveable property in the sense of the General Clauses Consolidation Act (I of 1868), and of Sch. II, cl. 6, of the Provincial Small

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Cause Courts Act. A Small Cause Court therefore is not competent to try a suit for enforcement of a lien in respect of standing crops. CHEDA LAL *v.* MULCHAND. MINDAI *v.* KUNDAN SINGH
I. L. R. 14 All. 30

104. ——— *Act XI of 1865, s. 6—Suit to establish right to crops on basis of title to land on which they are grown—Question of title.* A suit to establish the plaintiff's right to a standing crop on the basis of his title to the land is an ordinary civil suit, and not a suit of a Small Cause Court nature. *Godha* v. *Naik Ram, I. L. R. 7 All. 152*, and *Shiboo Narain Singh* v. *Madden Ally, I. L. R. 7 Calc. 608*, relied on. DAKHYANI DEBEA *v.* DOLEGOBIND CHOWDHRY
I. L. R. 21 Calc. 430

105. ——— Customary payments—*Proprietary due, suit for.* A suit for russum (a proprietary due) not claimed as rent nor under a contract, but by custom, payable by cultivators in occupation of the land either as proprietors or raiyats, is not of a nature triable by a Small Cause Court. EBRAHIM SAIB *v.* NAGASAMI GURUKAL
I. L. R. 3 Mad. 9

106. ——— *Suit for inamdar for proprietary dues.* Suits for proprietary dues, to which the inamdar, as the owner of the village, lays claim, are not cognizable by a Court of Small Causes. They are not paid as rent, nor are they claimed under any contract. SUBRAMANIAN CHETTI *v.* PRINCE OF ARCOT
I. L. R. 2 Mad. 146

107. ——— *Suit for share of jajman's collections.* A suit for a share of the collections made from "jajmans" in return for spiritual instruction is not of the nature cognizable by a Court of Small Causes under Act XI of 1865. CHOONEE LALL *v.* GOUREE SHUNKUR
1 Agra 84

108. ——— Damages—*Act XI of 1865, s. 6—Suit for damages for personal injury.* By s. 6 of Act XI of 1865, suits to recover damages for personal injury cannot be brought in a Mofussil Small Cause Court, unless actual pecuniary damage has resulted from the injury. That section excludes from the jurisdiction of the Mofussil Small Cause Courts suits for defamation, infringement of right, and the like, where no actual pecuniary damage has been sustained by the plaintiff, and where the measures of damages to be awarded is often a question of some nicety, but does not exclude suits for actual damages merely because, besides the actual pecuniary loss sustained, the plaint asks for something additional for loss of character or other indefinite injury. DURGA PERSHAD *v.* ASA JOLAHA
I. L. R. 5 Calc. 925 : 6 C. L. R. 487

109. ——— *Suit for damages —Loss of reputation.* Where actual pecuniary damages have resulted from personal injury, the suit for damages as a whole will lie in the Small Cause Court, even though it should include damages for loss of reputation or other claim for damages not cognizable in the Court. GUNGA NARAIN MOYTRO *v.* GUNGADHUR CHOWDHRY
13 W. R. 434

MANSING LALUNG *v.* THERAM DOLOYE
22 W. R. 395

110. ——— *Suit for damages for malicious prosecution.* A suit properly alleging a malicious prosecution and special pecuniary loss resulting therefrom is cognizable in a Small Cause Court. SITARAMAN *v.* SUSA PILLAI
2 Mad. 254

111. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 35 (c)—Suit to recover costs of a criminal prosecution.* Costs incurred in defending a criminal prosecution are recoverable only by a suit for damages for malicious prosecution. Such a suit is one for "compensation" within the meaning of cl. 35 of Sch. II of the Provincial Small Cause Courts Act (IX of 1887), and is excluded from the jurisdiction of a Small Cause Court. MAHOMED ALI *v.* BAYAMA
I. L. R. 14 Bom. 100

112. ——— *Suit for damages for personal injury—Actual pecuniary damage.* The plaintiff, in a suit for damages laid at R200 claimed R50 on account of medical expenses caused by an assault committed on him by the defendants, R50 as the costs of a criminal prosecution which he had brought against them, and R100 for injury to his reputation and feelings. *Held*, that, inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s. 6, prov. (3), of the Mofussil Small Cause Court Act (XI of 1865), of a nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Gunga Narain Moytro* v. *Gudadhur Chowdhry, 13 W. R. 434*, referred to. JIWA RAM SINGH *v.* BHOLA . . . . I. L. R. 10 All. 49

113. ——— *Compensation for personal injury—Actual pecuniary damage.* The plaintiff in a suit for compensation for malicious prosecution claimed R200 as compensation for the mental annoyance caused him by such prosecution and R25, the actual expense incurred by him in defending himself from the charge made against him. *Held*, with reference to s. 6(3) and s. 12 of Act XI of 1865, that, the suit being one for the recovery of damages on account of an alleged personal injury, from which actual pecuniary damage had resulted, it was cognizable and should have been instituted in the Court of Small Causes having local jurisdiction. *Gunga Narain Mytro v. Gudadhur Chowdhry, 13 W. R. 434*, and *Brojo Soondur* v. *Eshan Chunder Roy, 15 W. R. 179*, followed. DEBI SINGH *v.* HANUMAN UPADHYA
I. L. R. 3 All. 747

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

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114. ——— *Act XI of 1865, s. 6—Suit for damage to crops.* The term "damages" in s. 6 of Act XI of 1865 includes damages to crops, and a suit to recover damages for the wrongful reaping and carrying off the produce of certain fields is cognizable by a Court of Small Causes. DAUR SINHA *v.* RUGHNUNDUN SINHA **3 N. W. 101**

115. ——— *Suit for value of produce carried off by defendant cultivating plaintiff's land without consent.* A suit to recover the value of produce carried off without plaintiff's consent from his land, which had been forcibly retained in the cultivation of defendant No. 1, assisted by defendant No. 2, was *held* to be a suit not for rent, but for damages. KAROO KAHAR *v.* NAUBOO SINGH . . . **24 W. R. 380**

116. ——— *Provincial Small Cause Courts Act (IX of 1887)—Suit for damages for the forcible cutting and carrying away of grass.* Act IX of 1887 does not exclude from the jurisdiction of the Small Cause Court a suit for damages for the forcible cutting and carrying away of grass. *Sungram Singh* v. *Juggun Singh, 2 N. W. H. C. 18; Daur Sinha* v. *Rughnundun Singha, 3 N. W. H. C. 101; Darma Ayyan* v. *Rajapa Ayyan, I. L. R. 2 Mad. 181;* and *Manappa Mudali* v. *McCarthy, I. L. R. 3 Mad. 192,* referred to. KRISHNA PROSAD NAG *v.* MAIZUDDIN BISWAS **I. L. R. 17 Calc. 707**

117. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 31—Suit for profits of land.* A suit to recover with interest from the date of suit R500, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession, is not a suit for the profits of land within cl. 31 of Sch. II of Act IX of 1887; such a suit is not excepted from the jurisdiction of the Small Cause Court under that Act. ANNAMALAI *v.* SUBRAMANYAN **I. L. R. 15 Mad. 298**

118. ——— *Suit for damages for value of timber washed up and taken away by Government.* Where a landowner sued for damages for the value of timber carried away by Government after being washed on to his estate and to have his right declared as against Government to all timber that in future might be washed on to his estate:—*Held,* that the suit was not one which was cognizable by a Court of Small Causes. CHUTTER LALL SINGH *v.* GOVERNMENT . **9 W. R. 97**

119. ——— *Suit to recover value of fishing nets.* The plaintiffs sued the defendants in the Small Cause Court to recover the value of certain nets, the property of the plaintiffs, of which the defendants had taken wrongful possession, and damages for the loss sustained by the plaintiffs, in that they were unable to carry on their business as fishermen by reason of the detention of their nets by the defendants. *Held,* that the Small Cause Court had jurisdiction to entertain the suit. MADUTHAN *v.* SUBBIER . . **6 Mad. 34**

120. ——— *Suit for damages for illegal attachment—Civil Procedure Code, 1859, ss. 81 and 88.* Certain moveable properties, fishing nets, etc., having been attached under Act VIII of 1859, s. 81, the suit was eventually dismissed and costs awarded to the defendants, who thereupon sued the plaintiffs to recover damages sustained consequent on the attachment, *viz.*, first for what could have been earned by means of the fishing nets had they not been under attachment; and second, for injury suffered by the nets owing to carelessness and exposure. *Held,* that the suit was properly cognizable in the Small Cause Court, and the Judge was at liberty to take into consideration both elements of damage. Such a suit would only be barred when compensation had been awarded under s. 88 of the Civil Procedure Code. GOBURDHUN MAJHEE *v.* BANEE CHUNDER DOSS **21 W. R. 375**

121. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 35—Suit for compensation for illegal attachment—Suit to recover money paid in excess.* The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle. *Held,* that the suit was cognizable by the Small Cause Court. KARUPPANAN AMBALAM *v.* RAMASAMI CHETTI **I. L. R. 21 Mad. 239**

122. ——— *Suit for damages for breaking wall.* In a suit for damages for breaking down and removing bricks from a wall, where defendant's plea was *bonâ fide* purchase for value from plaintiff's predecessor, and plaintiff replied that the sale was invalid, as one made by a Hindu widow without legal necessity:—*Held,* that the suit was cognizable by a Court of Small Causes. SHUMBHOO CHUNDER MULLICK *v.* PRAN KRISTO MULLICK . . . . **13 W. R. 105**

123. ——— *Suit for damages for obstruction of watercourse—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 35 (i)—"Diversion," meaning of.* If by obstruction the flow of water is diverted from a plaintiff's lands, such obstruction amounts to "diversion" within the meaning of cl. 35 (*i*) of Sch. II of Act IX of 1887, and a suit for damages for such obstruction will not lie in the Small Cause Court. PERIAKARUPPAN *v.* PALANIVANDI . . **I. L. R. 18 Mad. 28**

124. ——— *Suit for damages for injury caused by diversion of watercourse—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 35 (i).* A suit to recover damages for injury to a wall caused by the diversion of a watercourse is cognizable by a Provincial Small Cause Court. Such a suit does not fall within the exception of Art. 35 (*i*) of Sch. II to Act IX of 1887. *In re* HAUSAMBHAI ABDULABHAI **I. L. R. 20 Bom. 283**

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125. ——— *Suit for damages for omission to certify payments to the Court. Held,* that a suit will lie in the Small Cause Court for damages sustained in consequence of decree-holder fraudulently omitting to certify to the Court the payments made by plaintiff in satisfaction of a decree out of Court, when there was a contract made that he should so certify them. BHUGOBAN TANTEE *v.* GOBIND CHUNDER ROY **9 W. R. 210**

But unless there is actual damage, the suit should be dismissed. MOHIM MUNDUL *v.* KALA CHAND NAEK . . . . **13 W. R. 147**

126. ——— *Suit to recover money paid to save estate from sale.* A suit to recover money as damages, measuring the loss to which plaintiff was put by having to pay on behalf of defendant money which defendant had agreed to pay out of the purchase-money in order to save from sale in execution of a decree an estate which plaintiff had purchased from him, is a suit cognizable by a Small Cause Court, from whose decision no special appeal lies. RAMGUTTY GANGOOLY *v.* KURALEE PERSHAD GANGOOLY . . **17 W. R. 446**

127. ——— *Suit to recover money paid for defendant—Act XI of 1865, s. 6.* A suit to recover money which plaintiff has paid for defendant is in the nature of a suit for damages, as described in s. 6 of the Small Cause Court Act. GOPAL SURNOKAR *v.* GOYARAM SIRCAR **13 W. R. 273**

128. ——— *Act XI of 1865, s. 6—Suit for damages.* A suit to recover the price of the skin and flesh of an ox, brought by a Mahar who asserted an hereditary right to carry away dead animals of the village to which he belonged, and take their skins, is a suit for damages and cognizable by a Court of Small Causes. KHANDU VALAD KERU *v.* TATIA VALAD VITHOBA . **8 Bom. A. C. 23**

129. ——— *Civil Procedure Code, 1882, s. 586—Suit for money paid and damages incurred by distraint of crops—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35, cl. (j)—Small Cause Court, Mofussil, jurisdiction of.* A suit to recover money paid to redeem crops which had been distrained by the defendants for rents due from persons other than the plaintiffs, and also for damages sustained on account of the distraint, is, so far as the claim relates to damages, a suit coming under cl. (*j*), Art. 35 of the Provincial Small Cause Courts Act (IX of 1887), and is therefore not entirely a suit of the nature of a Small Cause Court suit. S. 586 of the Civil Procedure Code, 1882, does not bar a second appeal in such a suit. DEWAN ROY *v.* SUNDAR TEWARY **I. L. R. 24 Calc. 163**

130. ——— *Code of Civil Procedure, 1882, s. 586—Suit for compensation for use and occupation of land valued at less than R500—Provincial Small Cause Courts Act (IX of 1887), ss. 15 and 23, Sch. II, Art. 8.* A suit for compensation for money realized by the defendants from the actual occupants of land, who were stated to have been the plaintiff's tenants, is a suit not for rent, but for damages of a nature cognizable by the Small Cause Court; therefore no second appeal lies to the High Court in such a suit valued at less than R500 notwithstanding that the plaint was returned by the Small Cause Court to be filed in the Civil Court under s. 23 of the Provincial Small Cause Courts Act, on the ground that the suit involved a question of title. *Mohesh Mahto* v. *Piru, I. L. R. 2 Calc. 470,* and *Muttukaruppan* v. *Sellan, I. L. R. 15 Mad. 98,* referred to. KALI KRISHNA TAGORE *v.* IZZATANNISSA KHATUN **I. L. R. 24 Calc. 557**

See MAKHAN LALL DUTTA *v.* GORIBULLAH SARDAR . . **I. L. R. 17 Calc. 54**

SADA SHANKAR *v.* BRIJ MOHAN DASS. **I. L. R. 20 All. 4801**

VIRA PILLAI *v.* RANGASAMI PILLAI. **I. L. R. 22 Mad. 149**

131. ——— *Suit for damages—Act XI of 1865, s. 6.* An action to recover from the hands of defendants money collected from a landed estate which had been charged with the payment thereof under an instrument to which the defendants had not been parties was *held* to be a personal action for damages within the meaning of Act XI of 1865, s. 6. BHUGOBUTTY CHURN BAJPAYE *v.* SARODA PERSHAD SOOKUL **22 W. R. 298**

132. ——— *Suit to recover as damages profits from service lands—Mad. Reg. VI of 1831, s. 3.* A small Cause Court has no jurisdiction to entertain a suit to recover damages claimed in respect of the profits which the plaintiff would have derived from service inam lands by reason of s. 3 of Reg. VI of 1831. TOPPYA PILLAY *v.* PEDDOO PILLAY . . . . **5 Mad. 383**

133. ——— *Suit by representative for share of debt due to deceased—Withdrawal of money on deposit by other representatives——Wrongful act.* The legal representatives having allotted the estate of the deceased in certain shares among themselves, a sum of money less than R500, the entire amount of a debt due to the deceased, was deposited with a banker by the debtor, and was withdrawn by certain of the legal representatives. The others thereupon sued in the ordinary Civil Court for their proportionate share. *Held,* that the suit was a suit for damages caused by the wrongful act of the defendants in withdrawing the whole amount, and was therefore cognizable by a Small Cause Court. KUMRUNNESSA *v.* SUJAN **10 C. L. R. 31**

134. ——— *Suit for damages for fraudulent concealment and misrepresentation.* A suit to recover R300 paid by plaintiff to defendant under a fraudulent concealment of the fact that defendant was engaged as mookhtear for another party who had brought a suit against plaintiff,

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and upon a fraudulent misrepresentation by defendant that he was conducting plaintiff's case when in fact he was acting for the opposite party, was *held* to be substantially a suit to recover damages for the injury sustained by plaintiff by reason of the fraudulent concealment and misrepresentation, and to be cognizable by a Small Cause Court. FATIMA BEGUM *v.* MOOSA . **18 W. R. 128**

135. ——— *Suit for damages for withholding receipt for rent.* A suit for damages for withholding a receipt for rent is not cognizable by a Court of Small Causes, and therefore was *held* not to come under the purview of Act XXIII of 1861, s. 27. SHOYLENDRO GEER SUNNYASEE *v.* PATOO DOSS BUSANEA . . **23 W. R. 304**

136. ——— *Suit for recovery of money paid to, but misapplied by, ijaradar.* A suit for the recovery of money alleged to have been paid by the plaintiff to an ijardar on account of arrears of rent, when the same has not been applied to the purpose for which it was given, or when a receipt for it is withheld from the plaintiff, is not cognizable by a Small Cause Court, but by a Munsif under s. 11, Bengal Act VIII of 1859. BROJONATH DEY *v.* SHUMBOO CHUNDER CHATTERJEE **18 W. R. 25**

137. ——— *Act XI of 1865, s. 6—Suit for overpayment by mistake—Contract Act, s. 72.* A suit under s. 72 of the Contract Act to recover from a creditor the amount of an overpayment made to him by mistake is a suit for damages within the meaning of Act XI of 1865, s. 6, and is accordingly cognizable by a Mofussil Court of Small Causes. BADRUNNISSA *v.* MUHAMMAD JAN **I. L. R. 2 All. 671**

138. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II—Suit for damages for breach of covenant not to cut and carry away trees—Jurisdiction of Small Cause Court—Civil Procedure Code (Act XIV of 1882), s. 622—Suit brought on the ordinary side of Court, though maintainable on the Small Cause side—Revision by High Court.* By an agreement between a landlord and his tenants, it was recited that the landlord had authorised his tenants to enjoy all his rights, and the tenants covenanted not to cut trees growing on the estate. The landlord's rights included the right to cut certain green trees for his own use and certain other green trees for agricultural purposes, as well as all trees planted by himself, at his option; and he was further entitled to take and use all decayed and fallen trees. The landlord sued the tenants to recover R20, being the value of trees which, it was alleged, the tenants had cut and taken away. The suit was instituted on the ordinary side of the Court of first instance, and no objection was raised, either there or on appeal, as to the competency of that Court to entertain it. The District Munsif passed a decree in plaintiff's favour for a portion of the amount claimed, which was increased by R1-8-0 by the Subordinate Judge, on appeal. Upon a civil revision petition being filed in the High Court:—*Held*, that the suit was one for damages for breach of covenant, and as such was cognizable by a Court of Small Causes, and that the Court in which it had been instituted had no jurisdiction to entertain it. RAMASAMY CHETTIAR *v.* ORR (1902) **I. L. R. 26 Mad. 176**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

139. ——— **Declaratory Decree**—*Suit to determine co-parcener's rights in moveable property.* A Small Cause Court has no power to entertain a suit for a declaratory decree. There is nothing to prevent a Small Cause Court from determining whether a person who has been made a co-plaintiff and claims as a co-parcener of the original plaintiff has any right to the property sued for. The decree in such a case, if given in favour of the plaintiffs, must order that the parties do recover possession of property sued for in such shares as the Judge may consider them to be entitled. A declaratory decree of the relative rights of the parties cannot be made. AKBAR ALI *v.* JEZUDDIN . **I. L. R. 8 Calc. 399**

140. ——— *Suit for declaration of right to bring property to sale as liable to attachment.* A suit in which the plaintiff sues for a declaration of his right to bring certain property to sale as the property of his judgment-debtor cannot be entertained by a Small Cause Court. RAMESHUR KULWAR *v.* BEHAREE SETH **3 N. W. 208 : Agra F. B. Ed. 1874, 254**

141. ——— *Suit for declaration of right and for consequential relief.* A suit in which the plaintiff prays the Court to consider and declare his right as heir, and for consequential relief, is not within the cognizance of a Small Cause Court. KOLA AHEER *v.* SAJNA AHIMUR . **3 N. W. 105**

142. ——— *Act XI of 1865, s. 6—Declaration that bond is satisfied—Claim for money on bond.* A claim for money on a bond as specified in Act XI of 1865, s. 6, does not include case for a declaration that the bond has been satisfied and is inoperative. A suit of that description, if maintainable, must be brought in the regular Court. AGUR MULLICK MUNDAL *v.* DEBNATH CHATTERJEE . . . **24 W. R. 190**

143. ——— *Suit for declaration of right to moveable property wrongfully taken.* Where a suit is brought for property wrongfully taken by the defendant praying for restoration of such property, either to the plaintiff directly or to some other person wholly or partly as agent for the plaintiff, it is a "suit for property" within the meaning of the Small Cause Court Act (XI of 1865), and if the property is moveable and of less than R500 in value, the suit is then a small cause. Accordingly where the plaintiffs, who were co-members with the defendants of a division of a caste, and as such tenants-in-common with them of certain cooking vessels of less than R500 in value, were excluded by the defendants from possession and common use of the vessels, and sought for a declaration

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that the plaintiffs and the defendants were equally entitled to the use of the said vessels, and for restoration of the same to some third person who should hold them to the use of the plaintiffs and defendants:—*Held*, that the suit was not a suit for a declaratory decree, but for the recovery of property within the meaning of the Small Cause Court Act (XI of 1865), and as such was exclusively triable Courts were Court. The proceedings of the lower by Small Cause pronounced null, and the plaint directed to be returned for presentation in the proper Court. KALIAN DAYAL *v.* KALIAN NARAR
I. L. R. 9 Bom. 259

144. _____ A suit for a declaration of right by a person against whom an order has been passed under s. 280 of the Civil Procedure Code, 1877, will not lie in the Small Cause Court. *Ramdhan Biswas* v. *Kefal Biswas, 1 B. L. R. S. N. 10 : 10 W. R. 141 ; Moozdeen Gazee* v. *Dinobundhoo Gossame, 13 W. R. 99 ;* and *Woomesh Chander Bose* v. *Muddun Mohan Sircar, 2 W. R. 66,* discussed and explained. SHIBOO NARAIN SINGH *v.* MUDDEN ALLY. NATABAR NANDI *v.* KALIDASS PALI . **I. L. R. 7 Calc. 608 : 9 C. L. R. 8**

145. _____ **Decree**—*Suits to recover certain decrees, and claim to execute them.* In addition to a claim to recover certain decrees, amounting together in value to less than R500, the plaintiffs claimed a decree authorizing them to put the same into execution. The suit was not a suit of the nature cognizable by a Court of Small Causes. BALAM DAS *v.* DWARKA DAS . **7 N. W. 88**

146. _____ *Suit on decree of Civil Court.* A suit cannot be maintained in a Small Cause Court in the mofussil to enforce the decree of a Civil Court. MANCHHARAM KALLIANDAS *v.* BAKSHE SAHEB MIR MAINUDIN KHAN
6 Bom. A. C. 231

147. _____ *Suit for balance due on decree of Small Cause Court.* A suit cannot be maintained in a Small Cause Court in the mofussil to recover the unsatisfied balance of a decree of such Court. SANDES *v.* JOMIR SHAIKH
9 W. R. 399

148. _____ *Suit for instalment of decree under Act X with stipulation for execution of decree in default.* Where a defendant agreed to pay the amount of a decree under Act X by two instalments, and the remedy provided for the enforcement of the contract in the event of the defendant making default was the execution of the decree, and not a suit in the Civil Court:—*Held*, that a suit would not lie in the Small Cause Court to recover the amount of the second instalment. AGHORE CHUNDER MOOKERJEE *v.* WOOMASOONDEREE DEBEA . . . **7 W. R. 216**

149. _____ *Suit to set aside decree of Small Cause Court.* A suit to set aside a decree of a Small Cause Court when no defect of jurisdiction is manifest on the face of the proceeding

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and where there is no reason to suppose that the decree was obtained by fraud or collusion, cannot be maintained in a Court of Small Causes. BAMA SOONDUREE DEBEE *v.* KAMINEE BEWA
10 W. R. 352

150. _____ *Application to set aside an ex parte decree—Necessity of depositing amount of decree or giving security.* S. 17 of the Provincial Small Cause Courts Act, 1887, requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree or give security as provided for by the section so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. *Jogi Ahir* v. *Bishen Dayal Singh, I. L. R. 18 Calc. 83,* followed. *Ramasami* v. *Kurisu, I. L. R. 13 Mad. 178,* and *Muhammad Fazal Ali* v. *Karim Khan, Punj. Rec. (1894) 410,* dissented from. JAGAN NATH *v.* CHET RAM (1906)
I. L. R. 28 All. 470

151. _____ **Deed**—*Suit for re-formation of a deed.* A Small Cause Court has no jurisdiction to entertain a suit for the re-formation of a deed. GULABHAI MONDAS *v.* DAYABHAI GOVARDHANDAS
10 Bom. 51

152. _____ *Suit as to validity of gift or deed of sale by Hindu law.* A Small Cause Court has jurisdiction in cases involving questions as to the validity or otherwise under the Hindu Law of a deed of gift or a deed of sale. GRISH CHUNDER ROY *v.* GOBIND SINGH
17 W. R. 88

See ROGHOORAM BISWAS *v.* RAMCHANDER DOBEY
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and HUREE PARSAD MALEE *v.* KOONJO BEHARY SHAHA . . **Marsh. 99 : 1 Hay 238**

153. _____ **Dower**—*Suit for dower under kabinnamah.* A suit for the maujjil or exigible portion of dower due to plaintiff under a kabinnamah is cognizable by a Small Cause Court, under s. 6, Act XI of 1865, notwithstanding that questions of very considerable difficulty may be raised in it collaterally with regard to the validity of the marriage. The decision of the Small Cause Court on such collateral matters has not the same effect as the decision of the Court which had jurisdiction to determine then in a suit regularly brought for that purpose. HALA KHOORY BIBEE *v.* BASOO KOSHYE
17 W. R. 512

154. _____ *Suit for deferred dower—Act XI of 1865, s. 6.* A suit for deferred dower or muwajjal, payable to the wife by the husband upon her divorce, or upon the husband's death by his heirs out of his estate, is cognizable by a Small Cause Court. HAYATUNNISSA BIBEE *v.* ASIROODDEEN . . . . **18 W R. 304**

155. _____ *Suit for property conveyed in lieu of dower. Held*, that a suit

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for R100 would not lie in the Small Cause Court upon a deed by which the defendant conveyed to the plaintiff, in lieu of the amount (R100) due to her as a dower, a half share in all his property, moveable and immoveable, and under which deed, therefore, the plaintiff was entitled to a moiety of all such property, but could not sue for the sum originally stipulated for. NEELOO BEBEE *v.* MISSER BISWAS **6 W. R. Civ. Ref. 12**

156. ——— **Dwelling or carrying on business**—"*Dwelling*"—*Actual residence.* The actual presence of the defendant within the jurisdiction of the Court is not necessary, if he was there dwelling at the commencement of the suit, and a temporary dwelling is sufficient to give jurisdiction to a Small Cause Court. ANANTHA NARAYANA *v.* PERIYANA KONE . . . **5 Mad. 101**

157. ——— *Dwelling—Casual residence—Act XLII of 1860, s. 4.* Mere casual presence, or even residence for a temporary purpose, without the intention of remaining is not dwelling within the jurisdiction of a Small Cause Court within the meaning of s. 4 of Act XLII of 1860. A person, resided at Coimbatore, but had some cultivated land within the local jurisdiction of Ootacamund to which place he came to answer another demand against him. *Held*, that he did not dwell within the jurisdiction of the Ootacamund Small Cause Court. SAMINATHA PILLAI *v.* VARISAI MAHOMED RAVATTAN . . . **2 Mad 304**

158. ——— *Temporary absence—Dwelling—Act XI of 1865, s. 8.* Although a defendant may be temporarily absent from his dwelling-house, yet if he retains the same, he will be held to dwell there within the meaning of the Small Cause Court Act (XI of 1865). To dwell in a place is to have one's permanent abode there. MADHO DOSS *v.* SITA RAM . . **3 N. W. 121**

159. ——— *Temporary absence from imprisonment—Residence.* Temporary imprisonment beyond the jurisdiction of a Small Cause Court was *held* not to bar the jurisdiction of that Court in respect of defendants who formerly resided within its jurisdiction and whose families continued to reside within it, the inference from the latter fact being that the defendants had an intention of returning to their former place of abode on the termination of their imprisonment. GOPAL CHUNDER SIRCAR *v.* KURNODHAR MOOCHEE **7 W. R. 349**

160. ——— *Dwelling—Temporary residence—Attendance at race meeting.* In the case of a person attached to a regiment stationed at Shahjehanpore, who had been gazetted to two years' furlough in India, served with a summons issued out of the Small Cause Court at Meerut whilst attending a race meeting at the latter place in respect of a debt contracted beyond the jurisdiction of that Court:—*Held*, that, if he had not availed himself of furlough, but was only present on short

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leave at Meerut, he was not dwelling within the jurisdiction of the Meerut Court, or if, having availed himself of furlough, he retained his permanent residence at Shahjehanpore, and merely visited Meerut for a few days, he was in that case also not dwelling at Meerut, but if, having availed himself of furlough and having retained no permanent place of residence at Shahjehanpore nor having any permanent place of residence elsewhere, he attended the race meeting at Meerut with the intention of leaving that place after the races and of proceeding elsewhere in the enjoyment of his furlough, in such case he must be held to have been dwelling at Meerut when the summons was served. MAYHEW *v.* TULLOCH . . . . **4 N. W. 25**

161. ——— *Residence as domestic servant.* A suit is not maintainable at K against a defendant who is employed as a domestic servant at M, and who is not shown to have any immediate or early intention of returning to K where his family are continuing to reside; the word "dwell" in s. 8, Act XI of 1865, it being *held*, must be used in the strict sense of actual residence. PORGASH PARAY *v.* HACHIM . **7 W. R. 417**

162. ——— *Act XI of 1865, s. 8—Place of dwelling.* A servant residing within the jurisdiction of one Small Cause Court who has a family house within the limits of the jurisdiction of another Small Cause Court in which his father lives, and which he himself occasionally visits, does not dwell within the local limits of the latter Court within the meaning of s. 8 of Act XI of 1865, and although the cause of action may have arisen there, a suit against him will not lie in that Court. GENDU MALHARI *v.* GOVIND ATMARAM . **10 Bom. 409**

163. ——— *Suit against wife—Husband not in jurisdiction.* A suit against a woman living under the protection of her husband is not cognizable in a Small Cause Court, if at the time of the commencement of the suit the husband does not dwell, nor personally or through a servant or agent carry on business or work for gain within the local limits of the jurisdiction of the Court. BOWMAN *v.* SHAWE . . **10 W. R. 240**

164. ——— *Commission agent—Residence—Carrying on business.* A person who carries on business at a place by a commission agent, to whom he only consigns goods, cannot be said to carry on business or personally to work for gain within the local limits of a Court where the commission agent resides. GOPEE MOHUN ROY *v.* PROTAP CHUNDER ROY . . **11 W. R. 530**

165. ——— *Act XI of 1865, s. 8—Residence—Zamindari business.* Zamindari business is not such business as is intended by Act XI of 1865, s. 8, and mookhtears and karpurdazes carrying it on are not servants or agents within the meaning of s. 11. Where zamindars from the mofussil come in occasionally to the head-quarters of a Small Cause Court to prosecute or defend suits,

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settle business with creditors or for social intercourse or medical treatment, and remain in their boat or put up at the houses of their mookhtears and karpurdazes, they cannot be said to have a " lodging "within the limits of the Courts, such as is intended by s. 8, expl. A. NOBIN CHUNDER *v.* BURODA KANT SHAHA . . **19 W. R. 341**

ANONYMOUS . . . **23 W. R. 223**

166. ——— *Act XI of 1865, s. 9—Suit against Agent of Governor General.* A suit against an Agent to the Governor General on the part of a Government, is substantially a suit against Government, and ought, under s. 9, Act XI of 1865, to be brought in a Court having jurisdiction at the seat of Government. ROOPUN TEWAREE *v.* BUCKLE . . . **10 W. R. 142**

167. ——— *Residence in Cantonment—Practising in Small Cause Court jurisdiction.* Where a pleader resides within the limits of a Cantonment, and practises as a pleader within the jurisdiction of a Small Cause Court, both the Cantonment Magistrate and the Small Cause Court Judge have concurrent jurisdiction over him to the amounts respectively cognizable by them. SHAPURJI JEHANGIR *v.* MORGAN **4 Bom. A. C. 187**

168. ——— *Dwelling—Act XI of 1865, s. 8.* The defendant, an officer in a regiment stationed at Vellore, was sued for money due for the rent of a house occupied by him at Madras. While absent on leave on medical certificate, he rented the plaintiff's house at Madras, where he was residing at the time of the institution of the suit; but he returned to Vellore previous to the hearing of the suit. The Small Cause Court Judge of Vellore held that the defendant was dwelling at Vellore at the time of the institution of the suit within the meaning of s. 8 Act XI of 1865. *Held*, that there was nothing in point of law to prevent the Judge from affirming his jurisdiction. KISHUN SINGH *v.* STURT . . . . **5 Mad. 471**

169. ——— *Defendant residing out of jurisdiction—Act XXIII of 1861, s. 4.* The provisions of s. 4 of Act XXIII of 1861 were applicable to Courts of Small Causes in the mofussil. ANPURNABAI *v.* SAKHARAM JAGANNATH **6 Bom. A. C. 256**

170. ——— *Cause of action —Defendant residing out of jurisdiction—Act XXIII of 1861, s. 4.* When a cause of action had arisen within the local jurisdiction of a Small Cause Court, but one of several defendants resided out of such jurisdiction, sanction might be given, under s. 4 of Act XXIII of 1861, by the High Court to the Small Cause Court to try the suit. MATHURADAS JAGJIVANDAS *v.* NATHA BAJA **6 Bom. A. C. 131**

MOHUR RAM MOODEE *v.* KARBAREE SIRDAR. **18 W. R. 312**

171. ——— *Suit against joint obligors—Act XLII of 1860, s. 21.* An order from the High Court was necessary to enable a Court of Small Causes to entertain a suit against several obligors, one of whom at the time of filing the plaint was neither resident nor personally working for gain within the limits of its jurisdiction. Such order should be applied for after the reception of the plaint, upon a statement of the circumstances of the particular case. S. 21 of Act XLII of 1860 was to have the same operation as if Act XXIII of 1861 had formed part of Act VIII of 1859 when it became law. SABHAPATI MUDALI *v.* MUTTUSVAMI MUDALI . . . . **1 Mad. 103**

172. ——— *Madras Civil Courts Act (III of 1873)—Act XI of 1865, s. 8.* Since the passing of the Madras Civil Courts Act (III of 1873), the general control over all the Civil Courts is vested in the District Judge to whom the application should be made. It is only in cases where the defendant is beyond the local jurisdiction of the District Court, and the Court before whom the suit is instituted has not otherwise jurisdiction under Act XI of 1865, s. 8, that a reference to the High Court is necessary. ANONYMOUS **8 Mad. Ap. 10**

173. ——— *Suit for debt against defendants with joint liability—Act XXIII of 1861, s. 4.* A suit for debt against two defendants whose liability was joint, but one of whom at the time of filing the plaint was neither resident nor personally working for gain within the limits of the jurisdiction, might be tried by a Small Cause Court within whose jurisdiction the other defendant was resident at the time of the commencement of the suit, provided an order was obtained from the High Court under s. 4 of Act XXIII of 1861. RUNGIAH PILLAI *v.* CHINNASAMI PILLAI . **3 Mad. 374**

174. ——— *Joint bond—One of parties out of jurisdiction—Act XI of 1865, s. 12.* In a suit brought on a bond jointly executed by the defendants, one of whom resided in Calcutta and the other within the jurisdiction of the Munsif's Court at Alipore :—*Held*, that it was cognizable by the Small Cause Court, although the authority of the High Court was necessary before it was tried, and therefore, under s. 12, Act XI of 1865, the Munsif had no jurisdiction to try the suit. KHODA BAKSH MISTRI *v.* BENI MANDAL **6 B. L. R. 719 note : 14 W. R. 156**

175. ——— **Endowment**—*Suit by Mahomedan for share of property under terms of certain endowment—Provincial Small Cause Courts Act (IX of 1887), Sch II, cl. 18.* A suit by a Mahomedan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by cl. 18 of Sch. II of the Provincial Small Cause Courts Act (IX of 1887), and therefore not cognizable by a Court of Small Causes. MIHR ALI SHAH *v.* MUHAMMAD HUSEN **I. L. R. 14 All. 413**

176. ——— **Foreign judgment**—*Jurisdiction—Suit on foreign judgment.* A suit upon a

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foreign judgment is not cognizable by a Court of Small Causes established under Act XI of 1865. ANAKATTIL NARAYANA KRISHNAN KARTHAVU *v.* KOCHERI PILO PILO . I. L. R. 6 Mad. 191

177. ———— *Suit on foreign judgment—Judgment of Court of Native State.* No suit is maintainable in a Small Cause Court in British India founded upon the judgment of a Court situate in a Native State. BHAVANISHANKAR SHEVAKRAM *v.* PURSADRI KALIDAS I. L. R. 6 Bom. 292

178. ———— Government—*Suit to which Government officials are parties—Act XI of 1865, ss. 1, 6, and 9—Local Government.* A suit, within the pecuniary and other limits prescribed for Courts of Small Causes, in which an officer of Government is a party in his official capacity, may be entertained by a Court of Small Causes in the mofussil. The phrase "Local Government" used in s. 9, and defined in s. 1 of Act XI of 1865, does not apply to the Collector of a district, but rather to the Governors or Lieutenant-Governors of Presidencies or Commissioners of Provinces. DESALJI MANAJI *v.* HEMADALLI IMAM HAIDARBAKSHA 10 Bom. 308

179. ———— *Suit for compensation for damages against the Secretary of State—Provincial Small Cause Courts Act (IX of 1887), Sch, II, Art. 3.* A suit was brought against the Secretary of State in a Mofussil Small Cause Court for compensation for damages done to an oil-mill by the officials of the Nalhati State Railway. *Held*, that the suit was not within Art. 3, Sch. II of Act IX of 1887, and that it was cognizable by the Small Cause Court. BUNWARI LAL MOOKERJEE *v.* SECRETARY OF STATE FOR INDIA I. L. R. 17 Calc. 290

180. ———— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 3—Karnam in a zamindari—Officer of Government—Public servant.* The plaintiffs, being the lessees of a settled zamindari, brought a suit in a Small Cause Court against a karnam in the zamindari to recover damages sustained by reason of the defendant's default in keeping certain accounts, etc. *Held*, that the karnam was not an officer of Government, and that the suit was maintainable under the Provincial Small Cause Courts Act. ORR *v.* NEELAMEGAM PILLAI . . I. L. R. 18 Mad. 395

181. ———— Immoveable property—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 4 and 13—Hereditary allowance—Bombay General Clauses Act (Bom. Act III of 1886).* Plaintiffs sued in the Court of Small Causes at Poona to recover R400 for arrears alleged to be payable to them under an agreement by the defendant's father to pay R150 per annum, of which R50 were for maintenance of plaintiff's mother and the residue was to be applied towards defraying the expenses of a temple. The terms of the agreement showed that it was intended that the payment for

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the expenses of the temple should be continued in perpetuity. The Judge dismissed the suit, holding that being for a hereditary allowance it was a claim for immoveable property and came under cls. (*4*) and (*13*) of Sch. II of the Provincial Small Cause Courts Act (IX of 1887). On application by the plaintiffs to the High Court under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) :—*Held*, reversing the decree, that the suit was not for possession of immoveable property or recovery of an interest in such property within the meaning of Art. 4, nor did it come within the purview of Art. 13 of Sch. II of the Act. The Small Cause Court had therefore jurisdiction to entertain the suit. VISHNU GANESH JOSHI *v.* YESHAVANTRAO I. L. R. 21 Bom. 387

182. ———— Immoveable property—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, cls. (13) and (31)—Small Cause Court.* The plaintiff claimed, as land-owner, to be entitled to receive the rents or fees paid by shopkeepers for the temporary occupation, during a fair, of a piece of land, which, the plaintiff alleged, belonged to his *mahal*. He further alleged that the defendant, claiming that the land was his, had wrongfully received those dues or rents. *Held*, that this was a suit which fell within the provisions of the latter part of cl. (31) of the second Schedule to Act IX of 1887, and was not within the cognizance of a Court of Small Causes. *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve, I. L. R. 17 Bom. 42*, referred to. RAMESHAR SINGH *v.* DURGA DAS (1901) . . . . I. L. R. 23 All. 437

183. ———— Intestacy—*Suit for money as share under an intestacy.* The decree of a Small Cause Court was annulled as made without jurisdiction in a suit to recover money as personal property in respect of a share under an intestacy. GRISH CHUNDER SINGH *v.* AUNA DOSSEE 17 W. R. 46

NOBIN CHUNDER GOSSAMEE *v.* DRIBO MOYEE DEBEE . . . . 17 W. R. 520

184. ———— *Suit for possession of personal property as heir under former decree.* A suit for possession of personal property to which the plaintiff has been, by a decree in a former suit, declared entitled as heir of a third person, is not a suit coming within the second exception to s. 6 of Act XI of 1865, and is therefore, where the value is not beyond the jurisdiction, cognizable by a Court of Small Causes, and consequently no appeal lies from the decree in such a suit. MOHESHUR MONDUL *v.* KOILASH NATH MONDUL . . . 7 C. L. R. 71

185. ———— Maintenance—*Suit for arrears of maintenance—Right to maintenance.* A Small Cause Court has jurisdiction only as regards arrears of fixed maintenance, but not to determine the right to receive it. BHUGWAN CHUNDER BOSE *v.* BINDOOBASHINEE DOSSEE 6 W. R. 286

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186. ——— *Suit for arrears of maintenance. Held,* that a suit by a widow for arrears of maintenance fixed by a Munsif's decree where defendant urged non-liability on the ground that the property of plaintiff's husband was exhausted, and that defendant had already brought an action in the Munsif's Court for release from his liability, was not cognizable by the Small Cause Court. KAMINEE DOSSEE *v.* BISHONATH SHAHA **9 W. R. 214**

HEMA KOOEREE *v.* AJOODHYA PERSHAD. **24 W. R. 474**

187. ——— *Maintenance, suit for arrears of—Fixed maintenance—Small Cause Courts (Provincial) Act (IX of 1887), Sch. II, cl. 38.* A suit for arrears of fixed maintenance is a suit relating to maintenance within the meaning of that term as used in cl. 38 of Sch. II of the Provincial Small Cause Courts Act (IX of 1887), and is therefore not cognizable by a Court of Small Causes. AMRITOMOYE DASIA *v.* BHOGIRUTH CHUNDRA . . . . **I. L. R. 15 Calc. 164**

188. ——— *Provincial Small Cause Courts Act (IX of 1887), cl. 38, Sch. II—Suit for arrears of maintenance due under a bond or agreement.* A suit for arrears of maintenance due under a bond or agreement is not cognizable by a Provincial Court of Small Causes under cl. 38 of Sch. II of Act IX of 1887. BHAGVANTRAO *v.* GANPATRAO . . . **I. L. R. 16 Bom. 267**

189. ——— *Suit for arrears of maintenance—Provincial Small Cause Court Act (IX of 1887), Sch. II, Art. 38.* A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court. SAMINATHA AYYAN *v.* MANGALATHAMMAL **I. L. R. 20 Mad. 29**

190. ——— *Suit by Hindu widow. Held,* that a suit for maintenance by a Hindu widow is cognizable by a Court of Small Causes in the mofussil. JUDAL KOM RANCHHOD MULJI *v.* HIRA MULJI . **4 Bom. A. C. 75**

RAMCHANDRA DIKSHIT *v.* SAVITRIBAI **4 Bom. A. C. 73**

But *see quære* in RAMABAI *v.* TRIMBAK GANESH DESAI . . . . . **9 Bom. 283**

191. ——— *Suit for maintenance.* In the absence of any special bond or other contract for the payment of maintenance, a suit for maintenance is not cognizable in a Court of Small Causes in the mofussil. SIDLINGAPA *v.* SIDAVA KOM SIDLINGAPA . **I. L. R. 2 Bom. 624**

NOBIN KALEE DEBEA *v.* BINDUBASHINEE DEBEA . . . **5 W. R. S. C. C. Ref. 5**

192. ——— *Suit for maintenance.* In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage :—*Held* (following *Sidlingapa* v. *Sidava kom Sidlingapa, I. L. R. 2 Bom., 624*), that the suit, although for a sum under R500, was not cognizable by a Court of Small Causes under Act XI of 1865, there being no allegation that the maintenance claimed was secured by bond or other special contract. *Nobin Kalee Debea* v. *Bindubashinee Debea, 5 W. R. S. C. C. Ref. 5,* followed. APAJI CHINTAMAN DEVDHAR *v.* GANGABAI . **I. L. R. 2 Bom. 632**

193. ——— *Act XI of 1865, s. 6—Civil Court—Suit by the mother of a child to recover from the father the cost of its maintenance.* A Mahomedan wife, divorced by her husband while pregnant, subsequently gave birth to a son. The father refused to maintain the child, which was therefore maintained by the mother, who now sued the father to recover the amount expended by her in the child's maintenance. *Held,* that the obligation on which the suit was based was one, if it existed at all, that was imposed on the father by the law, and did not arise out of any contract, express or implied : hence the suit was one not cognizable by a Court of Small Causes, but by the ordinary Civil Court. NURBIBI *v.* HUSEN LAL **I. L. R. 7 Bom. 537**

194. ——— *Suit for breach of agreement for payment in nature of maintenance.* Where the defendant entered into an agreement in writing with the plaintiff (the widow of defendant's brother) to deliver to her every year a specified quantity of paddy by way of maintenance :—*Held,* that the Small Cause Court had jurisdiction to entertain a suit for a breach of the agreement. PAUPAMMA *v.* CHINNA REDDY . **5 Mad. 432**

195. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 38—Suit for maintenance based on a family arrangement.* A suit for maintenance based on a family arrangement is within the jurisdiction of a Mofussil Small Cause Court. KOMU *v.* KRISHNA **I. L. R. 11 Mad. 134**

196. ——— *Suit for maintenance fixed by decree of Court.* A suit for maintenance fixed by a Court's decree is not cognizable by a Small Cause Court. PAHLUD SINGH *v.* AHLUD SINGH . . . . . **6 N. W. 91**

197. ——— *Suit for maintenance fixed by decree.* A suit by a Hindu widow for arrears of maintenance, based on a decree charging immoveable property, with the payment of the maintenance allowance, is not a suit of the nature cognizable in a Court of Small Causes. *Pahlud Singh* v. *Ahlud Singh, 6 N. W. 91,* followed. DHARAM CHAND *v.* JANKI **I. L. R. 5 All. 389**

198. ——— *Suit for arrears of maintenance fixed by award.* A suit for arrears of maintenance, at a rate ascertained by an award, is not a suit of the nature cognizable by a Court of Small Causes : *Guneshee* v. *Chotay Lall, 3 N. W.*

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

117. The suit was bad, being based upon an award, in which the arbitrators had exceeded their powers. DURJAN SINGH *v.* SIBIA **7 N. W. 329**

199. ——— *Contract Act (IX of 1872), s. 23—Consideration opposed to public policy—Parents making profit for themselves out of the marriage of their daughter—Small Cause Court suit—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (38).* The parents of a girl caused her to enter into an utterly unsuitable marriage, the husband agreeing to pay a certain sum monthly for the maintenance of the parents. On suit by the mother to recover certain instalments of the maintenance so promised, it was *held*, (i) that the suit was one not cognizable by a Court of Small Causes; and (ii) that the agreement was one which was opposed to public policy, and ought not to be enforced. *Bhagvantrao* v. *Ganpatrao, I. L. R. 16 Bom. 267; Dholidas Ishvar* v. *Fulchand Chhagan, I. L. R. 22 Bom. 658;* and *Vishvanathan* v. *Saminathan, I. L. R. 13 Mad. 823*, referred to. BALDEO SAHAI *v.* JUMNA KUNWAR (1901) . . **I. L. R. 23 All. 495**

200. ——— **Marriage**—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35, cl. (g)—Suit for actual pecuniary damages for breach of contract of marriage—Jurisdiction.* A suit for actual pecuniary damages for breach of contract of marriage comes within cl. (*g*) of Art. 35, Sch. II of Act IX of 1887, and as such is excluded from the jurisdiction of the Small Cause Court. KALI SUNKER DASS *v.* KOYLASH CHUNDER DASS **I. L. R. 15 Calc. 833**

201. ——— **Mesne profits**—*Suit solely for mesne profits.* A suit for mesne profits only, no other question arising, is cognizable by a Small Cause Court. SUNGRAM SINGH *v.* JUGGUN SINGH **2 N. W. 18**

202. ——— *Suit for mesne profits—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31.* A suit for the mesne profits of land for a period during which the plaintiff had been dispossessed by the defendant comes within Art. 31 of Sch. II of Act IX of 1887, and therefore is not cognizable by a Small Cause Court. SRIRAM SAMANTA *v.* KALIDAS DEY **I. L. R. 18 Calc. 31**

203. ———*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit for mesne profits under R500—Civil Procedure Code (Act XIV of 1882), s. 586—Second appeal.* A suit for mesne profits is cognizable in Courts of Small Causes where the value of the subject-matter in dispute is less than R500, and Art. 31 of Sch. II of the Provincial Small Cause Courts Act does not apply thereto. Such a suit falls within the provisions of s. 586 of the Civil Procedure Code, and no second appeal lies from a decision in it. *Kunja Behary Singh* v. *Madhub Chundra Ghose, I. L. R. 23 Calc. 884,* followed. SESHAGIRI AYYAR *v.* MARAKATHAMMAL . . **I. L. R. 22 Mad. 196**

LINGAYYA AYYAVARU *v.* MALLIKAYUNA AYYAVARU . . **I. L. R. 22 Mad. 196 note**

204. ——— *Nature of suit—Appeal—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (31).* The plaintiff purchased certain land in June, 1892, at a sale in execution of a decree against *R*. He did not obtain formal possession until June, 1894. The defendant was in actual possession of the land, under an alleged private sale by *R* to him in October, 1892. The plaintiff now sued the defendant for mesne profits for three years, *viz.*, from 1894 to 1896, alleging that they had been wrongfully received by the defendant. *Held*, that he suit fell within the exception of cl. (*31*) of Sch. II to the Provincial Small Cause Court Act (IX of 1887) and was not of a nature cognizable by Courts of Small Causes, and that, therefore, an appeal lay to the District Court from the Court of the Subordinate Judge. ANTONE *v.* MAHADEV ANANT (1900). **I. L. R. 25 Bom. 85**

205. ——— *Civil Procedure Code (Act XIV of 1882), s. 586—Suit of a nature cognizable in a Court of Small Causes—Suit for mesne profits—Second appeal—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (31).* A suit for mesne profits is not a suit for an account, but a suit for damages and is not exempted from the jurisdiction of the Small Cause Courts under cl. (*31*) of Sch. II to the Provincial Small Cause Courts Act. There is no second appeal from a decision in such a suit. SUBBA RAO *v.* SITARAMAYYA (1900) . . . **I. L. R. 24 Mad. 118**

206. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (31)—Dispossession of plaintiff from immoveable property by defendant under decree—Receipt by defendant of profits—Decree reversed on appeal—Suit by plaintiff to recover profits wrongfully received by defendant while in possession—Suit not cognizable by Small Cause Court.* Defendant obtained a decree against plaintiff for possession of certain immoveable property, in execution of which defendant took possession of the property. Plaintiff appealed against the decree, which was reversed. While defendant was in possession, he received profits from the property amounting to a sum less than R500. Plaintiff now sued in the Court of Small Causes to recover this sum as profits which had been wrongfully received by defendant:—*Held*, that the suit was not cognizable by a Court of Small Causes. *Subba Rao* v. *Sitaramayya, I. L. R. 24 Mad. 118; Seshagiri Ayyar* v. *Marakathammal, I. L. R. 22 Mad. 196;* and *Kunjo Behary Singh* v. *Madhub Chundra Ghose, I. L. R. 22 Calc. 884,* considered. SAVARIMUTHU *v.* AITHURUSU ROWTHER (F.B. 1901) **I. L. R. 25 Mad. 103.**

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SMALL CAUSE COURT, MOFUSSIL —contd.

2. JURISDICTION—*contd.*

207. ——— **Military men**—*Military officer—Military Court of Requests.* A Court of Small Causes has no jurisdiction to try an action brought against a military officer in a military cantonment where a Court of Requests is established. ABOO SAIT & Co. *v.* ARNOTT. ABOO SAIT & Co. *v.* DALE . . . . . **2 Mad. 439**

208. ——— *Military Courts of Requests—Act XLII of 1860.* Act XLII of 1860, s. 6, did not alter or interfere with the jurisdiction of the Military Courts of Requests constituted by Stat. 20 & 21 Vict., c. 66, s. 67. SHANMUGA *v.* MEDDLETON . . **1 Mad. 443**

209. ——— *Liability of European soldiers and their native wives to Small Cause Court jurisdiction.* Reference to the High Court regarding the amenability of European soldiers and their native wives to Small Cause Courts in action for debt. KEEFE *v.* CHRISTIE **5 W. R. S. C. C. Ref. 21**

210. ——— *Non-commissioned officer in civil employ.* A non-commissioned officer or soldier not serving in the army but employed in the civil department and residing beyond military cantonments is amenable to the jurisdiction of the Small Cause Court as a Civil Court, even in cases below thirty pounds. COHEN *v.* MCCARTHY . . . . . **14 W. R. 231**

211. ——— *European soldier acting as army school-master.* A European soldier doing duty as an army school-master, not being liable to a Court of Requests, is not exempted from liability to a Cantonment Court of Small Causes. The Mutiny Acts give soldiers no privileges as to liability to jurisdiction or actions. MAWADY BEEJARAJOO *v.* HAYNES . . . **6 Mad. 83**

212. ——— *Suit against military officers—Military Court of Requests—Mutiny Act, 1862, s. 103.* An action was brought in a Small Cause Court against a military officer residing at M, at which the only other military persons stationed were staff officer and two sergeants. *Held*, that the Court had jurisdiction to try the case, the suit not being one exclusively cognizable by a Court of Requests under s. 103 of the Mutiny Act of 1864. BASTIAN *v.* TIREMAN **2 Mad. 389**

213. ——— *Mutiny Act (30 & 31 Vict., c. 13), s. 99—Camp-followers—Jurisdiction of Civil Courts.* The defendant, a native of India, attached to the mess of a European regiment stationed at Sinchal, was *held* to come within the provisions of s. 2 of the Mutiny Act (30 & 31 Vict., c. 13) as being a "follower in or of Her Majesty's Indian forces," and therefore to be, by s. 99, exempt while in that position from the jurisdiction of the Civil Court. NASIRUDDIN *v.* KHODABAKSH . . . **2 B. L. R. S. N. 7**

S. C. MUSSEROODDEEN *v.* KHODA BUX **10 W. R. 386**

SMALL CAUSE COURT, MOFUSSIL —contd.

2. JURISDICTION—*contd.*

214. ——— *Military officers.* The 99th section of the Mutiny Act (30 & 31 Vict., c. 13) exempts officers in all places in India, where anybody of Her Majesty's force may be serving, from the jurisdiction of the Civil Courts in respect of personal actions. Where the defendants were residents of Sinchal and Jallapahar, and attached to the troops stationed there:—*Held*, that they were not amenable to the jurisdiction of the Small Cause Court at Darjeeling. HOSSEIN *v.* DICKENSON . . . . . **2 B. L. R. S. N. 3**

S. C. HOSSEINEE *v.* DICKINSON . **9 W. R. 112**

215. ——— **Money had and received**—*Suit for money had and received for plaintiff's use—Implied contract—Zamindari due.* A zamindar as such claimed and realized from a tenant R20, being one-fourth of the price of trees cut down and sold by the tenant, basing his claim on general usage. The tenant sued to recover such money, denying that any such usage existed. *Held*, that the suit was in the nature of one for money had and received by the defendant for the plaintiff's use, and therefore cognizable in the Court of Small Causes. *Lachman Prasad* v. *Chammi Lal, I. L. R. 4 All. 6*, followed. COLLECTOR OF CAWNPORE *v.* KEDARI . . . . **I. L. R. 4 All. 19**

216. ——— ——— *Suit by assignee of profits against lambardar.* The transferee of a mortgage of a share of an undivided estate sued the lambardar of the estate for the profits of such share for a certain year, the amount claimed being R500. *Held*, regarding such suit as one for money had and received to the plaintiff's use, that it was one of the nature cognizable in a Court of Small Causes. MUHAMDI BEGAM *v.* ABBAS ALI KHAN **I. L. R. 5 All. 531**

217. ——— *Money deposited under agreement to return mortgaged property.* *C*, a mortgagee, the mortgage having been foreclosed, sued *D*, the mortgagor, for possession of the mortgaged property and obtained a decree for possession thereof. He subsequently agreed with *D* to surrender the mortgaged property to him, if he deposited the mortgage-money in Court by a specific day. *D* borrowed the money for this purpose by means of a conditional sale of the property to *L* and deposited it in Court; the deposit was made after the specified day, and consequently *C* took possession of the property. The money deposited by *D* remained in deposit, and while there *C* caused it to be attached in execution of a money-decree he held against *D*, and it was paid to him. *L* thereupon sued *C* in the Munsif's Court to recover the money which amounted to R350. *Held*, that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes. LACHMAN PRASAD *v.* CHAMMI LAL . **I. L. R. 4 All. 6**

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

218. ——— *Suit for money received for plaintiff's use.* When one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other joint creditors. Such implied contract falls under the purview of s. 6 of Act XI of 1865, and a suit will lie in the Small Cause Court by a creditor to recover his share. *Lachman Prasad* v. *Chammi Lal, I. L. R. 4 All. 6 ; Huro Mohun Roy* v. *Khetter Monee Dossee, 12 W. R. 372 ; Sunkur Lall Patuck Gyawal* v. *Ram Kalee Dhamin, 18 W. R. 104,* referred to. SOHAN *v.* MATHURA DAS . **I. L. R. 6 All. 449**

219. ——— *Suit for share of compensation awarded for land acquired for public purposes.* A suit was brought by some of the co-sharers in a putti of a mehal in which land had been taken for public purposes under the Land Acquisition Act, against the other co-sharers in the putti for the proportion due to them out of a sum of money which had been awarded as compensation for the acquisition of the land, and which the defendants had received. *Held,* that the suit was one for money had and received for the plaintiff's use, and was therefore cognizable by a Court of Small Causes. *Sohan* v. *Mathura Das, I. L. R. 6 All. 449,* followed. UMRAI *v.* RAM LAL **I. L. R. 7 All. 384**

220. ——— *Suit to recover share of profits of inam villages—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cls. (4), (31), s. 23, cl. (1).* In a suit for the recovery of a certain share in the profits of inam villages, of which the defendant was the manager, the only relief claimed by the plaintiffs being payment of money, namely, R13 :—*Held,* that the suit was for money had and received for plaintiff's use, and was cognizable by the Court of Small Causes. It did not fall under cl. (4) of Sch. II of the Provincial Small Cause Courts Act (IX of 1887), as it was not a suit for the possession of immoveable property or for recovery of an interest in such property. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiff's share of profits, then the suit would have fallen under cl. (31), Sch. II of the Act. DAMODAR GOPAL DIKSHIT *v.* CHINTAMAN BALKRISHNA KARVE **I. L. R. 17 Bom. 42**

221. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 13 and 31—Small Cause Court Suit—Suit for money had and received—Second appeal—Civil Procedure Code, s. 586.* Under a decree passed upon an award a certain market was partitioned between the plaintiff and the defendant. In the plaintiff's share was a temple. The plaintiff, alleging that according to the award and the decree thereon the duties and weighment charges, collected in the market were allotted for payment of the expenses of the temple, sued the defendant to recover, for the purposes of the temple, certain dues said to have been collected by the defendant in his share of the market. The suit was instituted in the Court of a Munsif. *Held,* (i) that the suit was a suit of the nature cognizable by a Court of Small Causes, and (ii) that the fact that the suit was instituted in the Court of a Munsif and not in a Court of Small Causes would not render the provisions of s. 586 of the Code of Civil Procedure inapplicable. *Kalian Dayal* v. *Kalian Narer, I. L. R. 9 Bom. 259,* followed. *Dyebukee Nundun Sen* v. *Mudhoo Goopta, I. L. R. 1 Calc. 123,* dissented from. MAHADEO *v.* BUDHAI RAM (1904) **I. L. R. 26 All. 358**

222. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Jurisdiction of Small Cause Courts—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.* The plaintiff sued to recover three specific sums of money amounting to R447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant. *Held,* that the suit was one cognizable by a Court of Small Causes ; and that, therefore, no second appeal lay. GIRJABAI *v.* RAGHUNATH (1905) . . . **I. L. R. 30 Bom. 147**

223. ——— **Money illegally exacted**—*Suit for money illegally exacted from plaintiff—Mamlatdar's order—Bom. Act V of 1879, s. 87.* A suit for an amount less than R500, which the plaintiff alleged to have been illegally exacted from him by the defendant as rent, under a Mamlatdar's order, *held* to be cognizable by a Court of Small Causes, and not by a Subordinate Civil Court. GANESH HATHI *v.* MEHTA VYANKATRAM HARJIVAN **I. L. R. 8 Bom. 188**

224. ——— *Suit to recover illegal exaction of rent.* A suit to recover an illegal exaction of rent will not lie in the Small Cause Court. SURBO CHUNDER DOSS *v.* WOOMANUND ROY . . . . . **11 W. R. 412**

225. ——— *Suit to recover assessment by Government officials levied wrongfully—District Judge, jurisdiction of.* A suit to recover less than R500, levied as assessment by Government officials, is cognizable by a Court of Small Causes ; and therefore, under s. 27 of Act XXIII of 1861, no special appeal lay. District Judges should ordinarily try such suits when brought in the District Court, and should not delegate the trial to their assistants. RAMCHANDRA BHIKAJI *v.* COLLECTOR OF RATNAGIRI **10 Bom. 305**

226. ——— **Mortgage**—*Money decree on mortgage-bond.* A Small Cause Court has jurisdiction to give a simple money-decree in a suit upon a bond in which landed property is hypothecated. DOORHYAR ROY *v.* DULSINGHAR SINGH **12 W. R. 367**

227. ——— *Money-decree on mortgage-bond.* The Small Cause Court has no

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

jurisdiction in the case of a claim for money due under a bond for less than R500, where the property pledged under the bond is made liable. TRIPOORA SOONDUREE *v.* KOYLASH CHUNDER BOSE **15 W. R. 265**

228. ——— *Suit to enforce contract pledging moveable property.* Plaintiff sued for recovery of a sum of money lent upon the pledge of personal property, and asked that the moveable property pledged might be declared liable. *Held*, that a Small Cause Court had jurisdiction to entertain a suit to enforce a contract pledging moveable property. APPAVU PILLAI *v.* SUBRAYA MUPPEN **2 Mad. 474**

229. ——— *Suit on bond hypothecating land.* In a suit for money due on a bond in which the payment is secured by mortgage of immoveable property, the Judge of a Small Cause Court is competent to try whether any debt is due upon the bond or not ; but he cannot declare whether or not the particular land mentioned in the bond is charged for the payment of the debt, nor can he attach the land in execution of the decree. RAM SHEWUK SAHOO *v.* FUTTO ROY **12 W. R. 184**

WEBB *v.* RINCHIDEN . . **14 W. R. 214**

230. ——— *Suit to recover money on bond and to declare lien on property mortgaged by bond.* A suit, the object of which is not only the recovery of money due upon a bond, but also a declaration of the plaintiff's lien on the property mortgaged by the bond, is not cognizable by the Small Cause Court. RAM NARAYAN MUKERJEE *v.* SARODA DEBI . **6 B. L. R. Ap. 39**

231. ——— *Suit for enforcement of hypothecation against moveable property—Act XI of 1865 (Mofussil Small Cause Courts Act), s. 6.* A suit was brought in a Small Cause Court to recover a sum of money from the defendants personally, and by enforcement of hypothecation of certain cattle by their attachment and sale. The cattle were in the hands of other persons, who had purchased them at an auction-sale in execution of a decree against the original defendants, and who were added as defendants under s. 32 of the Civil Procedure Code, 1882. *Held*, that the suit was not cognizable by a Small Cause Court, inasmuch as it did not fall under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property, or for the value of such property," within the meaning of s. 6 of the Mofussil Small Cause Courts Act (XI of 1865). *Ram Gopal Shah* v. *Ram Gopal Shah, 9 W. R. 136*, and *Godha* v. *Naik Ram, I. L. R. 7 All. 132*, referred to. SURAJPAL SINGH *v.* JAIRAMGIR **I. L. R. 7 All. 855**

232. ——— *Suit for enforcement of hypothecation against moveable property—Act XI of 1865, s. 6.* A suit by the assignee of a registered mortgage-bond hypothecating certain crops to enforce the hypothecation is not a Small

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh* v. *Jairamgir, I. L. R. 7 All. 85*, followed. *Ram Gopal Shah* v. *Ram Gopal Shah, 9 W. R. 136*, and *Appavu Pillai* v. *Subraya Muppen, 2 Mad. 474*, referred to. KALKA PRASAD *v.* CHANDAN SINGH . . **I. L. R. 10 All. 20**

233. ——— *Suit for order to enforce mortgage-decree against person and property of defendant.* A suit to obtain an order from the Court that a decree upon a mortgage of a certain house should be enforced against the person and property of the defendant, who had purchased the house at auction subject to the plaintiff's mortgage, but had subsequently removed the materials of the same and so deprived the plaintiff of his lien thereon, not being a claim for debt, damages, or for the recovery of property, is not cognizable by a Court of Small Causes. OMER KURIM *v.* LALA SHEWAN LALL . . . . . **4 C. L. R. 291**

234. ——— *Mortgage of moveable property—Suit for redemption.* Where moveable property has been pledged in a mortgage-bond as security for a loan, and the amount due on the mortgage is tendered but declined, the mortgagor's suit for possession will lie in the Small Cause Court. But if there has been tender and the suit is for possession after ascertainment of defendant's lien on the property, the Small Cause Court has no jurisdiction in the matter. BHUBOTARINEE GHOSANY *v.* JUGGERNATH TEWARY **16 W. R. 58**

235. ——— **Moveable property—***Act XI of 1865, ss. 19 and 20—Huts.* Huts are not "moveable property" within the meaning of Act XI of 1865. RAJ CHUNDER BOSE *v.* DHARMACHANDRA BOSE **2 B. L. R. A. C. 77 : 8 B. L. R. 510 note 10 W. R. 416**

ROHINI KANT GHOSE *v.* MAHABHARAT NAG. **8 B. L. R. 514 note : 10 W. R. 258**

236. ——— *Sale in execution of decree of Small Cause Court—Right of purchaser.* A hut is not "moveable property" within the meaning of s. 19 of Act XI of 1865. A Small Cause Court has no jurisdiction to sell a hut. A purchaser of a hut sold by a Small Cause Court in execution of a decree acquires no title to it. NATTU MIAH *v.* NANDRANI **8 B. L. R. F. B. 508 : 17 W. R. 309**

(*Contra*) KASI CHANDRA DUTT *v.* JADUNATH CHUCKERBUTTY **8 B. L. R. 512 note : 10 W. R. 29**

237. ——— *Immoveable property—Act XI of 1865, s. 19. Held*, that, for the purposes of the Mofussil Small Cause Courts Act, standing timber is not "moveable" property

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

Nasir Khan v. *Karamat Khan, I. L. R. 3 All. 168,* referred to. UMED RAM *v.* DAULAT RAM
I. L. R. 5 All. 564

238. ——— *Sugar mill—Moveable property.* A stone sugar-mill was *held* to be moveable or personal as distinguished from immoveable property. HURMUNGAL SINGH *v.* ATHUL SINGH . . . . . **4 N. W. 15**

239. ——— *Trees—Growing crops—Moveable property.* Trees and growing crops are not moveable property. TOFAIL AHMUD *v.* BANEE MADHUB MOOKERJEE: **24 W. R. 394**

240. ——— *Growing crops.* Growing crops are "immoveable property" and execution of a decree of a Small Cause Court cannot be had against them under s. 19 of Act XI of 1865. GOPAL CHANDRA BISWAS *v.* RAMJAN SIRDAR . . **5 B. L. R. 194: 13 W. R. 275**

MUHAMMAD SILEMAN *v.* SATU VALAD HARJI
5 Bom. A. C. 90

241. ——— *Suit for possession of tree or delivery of produce—Suit for definite quantity of produce of tree.* A Small Cause Court cannot entertain a suit for the possession of a tree nor for the annual delivery of the produce, so long as the tree should be productive. But a suit for definite quantity of the produce of the tree, or the value thereof, may be entertained by a Small Cause Court if the value be within the prescribed limit. SHANTI LAKSHMINARAASAMMA *v.* VEPA VENKATRAMADAS . . . **3 Mad. 237**

242. ——— *Suit for fruit upon trees—Suit for compensation for the wrongful taking of fruit upon trees—Immoveable property.* When the damage or demand does not exceed in amount or value the sum of five hundred rupees, a suit for the fruit upon trees, or damages in lieu thereof, is a suit cognizable in a Mofussil Court of Small Causes, the fruit upon trees not being immoveable property, but being moveable property within the meaning of s. 6 of Act XI of 1865. NASIR KHAN *v.* KARAMAT KHAN.
I. L. R. 3 All. 168

243. ——— *Thatch.* Suit to recover a thatch of a value less than R500 must be brought in the Small Cause Court. A thatch, especially when severed from the house, is moveable property. RAJKUMAR MOOKERJEE *v.* PRANNATH MOOKERJEE
7 B. L. R. Ap. 41: 15 W. R. 499

244. ——— *Suit to recover baluta leviable on the crops of village lands.* A suit to recover *baluta* leviable on the crops of village lands is not a suit for an interest in land, but for a share of produce severed from land, and is cognizable by a Mofussil Court of Small Causes. NARU PIRA *v.* NARO SHIDHESHVAR
I. L. R. 3 Bom 8

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

245. ——— *Act XI of 1865, s. 6—Suit by vatandar mahars to recover "aya"—Immoveable property, what is.* A suit for *baluta* or aya is a claim in respect of a hak belonging to, and forming the emoluments of, an hereditary office amongst Hindus, and one in respect of immoveable and not moveable or personal property. A Mofussil Small Cause Court has no jurisdiction to entertain a suit for such a claim. There is no difference in principle between the haks of hereditary officiating mahars of a village and the haks appendent to the hereditary office of a village joshi, for the office of an hereditary priest of a temple and its emoluments. The haks of the former are not personal property. APPANA *v.* NAGIA.
I. L. R. 6 Bom. 512

246. ——— *Suit for share of hakwartanee allowance.* A suit by an alleged sharer in a hakwartanee allowance to recover from the defendant, who received the whole of such allowance from Government, the plaintiff's share in it, was *held* not to be a suit cognizable by a Court of Small Causes. VENKAJI LAKSHMAN DESHPANDE *v.* YYAMUNABAI . **7 Bom. A. C. 114**

247. ——— *Suit for malikana allowance.* A suit for a malikana allowance concerns the proprietary right in land. A dispute concerning it may be regarded in the same light for the purposes of jurisdiction as a dispute concerning the proprietary right itself. A suit therefore of this special description is not one for a Small Cause Court. MAHOMED KARAMOTOOLLAH *v.* ABDOOL MAJEED . . **1 N. W. 205: Ed. 1873, 288**

248. ——— *Act XI of 1865, s. 6.—Suit to recover price of buffaloes after sale.* *A* obtained an ikrar from *B* by which *B* pledged to *A* certain buffaloes which *B* purchased with money borrowed from *A*. The ikrar also stipulated that *B* would not alienate his rights in the buffaloes till the sum borrowed was repaid. *A* obtained a decree against *B* for the amount of the loan and attached the buffaloes in execution. This attachment was set aside at the instance of *C*, who purchased the buffaloes from *B* after the date of the ikrar given by *B* to *A*. *A* sued *C* (making *B* a party) in the Small Cause Court, praying for the sale of the buffaloes pledged to him by *B*, or, in default of that, for the sum due to him. *Held*, that such a suit was not a suit within s. 6, Act XI of 1865, to recover personal property, or the value of personal property, and was not cognizable by the Small Cause Court. RAM GOPAL SHAH *v.* RAM GOPAL SHAH . . . . **9 W. R. 136**

249. ——— *Madras Rent Recovery Act, 1865—Suit to recover moveable property.* A suit to recover moveable property attached under colour of the Rent Recovery Act (Madras Act VIII of 1865) is cognizable by a Court of Small Causes constituted under Act XI of 1865. DAVUD BEG *v.* KULLAPPA **I. L. R. 11 Mad. 264**

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

250. ——— **Municipal Commissioners** —*Act XI of 1865, s. 9—Suit against Municipal Commissioners.* S. 9, Act XI of 1865, is no bar to a suit against Municipal Commissioners being brought in a Court of Small Causes. HURISH CHUNDER TALAPATTUR *v.* O'BRIEN **14 W. R. 248**

251. ——— **Municipal tax**—*Suit to recover Municipal tax.* A suit to recover a Municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865. LOGAN *v.* KUNJI **I. L. R. 9 Mad. 110**

252. ——— *Wrongful assessment of profession tax—Madras District Municipalities Act (Mad. Act IV of 1884), ss. 49, 50—Provincial Small Cause Courts Act (IX of 1887), Sch. II, para. 1—Order of a Local Government.* The Municipality at Tuticorin demanded R50 as profession tax from the South Indian Railway Company, which had already paid profession tax to the Municipality at Negapatam. The company complied with the demand under protest, and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court. *Held*, that the Court had jurisdiction to hear and determine the suit ; ss. 49 and 50 of the Madras District Municipalities Act of 1884 and Sch. II, cl. 1, of the Provincial Small Cause Courts Act (IX of 1887) are not applicable to such a suit. TUTICORIN MUNICIPALITY *v.* SOUTH INDIAN RAILWAY CO. . . **I. L. R. 13 Mad. 78**

253. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts 8 and 13—Calcutta Municipal Consolidation Act (Beng. Act II of 1888), ss. 117 and 119—Suit to recover occupier's share of tax by the owner of a bustee.* A suit by the proprietor of bustee land for the recovery of Municipal taxes from the owner of a hut in the bustee is cognizable by the Provincial Small Cause Courts. BROJONATH MITTRA *v.* GOPI SHAKRANI . . **I. L. R. 23 Calc. 835**

254. ——— **Order of Civil Court**—*Suit to set aside miscellaneous order of Civil Court.* A Small Cause Court has no jurisdiction to set aside a miscellaneous order passed by a Civil Court. BUNSEEDHUR *v.* KUDDEY LALL. **1 N. W. 112 : Ed. 1873, 198**

255. ——— **Partnership account**—*Suit for partnership account.* A suit for an account of a partnership is not cognizable by a Small Cause Court. SHURRUT CHUNDER KUR *v.* RAM SHUNKUR SURMAH . . . **10 W. R. 214**

256. ——— *Act XI of 1865, s. 6.* Where defendant had been plaintiff's servant in charge of plaintiff's shops, on the understanding that he was to be remunerated by a small share of the profits in lieu of fixed wages, a suit to recover the balance after deduction of such remuneration was *held* to be a suit on a demand cognizable by a Small Cause Court, and not for balance of partnership account. RAM KANAYE SHAHA *v.* BYKUNTNATH SHAHA . **15 W. R. 89**

257. ——— *Suit involving question of partnership account. A, B,* and *C,* the joint owners of an estate, sued their tenant in the Munsif's Court for rent ; the tenant defeated the suit by proving payment of the entire rent to *B. A* then brought a suit in the Small Cause Court against *B* for damages equal in amount to the one-third of rent due to him and the costs incurred by him and awarded against him in the rent suit in the Munsif's Court. *B* pleaded that he had expended the share of rent due to *A* for the benefits of the joint estate, and that *A* had collected the rents of other mehals belonging to the joint estate, and had not accounted for such rents. *Held*, that the suit, being one which involved questions of partnership account between the joint proprietors of an undivided estate, could not be entertained in a Court of Small Causes. RAMTONU ACHARJEE *v.* PEARYMOHUN ACHARJEE **I. L. R. 6 Calc. 551 : 7 C. L. R. 557**

258. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 29 (c)—Suit by a retired partner for the consideration due on account of his retirement.* A suit by a retired partner for money alleged to have been agreed to be paid to him by the continuing partners in consideration of his retirement is not a suit for balance of a partnership, and is not excluded from the jurisdiction of a Court of Small Causes. FAUJI LAL *v.* CHANGA MAL . **I. L. R. 19 All. 513**

259. ——— *Settlement of accounts—Promise to pay balance.* The plaintiff and defendant, having carried on business in partnership, settled their accounts and struck a balance of R196, which the defendant agreed orally to pay in a month. The plaintiff now sued in a Small Cause Court for the amount, not asking for an account to be taken. *Held*, that the suit was maintainable. MARIMUTHU *v.* SAMINATHA PILLAI . . . **I. L. R. 21 Mad. 366**

260. ——— *Jurisdiction—Suit for balance due on a partnership account—Addition of prayer for dissolution of partnership—Civil Procedure Code, s. 646B.* Where a plaint asked in effect for the recovery of a balance alleged to have been struck on the winding up of a partnership. *Held*, that the fact that a prayer for a declaration that the partnership had been dissolved was added did not oust the jurisdiction of a Court of Small Causes. *Held*, also, that when a reference is made to the High Court under s. 646B of the Code of Civil Procedure, the Court which makes it, should state its reasons for considering the opinion of the Subordinate Court, with respect to the nature of the suit to be erroneous. CHHOTU *v.* JAWAHIR (1905) . . . **I. L. R. 28 All. 293**

261. ——— **Prisoners' Testimony Act (XV of 1869)**—*Mofussil Small Cause Court*

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

Judge of—Defendant in custody. A Judge of a Small Cause Court in the Mofussil could direct the jailor to bring up before the Court, at the hearing of the suit, a defendant committed to custody, under s. 78 of Act VIII of 1859, without having recourse to the procedure under Act XV of 1869. KILARAM MAJI *v.* NARAYAN DAS
5 B. L. R. 215 : 13 W. R. 278

262. ——— **Purchase-money**—*Civil Procedure Code, s. 315—Suit to recover purchase-money—Suit by purchaser at Court sale when debtor had no saleable interest.* A suit brought, under s. 315 of the Code of Civil Procedure, by a purchaser at an execution-sale to recover the purchase-money when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, is not a suit of a nature cognizable by a Small Cause Court constituted under Act XI of 1865. PACHAYAPPAN *v.* NARAYANA
I. L. R. 11 Mad. 269

263. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 11—Suit to recover purchase-money by purchaser ejected from possession of his purchase by a third person.* Where a plaintiff brought a suit in the Small Cause Court to recover from the defendant the purchase-money which he had paid for a piece of land, but from which, however, he had been ejected by order of a Civil Court at the instance of a third person, it was *held* that the exception to Art. 11 of the second Schedule to the Provincial Small Cause Courts Act (IX of 1887) was no bar to the maintainability of the plaintiff's suit, although, as a defence to the action, it may be necessary for the defendant to show that he had a good title. GOOL KHAN *v.* TETAR GOALA . . **4 C. W. N. 63**

264. ——— **Receiver**—*Power to appoint receiver—Attachment and sale of bond—Civil Procedure Code, 1877, s. 268.* A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, which, by s. 268 of Civil Procedure Code, 1877, is six months from the date of the attachment, cannot be made available for satisfaction of the judgment-creditor's debt. NURSINGDAS RUGHUNATHDAS *v.* TULSIRAM BIN DOULATRAM . **I. L. R. 2 Bom. 558**

265. ——— **Registration Act**—*Suit on bond under s. 52, Registration Act, 1864.* The Court which had jurisdiction in a proceeding to enforce payment under the provisions of the Registration Act, XVI of 1864, of a registered bond was the Court in which a suit for the amount claimed was maintainable. A Small Cause Court therefore had jurisdiction in an application under that section on a bond on which not more than R500 was due at the time of the application. KESHAB LAL MITTER *v.* MASABDY MUNDUL
4 W. R. S. C. C. Ref. 11

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2. JURISDICTION—*contd.*

SREEMUNT SEN *v.* GORAI GAZEE
18 W. R. 199

which was a suit under s. 53 of Act XX of 1866.

266. ——— *Bond registered under Act XX of 1866, s. 53.* A suit upon a bond specially registered under the provisions of s. 50 of Act XX of 1866 for an amount less than R503 is cognizable by a Mofussil Court of Small Causes and under s. 586 of the Code of Civil Procedure, 1877, no second appeal lies to the High Court against an order passed on an application for execution of a decree made in such a suit. BULLOV BHUTTACHARJEE *v.* BABURAM CHATTOPADHYA
I. L. R. 11 Calc. 169

267. ——— **Rent**—*Suit for money for permission to tap date-trees.* Suit for money for which plaintiff agreed to let defendant tap certain date-trees and appropriate the produce for a single season :—*Held*, that such a suit was not one for rent, but for the breach of a contract in respect of which a Small Cause Court has jurisdiction. DEB NATH GHOSE *v.* PACHOO MOLLAH **6 W. R. Civ. Ref. 8**

268. ——— *Suit by landholder against purchaser of produce of tenant's land for rent—Damages.* *B*, who held a decree for money against *G*, a cultivator, brought to sale in execution of his decree the produce of certain land occupied by *G*, and such produce was purchased by *S*. The landholder, to whom *G* owed rent for the land, sued *G* and *S* for the amount of the rent, on the ground that under s. 56 of the N.-W. P. Rent Act the produce of the land was hypothecated for the rent. *Held*, that the defendants could only be held responsible *ex delicto*, and the suit was therefore one for damages, and the amount claimed being under R500, one cognizable in a Court of Small Causes. SHIBBA *v.* HULASI
I. L. R. 5 All. 518

269. ——— *Suit for rent under agreement—Failure to prove agreement.* In a suit for rent of a holding which the plaintiff alleged to be included within certain homestead land which he owned in virtue of a sale-certificate in execution of a decree, the defendant urged that the said holding was expressly excluded from the certificate. The plaintiff contended further that the defendant had agreed to pay him rent for the land in dispute. *Held*, that the material issue was as to the alleged agreement, and that, if the plaintiff failed to prove it, the issue would be as to whether the land belonged to him or to the defendant, and would require to be settled in the Civil Court. KHUDEERAM BISWAS *v.* KORAL BUDONEE DOSSEE . . . . **21 W. R. 379**

270. ——— *Tenant and under-tenant—Assignment of rent—Set-off.* The plaintiff held an under-tenure within a jote-jumma held by *B* within *D's* zamindari and under an assignment from *B* paid to the zamindar *D* a sum of money as rent due by *B* to *D*. Ultimately *D*, ignor-

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ing such payment, recovered the rent from *B* by a separate suit in which no plea of payment was raised, and the latter again recovered his due from plaintiff by a separate suit. *Held*, that an action was not maintainable in the Small Cause Court against the zamindar defendant *D*. *Held*, that, in the absence of any authority from *B* to plaintiff to set-off his payment to *D* against the rent due to *B*, the Collector had no jurisdiction to try whether *B* owed the plaintiff a sum equal to the rent, and that the Judge of the Small Cause Court was competent to try whether the plaintiff did pay money for the use of *B* at *B's* request, and, if so, to give plaintiff a decree for the same. DEANUT MUNDUL *v.* BUSSUNT MOYEE DOSSIA . **12 W. R. 190**

271. _____ *Suit for use of land—Damages—Rent.* Suit for rent or hire of land which defendant used and caused to be used for passing and repassing to and from his steamer: —*Held*, that, if there was no express hiring, the defendant ought to be sued for damages for trespassing upon the plaintiff's land; that if he agreed to pay for the use of a way across the land, it would not be rent, and that in either case the Small Cause Court was competent to entertain the suit. BRICE *v.* TOOGOOD . **5 W. R. S. C. C. Ref. 18**

272. _____ *Suit for rent of land with buildings.* In a suit for rent of land, where the principal subject of the entire occupation is bastu land, the residue (if any) of the holding being merely subordinate, the Small Cause Court has jurisdiction. But when the principal subject is agricultural land, the building or buildings being mere accessories thereto, the Small Cause Court will not have jurisdiction. CHUNDESSUREE *v.* GHEENATH PANDEY . . . **24 W. R. 152**

273. _____ *Arrears of rent of homestead, or bastu land, suit for—Provincial Small Cause Courts Act (IX of 1877), Sch. II, cls. 7 and 8.* A Mofussil Small Cause Court has no jurisdiction to entertain a suit for arrears of rent of homestead or bastu land under the provisions of the Provincial Small Cause Courts Act (IX of 1887). UMA CHURN MANDAL *v.* BIJARI BEWAH **I. L. R. 15 Bom. 174**

274. _____ *Suit for sums stipulated to be paid for use of private path.* A suit upon the contract for the paymnet of a stipulated sum per mensem to the owner for the leave granted by him to the defendants to use a path across his land is cognizable by the Small Cause Court. WOOMA PERSAD SHAW *v.* SHUMSHER SIRDAR **4 W. R. S. C. C. Ref. 10**

275. _____ *Suit on instalment-bond for nuzzur or salami.* Plaintiff sued in a Small Cause Court on an instalment bond for R81. The bond had been executed for nuzzur or salami contemporaneously with the execution of a pottah and kabuliat, by which the defendants agreed to pay the plaintiff R335 a year for two years, as rent for certain land. The pottah and kabuliat had not been registered. A previous suit brought by the plaintiff, under Act X of 1859, had been therefore dismissed, and no oral evidence was admitted to prove the terms of the pottah and kabuliat. *Held*, that the suit on the bond was properly cognizable by the Small Cause Court as a simple debt due under the bond. It was clearly not for rent, nor was it an abwab or illegal cess; whether it was nuzzur or salami was immaterial. DINANATH MOOKERJEE *v.* DEBNATH MULLICK **5 B. L. R. Ap. 1 : 13 W. R. 307**

276. _____ *Suit for rent and a sum as penalty for non-payment.* Where a party sued for R17-8 as rent, and a like sum as penalty for non-payment thereof, it was *held* that he was in fact suing for a penalty equal to double the amount due, and that a Small Cause Court was competent to entertain the suit. HINGUN SOWDAGUR *v.* BOISTUM CHURN OJAH **6 W. R. Civ. Ref. 5**

277. _____ *Suit for arrears of rent and assessment of rate.* A suit for arrears of rent of land for which no rent has ever been paid, where the plaintiff also asks for assessment of the rate of rent, is not cognizable by a Small Cause Court. GOPEE NATH GHOSE *v.* KEDAR NATH CHUCKERBUTTY. KEDAR NATH CHUCKERBUTTY *v.* GOPEE NATH GHOSE . . **23 W. R. 426**

278. _____ *Suit for rent—Act XI of 1865, s. 6.* A suit to assess rent at an increased rate upon the defendants and for a decree for rent at such rate in respect of land situated in a town, and upon which either a house or shop stands, is not a suit for rent within the meaning of s. 6, Act XI of 1865, and is maintainable in the ordinary Civil Courts and not in the Small Cause Courts. JOY KISHORE CHOWDHRAIN *v.* NUBEE BUKSH . . . . **17 W. R. 178**

279. _____ *Suit for rent of land used for building purposes.* A suit for the rent of land used for building purposes is not cognizable in a Mufussil Court of Small Causes. PEAREE BEWAH *v.* NOKOOR KURMOKAR . **19 W. R. 308**

GOKHUL CHUND CHATTERJEE *v.* MOSAHROO KANDOO . . . . . **21 W. R. 5**

280. _____ *Suit on instalment-bond for arrears of rent.* A suit upon an instalment-bond given for arrears of rent is cognizable in a Small Cause Court. Also a suit by a judgment-debtor to recover money paid by him to be applied in satisfaction of a decree under Act X of 1859, but not so applied by the decree-holder. SHUTT CHURN GHOSAL *v.* MAHOMED ALLY. TARINEE CHURN ROY *v.* GOPAL KISTO ROY **2 W. R. S. C. C. Ref. 5**

281. _____ *Suit on document given for arrears of rent—Act XI of 1865, s. 6.* A suit to recover arrears of rent on a tahood kistbundi, under which defendant had been appointed a tahsildar to collect rents, having been filed before

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

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the Munsif, it was returned as being cognizable by the Court of Small Causes. The Judge of the latter Court, seeing that the instalment-bond on which the suit was brought was exactly in the form of a kabuliat, and that the defendant was in possession of the land for which the rent was claimed, referred the question of jurisdiction to the High Court, which *held* that the money which the defendant contracted to pay, being rent, could not be sued for under Act XI of 1865. PEAREE MOHUN ROY CHOWDHRY *v.* ASSAD KHAN . **18 W. R. 444**

282. ——— *Suit for rent where there is no contract to pay it.* A suit was brought in the Small Cause Court by a zamindar against a raiyat for arrears of rent. The plaintiff alleged that he had tendered pottahs which the defendant was bound to accept, and the defendant alleged that the rent specified was such that he was not bound to accept the pottahs. *Held*, that the suit was not cognizable by a Court of Small Causes, there being no contract between the parties for the payment of rent. VENKATACHALA REDDIAR *v.* NARAYANA REDDY . . . **4 Mad. 393**

283. ——— *Suit for arrears of phulkar.* A suit for arrears of rent of the description known as phulkar cannot be tried by a Small Cause Court. GOBIND SOOKOOL *v.* GOKOOL BHUKUT . . . . **23 W. R. 304**

284. ——— *Act XI of 1865, s. 6—Jurisdiction—Suit for refund of rent voluntarily paid to a wrong person.* A Mofussil Court of Small Causes has no jurisdiction under s. 6 of Act XI of 1865 to entertain a suit for a refund of money paid as rent, in which it is found that the payment was made to a wrong person voluntarily, and under no mistake as to that person being entitled to receive it, but with the object of defrauding an intermediate tenure-holder. RAM CHAND DUTT *v.* MOSAI SANTAL . . **I. L. R. 11 Calc. 738**

285. ——— *Suit for rents—Suit at full rates after remission for years—Act XLII of 1860, s. 3—"Suit"—Mad. Regs. XXVIII of 1802 and V of 1822, s. 2.* A zamindari was attached in 1827, and the Collector, without authority from the Board of Revenue or the Government, remitted a portion of the tirvai, and continued such remission until 1842, when the zamindari was restored. The then zamindar and his successors continued the remissions, always, however, entering the faisal rates in the pottahs and setting down the remissions as munasib. In 1861 the plaintiff became lessee of the zamindari, and in 1862, pursuant to notice, he tendered pottahs for Fasli 1272 to the defendant and the raiyats at the faisal rates. *Held, first*, that the plaintiff was not precluded from raising the rents to the amount of the faisal assessment; *secondly*, that the Act of limitation did not apply, and, *thirdly*, that the plaintiff might sue in a Court of Small Causes for the rent for Fasli 1272. The word "suit" in the proviso of s. 3 of Act XLII of 1860 referred to regular suits before a Collector

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under Act X of 1859, and not to the summary proceedings under Regulation XXVIII of 1802 and s. 2 of Regulation V of 1822. ADIMULAM PILLAI *v.* KOVIL CHINNA PILLAI . . **2 Mad. 22**

But *see* UPPALAPATI GANAKAYA GARU *v.* BALAVI RAMUDU . . . . . **2 Mad. 475**

286. ——— *Suit for damages after notice to quit or pay rent.* A notice was issued on defendant requiring him to quit the land or pay rent, and defendant refused to do either. Plaintiff therefore rightly brought his suit for damages, and not for rent, and the Small Cause Court had jurisdiction to entertain it. But as the Court rejected the suit as being substantially one for rent, its order was set aside, and the suit ordered to be restored to the file of that Court. BHOOBUN MOHUN BOSE *v.* CHUNDERNATH BANERJEE **17 W. R. 69**

287. ——— *Damages on account of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits.* The plaintiff, alleging that the defendant, with her permission, removed a lock placed by her on her house and took possession of it, sued in a Court of Small Causes for "damages on account of rent" of which she was thus deprived. The Court, regarding the suit as one for use and occupation, made a decree in favour of the plaintiff. *Held*, that the suit was not rightly regarded as one for use and occupation, for the claim was not based on any contract, express or implied, it should have been regarded as an action of trespass brought to try a question of title,—an action in which the Court of Small Causes had no jurisdiction. The plaintiff's proper remedy was by an action of ejectment in the ordinary Civil Courts, to which, if he chose, he could add a claim for mesne profits for the period during which the defendant had been in occupation. The decree of the Court of Small Causes was accordingly annulled. JAMNADAS *v.* BAI SHIVKOR **I. L. R. 5 Bom. 572**

288. ——— *"Damages on account of rent"—Suit for use and occupation—Trespass—Ejectment—Mesne profits.* The plaintiff obtained a decree declaring him entitled to a certain house. He thereupon gave to the defendant, who was in occupation, notice to pay him rent, and on default of such payment he sued the defendant in the Court of Small Causes to recover "damages on account of rent." *Held*, that the suit was not maintainable in a Court of Small Causes, which could not be used as a medium for ejecting, by indirect means, a person in possession of immoveable property. *Held*, also, that the plaintiff's suit was only maintainable as a suit for damages on account of trespass, and in such a suit it would be necessary for the plaintiff to prove possession prior to the trespass, or to have obtained a decree, in ejectment which would relate back to the date of the trespass. The plaintiff had obtained no-

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thing more than a decree declaring him to be the owner of the house; but this did not necessarily import a right to immediate possession, nor could the plaintiff be allowed to deprive from it all the benefits which he might derive from a decree in ejectment. KALIDAS *v.* VALLABHDAS
I. L. R. 6 Bom. 79

289. _____ *Suit for the recovery of damages for the use and occupation of land.* A suit for the recovery of damages for the use and occupation of land is within the jurisdiction of the Mofussil Small Cause Courts. MAKHAN LALL DATTA *v.* GORIBULLAH SARDAR
I. L. R. 17 Calc. 541

KALI KRISHNA TAGORE *v.* IZZATANNISSA KHATUN
I. L. R. 24 Calc. 557

290. _____ *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 7—Suit for damagas for use and occupation of land.* A suit for damages for use and occupation of land is cognizable by a Court of Small Causes. VIRA PILLAI *v.* RANGASAMI PILLAI
I. L. R. 22 Mad. 149

291. _____ *Suit for jodi—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13.* A suit for arrears of *jodi* rent on favourable terms is maintainable as a small cause suit under Provincial Small Cause Courts Act, 1887. VENKATAGIRI RAJAH *v.* VENKAT RAU
I. L. R. 21 Mad. 243

292. _____ *Provincial Small Cause Courts Act (IX of 1887), s. 15 and Sch. II, Art. 8—Suits for rent other than house-rent—"Suits of the nature cognizable in Courts of Small Causes"—Second Appeal—Civil Procedure Code (Act XIV of 1882), s. 586.* A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto under s. 15 and Sch. II Art. 8, of the Provincial Small Cause Courts Act, 1887. A second appeal will lie in such a suit though the amount of value of the subject-matter of the original suit does not exceed R500. VEDACHALA MUDALI *v.* RAMASAMI RAJA
I. L. R. 22 Mad. 229

(*Contra*) SOUNDARAM AYYAR *v.* SENNIA NAICKAN
I. L. R. 23 Mad. 547

decided by a Full Bench and overruling the above case.

293. _____ *Suit by tenant for excess payment of rent—Civil Procedure Code (Act XIV of 1882), s. 586—Landlord and tenant—Bengal Tenancy Act (VIII of 1885), s. 144.* A suit between landlord and tenant of the recovery by the tenant of excess payments taken by the landlord in respect of the rent of the holding, and not exceeding R500, is a suit cognizable by the Small Cause Court, and under s. 568 of the Civil Procedure Code no second appeal lies. There is nothing in s. 144 of the Bengal Tenancy Act to override the provisions of s. 568 of the Civil Procedure Code, as it determines only the venue and has no bearing upon the nature of the suit. RANGO ROY *alias* RUNG LAL ROY *v.* HOLLOWAY
I. L. R. 26 Calc. 842
4 C. W. N. 95

294. _____ *Suit by a landlord against a tenant for a certain sum payable by him out of the rent to a third person by assignment—Whether such a suit is one for rent or for damages. Held* (by the Full Bench), that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent and not for damages. *Rutnessur Biswas* v. *Hurish Chunder Bose, I. L. R. 11 Calc. 221,* referred to. *Mohabut Ali* v. *Mahomed Faizullah, 2 C. W. N. 455,* approved of. BASANTA KUMARI DEBYA *v.* ASHUTOSH CHUCKERBUTTY . . . **I. L. R. 27 Calc. 67**
4 C. W. N. 3

295. _____ *Suit for rent in kind or its money value—Suit for rent—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35—Bengal Tenancy Act (VIII of 1885), s. 3, cl. 5.* A suit for produce rent or its money value is a suit for rent under the Bengal Tenancy Act, and not a suit for damages for breach of contract; such a suit is therefore not cognizable by a Provincial Small Cause Court. *Tajuddin Khan* v. *Ram Parshad Bhagat, I. L. R. 1 All. 217,* followed. *Lachman Parshad* v. *Hoolas Mahton, 2 B. L. R. Ap. 27 : 11 W. R. 151; Mullick Amanut Ali* v. *Okloo Pasi, 25 W. R. 130;* and *Jumna Doss* v. *Gausee Meah, 21 W. R. 124,* referred to. SHOMA MEHTA *v.* RAJANI BISWAS . **1 C. W. N. 55**

296. _____ *Landlord and tenant—Suit for rent by an assignee of landlord whether suit for rent or money—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8.* *K* and *U* owned in equal share some lands appertaining to a talukh; in execution of a decree, *K's* share in all the lands and *U's* share in some of the lands were sold and purchased by one *B,* who in Assar 1301 sold to the plaintiffs half of the land and the whole of the rent; plaintiffs again sold to the *pro formâ* defendants half of the lands which they had purchased and also half of the arrears for 1300. Plaintiffs brought a suit for recovery of the whole rent of 1300, the persons to whom they had sold a portion of those arrears being made *pro formâ* defendants. The claim was not exceeding R500 in value. *Held,* that the suit brought by the assignee against the tenant is a suit to recover the rent within the meaning of Art. 8 of Sch. II of the Provincial Small Cause Courts Act. That the money was due as rent at the time of the assignment

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

and the assignment did not deprive it of that character, so far, at all events, as the tenant was concerned. *Sama Soonduree Dossee* v. *Brindabun Chunder Mozoomdar, Marsh. 199; Lall Mohun Singh* v. *Troyluckonath Ghose, 14 W. R. 456;* and *Reedoy Monee* v. *Sibbold, 15 W. R. 344,* followed. *Lalla Bhugwan Sahoy* v. *Sungessur Chowdhry, 19 W. R. 411,* distinguished. MUNSAR *v.* LOKNATH ROY . . . . **4 C. W. N. 10**

297. ——— *Suit by an assignee of arrears of rent after they fall due, whether cognizable by the Smal lCause Court—Bengal Tenancy Act (VIII of 1885), s. 3, sub-s. 5—Provincial Small Cause Courts Act, Sch. II, Art. 8. Held,* by the Full Bench (BANERJEE, *J.*, dissenting), that a suit brought by an assignee of arrears of rent, after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes. SRISH CHUNDER BOSE *v.* NACHIM KAZI **I. L. R. 27 Calc. 827**
4 C. W. N. 357

MOHENDRA NATH KALAMAREE *v.* KAILASH CHANDRA DOGRA . . **4 C. W. N. 605**

298. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, cl. 8.—Suit for rent, with cross-demand for value of improvements—Jurisdiction of Small Cause Court.* Plaintiffs sued to recover arrears of rent due by defendants, and also prayed that the value of improvements due to the defendants might be made liable for the claim : *Held,* that the suit was one for rent, and triable by a Court of Small Causes. KARUNAKARA KURUP *v.* MUNIPERANAN (1901) **I. L. R. 24 Mad. 356**

299. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit for rent.* A suit by a divided co-parcener to recover his share of rent from a tenant, and, if he should not be liable, from the other co-parcener in whose sole name the lease was executed by the tenant, is substantially a suit for rent and is not as against the co-parcener " a suit for the profits of immoveable property belonging to plaintiff, which have been wrongfully received by defendant" within the meaning of Art. 31 of the second Schedule of the Provincial Small Cause Courts Act. SRINIVASA RAGHAVA AYYANGAR *v.* PICHAIKARAN (1905) . . . **I. L. R. 29 Mad. 184**

300. ——— **Sale-proceeds**—*Suit for refund of moneys paid under order of Court.* A suit to recover a refund of moneys paid under an order of Court is not cognizable by a Court of Small Causes. GRISH CHUNDER MUNDUL *v.* DOORGA DOSS . . . . **I. L. R. 5 Calc. 494**

301. ——— *Act XI of 1865—Civil Procedure Code, 1882, s. 295—Suit for refund of assets paid in execution of decree.* A suit under s. 295 of the Code of Civil Procedure to compel refund of assets paid in execution of a decree

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2. JURISDICTION—*contd.*

to a person not entitled thereto is cognizable by a Court of Small Causes constituted under Act XI of 1865. *Shahi Ram* v. *Shib Lal, I. L. R. 7 All. 378,* dissented from. HARIHARA *v.* SUBRAMANYA . . . **I. L. R. 9 Mad. 250**

302. ——— *Second appeal—Sale-proceeds, suit for share of.* A suit by one decree-holder against another for the money received by the latter on a division between them of the proceed of an execution-sale as his share of such proceeds under the order of the Court executing the decrees, is a suit of the nature cognizable in a Court of Small Causes, and consequently where the amount of such money does not exceed five hundred rupees, no second appeal lies in such suit. MATA PRASAD *v.* GAURI **I. L. R. 3 All. 59**

303. ——— *Civil Procedure Code, 1882, s. 295—Suit for refund of proceeds of execution-sale.* *S* and *L* held mortgage-bonds executed in their favour by the same person. *S's* bond was dated the 16th June 1882, and was registered, the registration being compulsory, *L's* bond was of prior date, the 30th December 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May 1883, notwithstanding that *S* claimed the whole on the ground that he was an encumbrancer under a decree passed on a registered instrument, and therefore entitled to priority. *S*, being dissatisfied with this order, brought a suit to recover from *L* the moiety of the sale-proceeds paid to him. *Held,* that the suit, being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes. SHAHI RAM *v.* SHIB LAL **I. L. R. 7 All. 378**

304. ——— *Suit for money paid for property sold where judgment-debtors had no interest—Provincial Small Cause Courts Act (IX of 1887), s. 15. Held,* that a suit to recover from a decree-holder money paid as the price of property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. MAKUND RAM *v.* BODH KISHEN . . **I. L. R. 20 All. 80**

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

Neither Art. 2 nor Art. 35, cl. (j), Sch. II of Act IX of 1887 excludes such a suit from the cognizance of the Small Cause Courts. PRASANNA KUMAR KHAN *v.* UMA CHARAN HAZRA **1 C. W. N. 140**

305. ——— *Proceeds of immoveable property—Jurisdiction—Act XI of 1865, s. 6—Money had and received—Sale of tenure—Co-sharers.* The plaintiff and the defendant were co-owners of a certain talukh. The zamindar brought a suit for arrears of rent of the taluk, against the defendant, obtained a decree, and in execution of that decree sold the tenure. The proceeds of the sale, after satisfying the zamindar's decree, were taken by the defendant, and the plaintiff instituted the present suit to recover an 8-anna share thereof. *Held*, that such a suit was not cognizable by a Small Cause Court. *Mata Prasad* v. *Gauri, I. L. R. 3 All. 59*, dissented from. RAM COOMAR SEN *v.* RAM COMUL SEN **I. L. R. 10 Calc. 388**

306. ——— **Salvage**—*Suit for salvage—Abandonment of property saved.* A suit for salvage, even when the saved property has been abandoned by those in charge of it, is not cognizable by a Court of Small Causes. KISHORE SINGH *v.* GUNNESH MOOKERJEE . . . **9 W. R. 252**

307. ——— **Tax**—*Suit for amount of trade impost—Suit for rent.* A Court of Small Causes has no jurisdiction to entertain a suit to recover the amount of a trade impost alleged to be leviable from the defendant in common with all other persons carrying on the trade of weaving within a particular district. Such a suit cannot be considered as a claim for rent. JAGHIRDAR OF ARNEE *v.* PERIYANNA MUDELY . **5 Mad. 317**

308. ——— **Title, question of**—*Provincial Small Cause Courts Act (IX of 1887), s. 23—Claim to possession of land when title to land disputed—Second appeal—Civil Procedure Code (Act XIV of 1882), s. 586—Practice.* The plaintiff sued to recover R75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal. *Held*, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under s. 586 of the Civil Procedure Code (Act XIV of 1882), no second appeal lay. VINAYAK GANGADHAR BHAT *v.* KRISHNARAO SAKHARAM ADHIKARI (1901) **I. L. R. 25 Bom. 625**

309. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 23—Question of title—Return of plaint—Jurisdiction of Civil Court—Declaration of title—Civil Procedure Code (Act XIV of 1882), s. 586—Appeal.* Where a plaint, having been returned by the Small Cause Court under s. 23 of the Provincial Small Cause Courts Act, was presented to the Munsif's Court, together with a

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

petition asking the Court to come to a decision on the question of title, but there was no prayer for declaration of title to the land, nor did the plaintiff offer to pay any further court-fee :—*Held*, that the question of title could not be decided finally in such a suit, and that the lower Appellate Court had no jurisdiction to make a declaratory decree for title. *Held*, also, that a second appeal was precluded by s. 586, Civil Procedure Code. *Kali Krishna Tagore* v. *Izzatunnissa Khatun, I. L. R. 24 Calc. 557*, followed. RASH BEHARI PAL CHOWDHRY *v.* SRIDHAR BELAL (1902) **6 C. W. N. 687**

310. ——— **Title, question of**—*Denial of title of plaintiff by defendant.* Where the cause of suit, as stated by the plaintiff, appears to be within the cognizance of a Court of Small Causes, the mere denial by the defendant of the plaintiff's right of title is not sufficient to oust the jurisdiction of the Court. If it reasonably appears to the Judge that a *bonâ fide* question of right, which is not within his jurisdiction to decide, is fairly raised in the suit, his jurisdiction ceases. AMMALLU AMMAL *v.* SUBHU VADIYAR . . **2 Mad. 184**

311. ——— *Question incidentally arising.* If a *bonâ fide* question of title arises incidentally in a Small Cause Court suit, the Court should determine it. ALAGIRISAMI NAIKER *v.* INNASI UDAYAN . **I. L. R. 3 Mad. 127**

312. ——— *Right to cut trees.* A Court of Small Causes may try incidental questions of title which are indispensable to the decision of the claim before it,—*e.g.*, a right to land on which depends a party's right to cut trees. RADHA CHURN GANGOOLY *v.* GUDADHUR BAHADOOR **15 W. R. 166**

313. ——— *Suit for produce of land.* If the right of the plaintiff be a question raised in a suit brought in a Court of Small Causes for recovery of value of produce, it is quite open to the Judge of the Court of Small Causes to try it and determine it incidentally to the main question in the suit,—the right to the produce claimed. DARMA AYYAN *v.* RAJAPA AYYAN **I. L. R. 2 Mad. 181**

314. ——— *Suit for damages for loss of produce.* The jurisdiction of a Small Cause Court is not ousted in a suit for damages for carrying away the produce of certain land when the defendant sets up title to the land in answer to the claim. *Per* TURNER, *C. J.*—When a suit is brought in a form in which it is cognizable by a Small Cause Court under Act XI of 1865, the Court cannot decline jurisdiction if it appears that incidentally a question of title is raised which it has not jurisdiction to determine for any other purpose than the decision of the suit before it. Under such circumstances, the Court may, however, properly grant a reasonable adjournment that the question may be litigated and determined by the proper tribunal. MANAPPA MUDALI *v.* MCCARTHY **I. L. R. 3 Mad. 192**

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

315. ——— *Act XLII of 1860.* Plaintiff sued defendant in the Small Cause Court for damages for having cut down and removed trees from plaintiff's land. Defendant pleaded that he was entitled to do so under his pottah. *Held*, the Court had jurisdiction to try the question of the genuineness of the pottah. RAGHU RAM BISWAS *v.* RAM CHANDRA DOBAY
B. L. R. Sup. Vol. 34 : W. R. F. B. 127

SHUMBHOO CHOWDHRY *v.* COMBS. **2 W. R. 179**

RAM JEEBUN KOYEE *v.* SHAHAZADEE BEGUM
9 W. R. 336

SUNKUR LALL PATTUCK *v.* GYAWAL RAM KALEE DHAMIN . . . . . **18 W. R. 104**

But *see* INAYAT KHAN *v.* RAHMAT BIBI
I. L. R. 2 All. 97

and PACHOO RAREE *v.* GOOROO CHURN DASS
15 W. R. 556

316. ——— *Question of amount due on bond mortgaging land.* Where an ijara constituted a mortgage of the rents as a security for an amount due on a bond, with a stipulation that the balance after paying the jumma payable by the mortgagor should be applied by the mortgagee in payment of the bond :—*Held*, that the Small Cause Court had jurisdiction to try what amount was due on the bond, and also to try the question of payment by means of the rent assigned. MOHIMA CHUNDER MOOKERJEE *v.* RAM CHURN ROY . . . **6 W. R. Civ. Ref. 16**

317. ——— *Suit for arrears of malikana allowance—Act XI of 1865, s. 6.* *A* sold a share in immoveable property to *M* by a registered deed of sale, which contained the following provision : "The said vendee is at liberty either to retain possession himself or to sell it to some one else, and he is to pay R25 of the Queen's coin to me annually (as malikana) which he had agreed to pay." *M* mortgaged the property to *B*, who obtained possession ; and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued *M* and *B* to recover arrears of malikana, the amount sued for being less than R500. *Held*, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mofussil Small Cause Courts Act (XI of 1865) was that directly and immediately involving questions of title to immoveable property should not be cognizable by the Small Cause Courts ; that in the present suit such a question was directly involved ; and that consequently s. 586 of the Code had no application and a second appeal would lie. *Mohamed Karamut-ullah* v. *Abdool Majeed, 1 N. W. 205*, and *Bhawan Singh* v. *Chatter Kuar, All. Weekly Notes (1882) 114*, referred to. *Pestonji Bezonji v. Abdool Rahiman, I. L. R. 5 Bom. 463 ; Qutub Husain* v. *Abul Husain, I. L. R. 4 All. 134,* and *Kadureesur Mookerjee* v. *Gooroo Churn Mookerjea, 2 C. L. R. 388*, distinguished. CHURAMAN *v.* BALLI . . . **I. L. R. 9 All. 561**

318. ——— *Suit for arrears of rent.* In a suit for arrears of rent a Small Cause Court may decide whether the renting has taken place, and pass judgment for the amount claimed, without adjudicating upon the plaintiff's title. SUBBIRAMANIYA AYYAN *v.* VELAYUDA DEVAR
1 Mad. 212

319. ——— *Denial of title.* A Small Cause Court has no jurisdiction to try a suit for rent where the defendant *bonâ fide* sets up by way of defence that the title to the land in respect of which the rent was claimed passed from the plaintiff to others since the creation of the tenancy between the plaintiff and defendant, and that the rent claimed had accrued due after the determination of the plaintiff's title as landlord. VENKATACHALAM *v.* THIMMA NAIKAN **5 Mad. 64**

320. ——— *Mahomedan law.* The seven heirs of a deceased Mahomedan under an agreement among themselves, took equal shares of 14 annas of his estate and allotted 2 annas to rehalallah, *i.e.*, devoted the profits to charitable purposes under the management of one of their number. On the death of such manager, three of the heirs sued his tenant for a proportion of rent equal to their shares and three-sevenths on account of rehalallah. The remaining heirs opposed the claim in regard to rehalallah, which they said the plaintiffs had no right to collect, and which could only be collected by the mutwali appointed by the deceased manager, urging that, if the Court did not admit the appointment of the mutwali, it would have to decide whether collections should be made by the heirs in equal shares or in shares allowed by the Mahommedan law. *Held*, that the suit ought not to be entertained by the Court of Small Causes. KOREEM BUX *v.* NOMEERO
20 W. R. 349

321. ——— **Trusts**—*Act IX of 1887 (Provincial Small Cause Courts Act), Sch. II, cl. (18)—Small Cause Court suit—Suit relating to a trust—Suit to recover money paid to legal practitioner to institute suits, but not so expended. Held*, that a suit in which the plaintiff claimed from the defendant, the refund of certain moneys alleged by the plaintiff to have been paid to the defendant, a legal practitioner, for the purpose of instituting certain suits, but not to have been so expended, was a suit which was within the cognizance of a Court of Small Causes, and was not a suit relating to a trust, within the meaning of cl. (*18*) of the second Schedule to Act IX of 1887. NORTH-WESTERN COMMERCIAL BANKING CORPORATION *v.* MUHAMMAD ISMAIL KHAN (1901)
I. L. R. 24 All. 208

322. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (18)—*

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

Suit for money borrowed by a trustee from his co-trustees out of moneys belonging to the trust estate—"Suit relating to a trust"—Jurisdiction of Small Cause Court. One of several trustees of a charity personally borrowed from other trustees some moneys belonging to the estate of the charity, and gave a promissory note therefor. The other trustees subsequently instituted a suit in the Small Cause Court to recover the amount: *Held*, that the suit was not one "relating to a trust," within the meaning of cl. (*18*) of Sch. II to the Provincial Small Cause Courts Act, and that the Small Cause Court had jurisdiction to try it. SUNDARALINGAM CHETTI *v.* MARIYAPPA CHETTI (1902)
I. L. R. 26 Mad. 200

323. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (18)—Suit relating to a trust—Appointment of plaintiff under trust deed on a salary—Suit for unpaid salary—Jurisdiction of Small Cause Court.* By a deed of trust, the settlor vested a press in trustees with the object of conducting a newspaper, and appointed plaintiff as editor and manager, on a fixed salary. Plaintiff acted, but subsequently resigned. On a suit being brought by plaintiff, on the Small Cause side of the Subordinate Judge's Court, to recover the amount due to him by way of salary between the date of the trust deed and that of his resignation: *Held*, that the Small Cause Court had no jurisdiction to try the suit. If the plaintiff had a cause of action, it was to enforce the performance of the trust in so far as it related to him, and the suit was barred, under cl. (*18*) of Sch. II to the Provincial Small Cause Courts Act. SUBRAMANIA AYYAR *v.* PANDI DORAISAMI TAVER (1902) . . . **I. L. R. 26 Mad. 368**

324. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 18—Gift, construction of—Hindu law—Suit relating to a trust.* A Hindu executed in favour of his daughter an instrument in the following terms: "I have hereby given to you to be enjoyed as stridhanam after my death 2,320 fanams out of 6,000 fanams which remain as kanom on the land T. . . . The proportionate rent on 2,320 fanams is 365 paras. This quantity of paddy . . . shall be enjoyed by you and your sons and grandsons hereditarily by receiving the same from my sons." After certain clauses, restricting the mode of enjoyment and the power of alienation the instrument proceeded, "in the event of the said kanom being paid, that money shall be received by my sons, and shall be invested in some other property, which may be approved of by you and your sons and by my sons, and from that property you may receive income yearly and enjoy the same." In a suit by a grandson of the donee to recover his share of the income: —*Held*, that the suit "related to a trust" within the meaning of the Provincial Small Cause Courts Act, Sch. II, Art. 18. KRISHNA AYYAN *v.* VYTHIANATHA AYYAN . . **I. L. R. 18 Mad. 352**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*contd.*

325. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 18—Suit by temple manager against his predecessor for damage sustained by temple—Suit relating to a trust.* A suit by the manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes. KRISHNAYYAR *v.* SOUNDARARAJA AYYANGAR
I. L. R. 21 Mad. 245

326. ——— *Suit against person collecting or receiving subscriptions for building a temple—Trustee—Civil Procedure Code (Act XIV of 1882), s. 30.* A person collecting and receiving subscriptions for the purpose of building a temple, in pursuance of a resolution come to at a meeting of the community, holds them in the capacity of a trustee, and a suit in respect thereof should be filed, under s. 30 of the Civil Procedure Code, in a Subordinate Judge's Court, and not in a Small Cause Court. MAHOMED NATHUBHAI *v.* HUSEN . . **I. L. R. 22 Bom. 729**

327. ——— **Wages**—*Suit for wages against European British subject.* A suit for wages under R50, alleged to be due from a European British subject to a native, can be tried in a Small Cause Court in the mofussil. RAMJAN BEG *v.* COOK
6 B. L. R. Ap. 91 : 14 W. R. 428

328. ——— **Wrongful distraint**—*Suit to recover value of goods distrained for rent under Mad. Act VIII of 1865, s. 27—Parties—Procedure.* A suit to recover the value of goods distrained for rent under Madras Act VIII of 1865, and forcibly carried away from the person distraining, may be maintained in a Court of Small Causes under s. 27 of the Act. The suit may be brought either by the landlord or the person authorized to distrain. A petition and summons and order, after hearing the parties and their evidence, appear to be the fitting mode of exercising the jurisdiction. VADAMALAI THIRUVANA TEVAR *v.* CARUPPEN SERVAI. ZAMINDAR OF SAITTUR *v.* CARUPPEN SERVAI
4 Mad. 401

329. ——— *Provincial Small Cause Courts Act (IX of 1887), Art. 35 (j)—Madras Rent Recovery Act (Mad. Act VIII of 1865), s. 15—Civil Procedure Code (Act XIV of 1882), s. 646B—Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts.* Certain moveable property having been distrained under s. 15 of the Rent Recovery Act (Madras), 1865, such distraint was set aside and the property ordered to be restored to the owners. That order not having been carried out, the owners filed suit on the Small Cause side of the Courts of the Subordinate Judge and the District Munsif for the value of the property so illegally retained. *Held*, that the suits were not excepted from the jurisdiction of the Small Cause Courts by Art. 3

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

2. JURISDICTION—*concld.*

(*j*) of Sch. II of the Provincial Small Cause Courts Act, 1887. CHAKRADHARUDU *v.* VENKTIARAMAYYA **I. L. R. 22 Mad. 457**

330. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, cl. 35 (j)—Compensation for illegal distress—Civil Procedure Code (Act XIV of 1882), s. 586—Second appeal—Limitation—Rent Recovery Act (Mad. Act VIII of 1865), s. 78—Cause of action complete on date of illegal distress.* A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendant, that they had raised a crop of paddy, measuring about 6 *garces*, and stored it in three heaps on the land, that one of the plaintiffs had paid all the *kist* that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy, measuring about 5 *garces*, under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 *garces* of grain, worth R250, at R50 per *garce*, in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January, 1898, and the suit was instituted on 26th July on the same year :—*Held*, that the suit was in substance one for compensation for illegal distress or attachment and not for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by a Court of Small Causes, and a second appeal lay. *Held*, also, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made. *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan, I. L. R. 24 Mad. 339*, distinguished. PAMU SANYASI *v.* ZAMINDAR OF JAYAPUR (1901) . **I. L. R. 25 Mad. 540**

3. PRACTICE AND PROCEDURE.

(*a*) EXECUTION OF DECREE.

1. ——— **Power of execution**—*Change of jurisdiction.* A Small Cause Court in which a decree is passed is competent to entertain an application for its execution, even if the debtor's residence and moveable property are situate in a place which has since the decree been excluded from that Court's jurisdiction. In such execution the course to be pursued was that prescribed by ss. 285 and 286, Code of Civil Procedure, 1859. KODOO MUNDUL *v.* SHUSHEE SHIKHUR SIRCAR **16 W. R. 227**

See ANONYMOUS. **B. L. R. Sup. Vol. 886 : 9 W. R. 175**

(*Contra*) MANSUK MOSUNDAS *v.* SHIVRAM DEVISING . . . . **I. L. R. 2 Bom. 532**

GRISH CHUNDER KUR *v.* KRISTO CHUNDER GHOSE . . . . . **18 W. R. 123**

ANONYMOUS . . **3 W. R. S. C. C. Ref. 7**

2. ——— **Mode of execution**—*Interest in moveable property, power to sell—Act XI of 1865, ss. 6 and 20.* A Small Cause Court can sell the undivided right, title, and interest, of a deceased debtor, to which the defendants succeeded, in the moveable property in satisfaction of a decree obtained against the defendants without infringing the second proviso of s. 6 of Act XI of 1865. Until the judgment-creditor has exhausted that mode of proceeding, he is not entitled to proceed against the debtor's immoveable property under s. 20 of the Act. AHOBALASCO CHETTY *v.* VENKATA KRISTNAMMA . . . . **5 Mad. 275**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*a*) EXECUTION OF DECREE—*contd.*

3. ——— *Execution of decree—Suit against member of undivided family.* A Court of Small Causes has not power to do more in execution of a decree against an undivided member of a Hindu family than issue process for the attachment and sale of the defendant's undivided right, title, and interest in the family moveable property. It would be for the purchaser at such a sale to obtain a partition. IYAHVEIN *v.* CHITHAMBARIEN . . . . **5 Mad. 312**

4. ——— *Act XI of 1865, ss. 19 and 20—Rights and interests of judgment-debtor under bond pledging immoveable property.* The rights and interests of a judgment-debtor under a mortgage-bond hypothecating to him immoveable property are not saleable by a Court of Small Causes. A sale of such rights by a Court of civil judicature, by virtue of a certificate issued under the provisions of s. 20 of Act XI of 1865, is the proper mode of execution. BUDDOO MULL *v* MAHAROOF . . . . **6 N. W. 129**

5. ——— *Power of Court to attach salary—Civil Procedure Code, 1882, ss. 223, 268.* A Mofussil Court of Small Causes must adopt the machinery of s. 223 of the Civil Procedure Code in all cases where execution is sought against persons or property outside its local jurisdiction. Such a Court therefore cannot attach the salary of a public officer where the same is disbursed outside its local jurisdiction. *Hossein Ally* v. *Ashotosh Gangooly, 3 C. L. R. 30*, followed. PARBATI CHARAN *v.* PANCHANAND **I. L. R. 6 All. 243**

6. ——— **Transfer for execution**—*Act XI of 1865, s. 20—Transfer to, and execution by, Munsif's Court—Sale of land—Certificate not filed—Title of purchaser.* A decree passed by a Subordinate Judge's Court on the Small Cause side was, after the abolition of the said Court, transferred by the District Court for execution to a District Munsif's Court. The District Munsif, on the application of the creditor, attached and sold certain land. No application was made by the creditor for a certificate as provided by s. 20 of Act XI of 1865, nor was any objection taken to the execution-proceedings by the debtor. The creditor, having purchased the land, sold it to *N*, who, in attempting to take possession was resisted

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*a*) EXECUTION OF DECREE—*concld.*

by the debtor. In a suit to obtain possession of the land :—*Held*, that *N* was entitled to recover. NAGIREDDI *v.* RAMANNA . **I. L. R. 7 Mad. 592**

7. ——— *Act XI of 1865, s. 20—Civil Procedure Code, 1882, s. 223—Small Cause decree of Subordinate Judge—Execution against immoveable property—Co-ordinate jurisdiction of Subordinate Judge and District Munsif—Execution by District Munsif.* The Court of a Subordinate Judge and that of a District Munsif had jurisdiction over certain immoveable property. A Small Cause decree of the former Court having been sent by the Subordinate Judge to the Court of the District Munsif for execution against the said property under the provisions of s. 20 of Act XI of 1865, the application for execution was rejected by the Munsif on the ground that this procedure was illegal. *Held*, that s. 20 of Act XI of 1865 was not modified by s. 223 of the Code of Civil Procedure, and that the Munsif's Court was therefore bound to execute the decree. KAHANARAMA *v.* RANGA **I. L. R. 8 Mad. 8**

(*b*) NEW TRIALS AND REVIEWS.

8. ——— **Act XI of 1865, s. 21—***Review—Limitation Act, 1877, Art. 173.* S. 21 of Act XI of 1865 held to be in force, notwithstanding the right of review given to Small Cause Courts in the mofussil by s. 623 of the Code of Civil Procedure, 1882. Where the circumstances of a case admit of a new trial, an application for such new trial is governed by s. 21 of Act XI of 1865 ; but where the circumstances of a case do not admit of a new trial, but do admit of a review, then the time within which an application for review should be made is to be governed by Art. 183, Sch. II of Act XV of 1877. MADON MOHON PODDAR *v.* PURNO CHUNDRA PURBOT **I. L. R. 10 Calc. 297**

9. ——— *Civil Procedure Code, 1877, ss. 623, 624—Power to grant new trial of case tried by predecessor.* A Judge of a Mofussil Small Cause Court was *held* to have jurisdiction to direct a new trial of a case tried by his predecessor, s. 21 of Act XI of 1865 not having been repealed by the Civil Procedure Code, 1877. *Per* GARTH, *C.J.*—The Judge, however, in dealing with applications for new trial under s. 21, should have regard to the rule laid down in s. 624 of the Code of Civil Procedure. SHUMSHER ALLY *v.* KURKUT SHAH **I. L. R. 6 Calc. 236 : 6 C. L. R. 549**

10. ——— *New trial of ex parte case—Re-opening of case against all the defendants.* It may be competent to the Judge of a Small Cause Court on hearing one of the defendants to set aside an *ex parte* decree as to all, if justice requires it. *e.g.*, if the objection is one which is common to the case of all, but he is not bound, because the decree is set aside as to one defendant

SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*b*) NEW TRIALS AND REVIEWS—*contd.*

to interfere with the decision against others who do not object. DOOKHEE KHAN *v.* RAJESSUREE RANEE . . . . **15 W. R. 371**

11. ——— *Fraudulent confession of judgment—New trial.* A Small Cause Court Judge may on the ground of fraud and false personation grant a new trial where judgment has been passed on a confession of judgment. *In the matter of* HURO MONEE DOSSEE . **17 W. R. 48**

12. ——— *Application for new trial, ground for—Computation of time prescribed for application.* An error as to date in the summons to plaintiff's witnesses is sufficient ground for setting aside an order dismissing his suit. The time prescribed by Act XI of 1865, s. 21, for an application for a re-trial is exclusive of the date on which the suit was dismissed. BIJOY GOBIND DEB *v.* MUDDUN RAM PAL **18 W. R. 454**

13. ——— *Third application for new trial.* A third application for a new trial in a Court of Small Causes is not admissible under s. 21, Act XI of 1865. DHUNNOO CHOWDHRY *v.* BUKSHUN . . **12 W. R. 266**

14. ——— *Non-appearance of defendant—Application to set aside ex parte decree.* There is nothing in the first part of s. 21 of Act XI of 1865 showing that an application in accordance with that portion of the section is limited to the first occasion on which a defendant puts in an appearance to a suit. Where therefore a case is adjourned from the date fixed in the summons to any later date, and on such later date a defendant is prevented by sufficient cause from appearing, and in default of such appearance an *ex parte* decree is given against him, he may apply under the first part of s. 21 for an order to set aside such decree. *In the matter of* DOYAL MISTREE *v.* KUPOOR CHUND **I. L. R. 4 Calc. 318 : 3 C. L. R. 482**

15. ——— *Procedure—Deposit of amount of decree and costs.* A defendant desiring a new trial of a case decreed against him in a Small Cause Court must deposit in Court the amount of the decree passed against him and costs, at the time of giving notice of his intention to apply for the new trial. A subsequent deposit, though made within seven days from the date of the decision, will not entitle the party to ask for a new trial. *Semble :* The "next sitting of the Court" mentioned in s. 21, Act XI of 1865, refers to the next sitting after the decision complained of ; and the words "within the period of seven days from the date of the decision" apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one Court. KAILAS CHANDRA SANNEL *v.* DOWLAT SHEIKH **5 B. L. R. Ap. 57 : 14 W. R. 42**

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*b*) NEW TRIALS AND REVIEWS—*contd.*

16. ——— *Deposit of amount of decree and costs.* If an application for a review of judgment made by a defendant in a Small Cause Court be in the nature of an application for a new trial, the amount of the decree, though made payable by instalments, must be deposited in Court, under s. 21 of Act XI of 1865. NAVROJI PESTANJI *v.* MANSUKH JAYACHAND **5 Bom. A. C. 70**

17. ——— *Deposit of costs.* Act XI of 1865, s. 21, does not require a plaintiff applying for a new trial to deposit the costs of the defendants. MOHIMA CHUNDER ROY *v.* HURNATH CHUNGO . . . **18 W. R. 446**

18. ——— *Notice of application.* Where one of the provisions of s. 21, Act XI of 1865, is not complied with,—*e.g.*, where no notice of an intention to apply at the next sitting of the Court for a new trial is given,—an application for a new trial cannot be entertained. *In re* PITAMBAR SADHU KHAN . **6 B. L. R. 390 note**

S.C. PETUMBAR SHADOO KHAN *v.* DOYA MOYEE DOSSEE . . . . **12 W. R. 17**

19. ——— *Practice—Notice of application—Review—Civil Procedure Code (Act X of 1877), s. 623.* The notice clause in s. 21, Act XI of 1865, is applicable only to those cases where a new trial cannot be applied for within seven days after the judgment, in consequence of there being no sitting of the Court. Where the application is made within seven days, the notice is unnecessary. If the grounds upon which the new trial is moved are proper grounds for granting a review, the applicant is entitled to proceed under s. 623 of the Code of Civil Procedure without resorting to Act XI of 1865. RATAN KRISHEN PODDAR *v.* RAGHOO NATH SHAHA **I. L. R. 8 Calc. 287 : 10 C. L. R. 275**

See ISAN CHUNDER BANERJEE *v.* LUCHUN GOPE. KEMP *v.* PREM NARAIN SINGH **I. L. R. 5 Calc. 699 : 5 C. L. R. 539**

20. ——— *"Next sitting of the Court"—Judge holding two offices.* Where the same person holds the office of Judge in two Small Cause Courts, and sits for the first half of the month in one Court and for the remaining half in the other, the next sitting of either Court after the close of its half monthly term would be on the first day on which the Judge sat again in that Court. MADHUB CHUNDER BISWAS *v.* OKHOY CHUNDER BISWAS. GOPEE MOHUN BANERJEE *v.* SREEKANTO BOSE . . **13 W. R. 103**

21. ——— *Application before execution of decree had been taken out for new trial.* An application presented to a Small Cause Court on the 25th May to set aside an *ex parte* decree obtained, on the 14th March, where no process had been executed for enforcing the decree, was *held* to fall within the first of the two provisions in s. 21, Act XI of 1865. SHOJONEE DOSSIA *v.* DHURONEE DHUR GHOSE . **16 W. R. 226**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*b*) NEW TRIALS AND REVIEWS—*contd.*

22. ——— *Notice of application—Next sitting of Court.* A judgment-debtor in a Small Cause Court on the day (28th July) of her arrest in execution of an *ex parte* decree deposited the amount claimed and gave notice under s. 21 of Act XI of 1865 that on the next day of the sitting of the Court she would file her grounds for a new trial. The Court next sat on the 1st August and she filed her application on the 2nd. *Held*, that the Judge of the Small Cause Court was right in proceeding to hear the application instead of going through the formality of telling her to first give notice and apply again. VAUGHAN *v.* LALL CHAND GHOSE . . . **15 W. R. 281**

23. ——— *Ex parte decree obtained on forged bond.* Petitioner specially registered a bond, brought it into a Small Cause Court, and, without serving the obligors with any summons, got an *ex parte* decree against them and shortly after took out execution. The judgment-debtor appeared within thirty days of the decree and applied for stay of execution on the ground that the bond was a forgery. Execution was stayed on security given, a re-hearing was granted in the presence of both parties, the original decree was reversed, and a fresh decree given. *Held*, that in this state of the facts the Small Cause Court had jurisdiction to grant a review and fresh decree, and that the procedure laid down in s. 21 of Act XI of 1865 was followed as far as it was applicable. *In the matter* OF MOHUN SAHOO **11 W. R. 245**

24. ——— *Second application for new trial.* An application having been made to a Small Cause Court Judge to set aside an *ex parte* decree, the Judge found from the record that the defendant had been personally served with a summons. He accordingly requested the pleader to tell his client to be present three days after to be examined. As neither the applicant nor his pleader was present on that date, the Judge rejected the application without issuing notice on the opposite party. A second application was then made under s. 21, Act XI of 1865. *Held*, that the communication to the pleader was an informal proceeding, and as applicant had not been summond in due form his application should not have been rejected in his absence, and the Judge was bound to hear the second application. GOPAL CHUNDER ROY *v.* ARMAN SHEIKH . **15 W. R. 402**

25. ——— *Application for new trial—Deposit of decretal amount or security—Provincial Small Cause Courts Act (IX of 1887), s. 17.* It is a condition precedent to the granting of a new trial that in accordance with the provi-

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*b*) NEW TRIALS AND REVIEWS—*concld.*

sions of s. 17 of the Provincial Small Cause Courts Act, 1887, an applicant should at the time of presenting his application for new trial deposit in Court the decretal amount or tender security for payment of the same. *Ramasami* v. *Kurisu, I. L. R. 13 Mad. 178*, dissented from. JOGI AHIR *v.* BISHEN DAYAL SINGH . **I. L. R. 18 Calc. 83**

Reviews of judgment of a Small Cause Court as distinguished from new trials are now governed by s. 623 of the Civil Procedure Code, 1882.

26. ——— *Provincial Small Cause Courts Act (IX of 1887), s. 17—Deposit of costs—Civil Procedure Code, 1882, ss. 623, and 624—Power of Judge to review order of predecessor.* On 23rd February 1888 the Sudordinate Judge of Tinnevelly dismissed with costs a Small Cause suit on the ground that the plaintiff had not secured the attendance of his witnesses. On 29th February the plaintiff presented a petition for review on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under s. 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition which proceeded on grounds other than those mentioned in s. 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates: he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition. *Held*, by the Full Bench, following the cases of *Karoo Singh* v. *Deo Narain Singh, I. L. R. 10 Calc. 80*, and *Fazal Biswas* v. *Jamadar Sheikh, I. L. R. 13 Calc. 231*, that, having regard to the provisions of s. 624 of the Code of Civil Procedure, the Officiating Subordinate Judge had jurisdiction to hear and determine the case on review. *Held*, by PARKER and WILKINSON, *JJ.*, that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory. RAMASAMI v. KURISU . . . **I. L. R. 13 Mad. 178**

(*c*) REFERENCE TO HIGH COURT.

[Reference to the High Court are now made under s. 617 of the Civil Procedure Code of 1882 which has been substituted for s. 22 of Act XI of 1865. The substituted section is of wider application than s. 22, and embraces questions arising in execution of decree as well as questions in a suit, which it was formerly held could not be referred.]

See SUROOP CHUNDER PATRE *v.* JADOO MOYTEE. **5 W. R. S. C. C. Ref. 7**

SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*c*) REFERENCE TO HIGH COURT—*contd.*

ANAND CHANDRA MAZUMDAR *v.* GOBARDHAN KHAN . . . **B. L. R. Sup. Vol. 457**
5 W. R. S. C. C. Ref. 19

KAMINEE SOONDUREE CHOWDHRAIN *v.* MUDHOO SOODUN MOOKERJEE . . **21 W. R. 376**

BANK OF BENGAL *v.* CURRIE
3 B. L. R. 396 : 12 W. R. 432

As to what is to be referred—

See GUJENDRO MOHUN SHAHA *v.* EASTERN BENGAL RAILWAY COMPANY . . **18 W. R. 145**

and how the reference is to be made—

DINONATH ADDY *v.* WELLER . **7 W. R. 16**

27. ——— **Ground for reference**—*Application of parties.* A Small Cause Court should not make a reference on a simple point merely on the application of the parties, unless it entertains a doubt upon the question. HURISH CHUNDER TALAPUTTUR *v.* O'BRIEN . . **14 W. R. 248**

28. ——— **Questions arising on application for new trial**—*Act X of 1867, s. 1—Act XI of 1865, s. 22.* When the judgment of a Small Cause Court is called in question by one of the parties on a point of law, such as that damages have been assessed on a wrong principle, his proper course is to apply for a new trial. The facts not being disputed, the Judge may grant a new trial as to what amount of damages were sustained; and in determining that question, he may alter his opinion as to the principle on which damages ought to be assessed, and upon the new trial assess them on the proper principle. A question of law raising on an application for a new trial was a question which might be referred to the High Court for its opinion as a question within the meaning of s. 1, Act X of 1867, arising at any point in the proceedings previous to the hearing of a suit. The hearing in a new trial is a hearing within Act XI of 1865, s. 22. An application for a new trial is a point in the proceedings previous to the hearing. ISAN CHANDRA SING *v.* HARAN SIRDAR
3 B. L. R. A. C. 135 : 11 W. R. 525

29. ——— *Act XI of 1865.* A point arising upon the application for a new trial may be referred to the High Court. NOBO COOMAR CHUCKERBUTTY *v.* KOYLASH CHUNDER BAROOREE . . . . **17 W. R. 518**

30. ——— **Change of Judges pending reference**—*Second reference by successor of Judge in case already decided.* Where a case was determined by a former Judge of a Small Cause Court, contingent upon the opinion of the High Court upon the question submitted by that Judge, and the parties had an opportunity of appearing and being heard in the High Court before the Judges expressed their opinion:—*Held*, that, when that opinion was expressed, the case was at an end, and that it was irregular for a Judge who had

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SMALL CAUSE COURT, MOFUSSIL —*contd.*

3. PRACTICE AND PROCEDURE—*contd.*

(*c*) REFERENCE TO HIGH COURT—*concld.*

succeeded to the Judge who referred the case to interfere in the matter. UMANUND ROY *v.* BROWNE **7 W. R. 352**

(*d*) MISCELLANEOUS CASES.

31. ——— Act XI of 1865, s. 45 and s. 20—*Power of clerk of Small Cause Court.* A clerk of Small Cause Court is not authorized to sign the copy of the judgment and certificate alluded to in s. 20, Act XI of 1865. ANONYMOUS **3 W. R. S. C. C. Ref. 7**

32. ——— s. 51—*Power to invest Small Cause Court Judge with powers of Principal Sudder Ameen.* S. 51, Act XI of 1865, did not authorize the Local Government to permanently and unconditionally invest the Judge of a Small Cause Court with the powers of a principal Sudder Ameen. The section only contemplated an occasional investment of the powers, and one contingent on the state on the business of the Court. BIJEE KOOER *v.* DAMODUR DASS . . **5 N. W. 55**

33. ——— s. 51—*Powers of local Legislature—Judges of Small Cause Courts. Held*, that in permanently investigating under s. 51 of Act XI of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares, with the powers of a Principal Sudder Ameen (Subordinate Judge), the Local Government did not exceed its power or contravene the law, although the occasional investiture of Small Causes Court Judges by name from time to time, with the powers of a Principal Sudder Ameen, may have been the mode of procedure contemplated by the Legislature as the one likely to be ordinarily adopted. *Bijee Kooer* v. *Damodur Dass, 5 N. W. 55*, impugned. CROSTHWAITE v. HAMILTON **I. L. R. 1 All. 87**

34. ——— *Execution of decree of Small Cause Courts against immoveable property—Powers of Judge of Small Cause Court.* The Judge of a Court of Small Causes, who has been duly invested with the powers of a Subordinate Judge under the provisions of s. 51 of Act XI of 1865, has "general jurisdiction" within the meaning of s. 20 of that Act, and can consequently, under the provisions of that section, enforce a decree under that Act against the immoveable property of the judgment-debtor. GOPAL *v.* NANKU **I. L. R. 1 All. 624**

35. ——— Power to invest Small Cause Courts with insolvency jurisdiction —*Civil Procedure Code, 1877, s. 5—Ch. XX, ss. 344—366.* The effect of s. 5 of the Code of Civil Procedure (Act X of 1877), coupled with the second schedule to that Act, was to render the whole of Ch. XX (relating to insolvent debtors) of the Code, including s. 360, inapplicable to Courts of Small Causes in the mofussil, notwithstanding the

SMALL CAUSE COURT, MOFUSSIL —*concld.*

3. PRACTICE AND PROCEDURE—*concld.*

(*d*) MISCELLANEOUS CASES—*concld.*

words "any Court other than a District Court" and "any Court situate in his district" which occur in that section. Consequently, the Government Resolution No. 2133 of the 3rd of April 1878, investing the Judge of the Court of Small Causes, Ahmedabad, with powers, under the said chapter, to adjudicate in insolvency matters, was *ultra vires* and invalid. LALLU GANESH *v.* RANCHHOD KAHANDAS . . . **I. L. R. 2 Bom. 641**

By the Civil Procedure Code Amending Act XII of 1879, s. 360 is made applicable to Small Cause Courts, so that such a resolution would now apparently be valid.

36. ——— Presentation of plaint—*Former order returning plaint—Provincial Small Cause Courts Act (IX of 1887), ss. 23 and 27.* Where a plaint in a suit for damages was presented to a Judge of a Small Cause Court, and it was found that it had formerly been presented to his predecessor, who was of opinion that the Court had no jurisdiction to try the suit and returned the plaint to the plaintiff under s. 23 of Act IX of 1887:—*Held*, that, the order returning the plaint being final under s. 27 of the Act, the Judge could not admit and register the plaint until that order had been set aside. *In re* HAUSAMBHAI ABDULABHAI **I. L. R. 20 Bom. 283**

37. ——— *Jurisdiction—Small Cause Suit—Subordinate Judge invested with Small Cause Jurisdiction—Small Cause Suit tried by a Subordinate Judge under his ordinary jurisdiction—Appeal.* Where a Subordinate Judge invested with Small Cause jurisdiction tried a Small Cause suit under his ordinary jurisdiction:—*Held*, that the character of the suit was not altered by the mode in which the Subordinate Judge had exercised his jurisdiction, and that his decree, being final, was not appealable to the District Court. SHANKARBHAI *v.* SOMABHAI (1900) **I. L. R. 25 Bom. 417**

SMALL CAUSE COURT, PRESIDENCY TOWNS.

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION.

(*a*) GENERAL CASES.

1. ———— Extension of jurisdiction by Act XV of 1882—*Act IX of 1850, s. 53—Abandonment of excess.* Whilst the pecuniary jurisdiction of the Small Cause Court was limited to R1,000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess, and in that suit they elected a non-suit under s. 53, Act IX of 1850. *Held*, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded, by their having abandoned the excess in the former suit, from recovering the full amount sued for. SIMSON *v.* GORA CHAND DOSS
I. L. R. 9 Calc. 473

2. ———— Adding sum to legal claim for purpose of giving jurisdiction—*Act IX of 1850, s. 28—Act XXVI of 1864, s. 2.* A plaintiff cannot give jurisdiction to the Small Cause Court by adding to his claim sums which he could not, under any circumstances, be entitled to recover. *Sikhur Chund* v. *Sooringmull, 1 Hyde 272*, distinguished. BONOMALLY NAWN *v.* CAMPBELL
10 B. L. R. 193 : 19 W. R. 20

3. ———— Abandonment of excess—*Claim not within pecuniary limits of jurisdiction.* The Court has no jurisdiction to hear a case unless there be an abandonment of any excess above its pecuniary jurisdiction. GORACHUND CHUNDER BOSE *v.* CHARROO CHUNDER GHOSE
Bourke O. C. 3 : Cor. 93

4. ———— Leave to sue—*Presidency Towns Small Cause Courts Act (XV of 1882), s. 18—Discretion, exercise of—Refusal of leave to sue—Jurisdiction—Defendant residing outside jurisdiction.* A tradesman in business in Calcutta sued his debtor, a resident at Lucknow, to recover a sum of R23 for goods sold in Calcutta and forwarded by the E. I. Ry. Co., for delivery at Lucknow. The plaintiff applied under s. 18 of Act XV of 1882 for leave to sue the defendant in the Calcutta Court of Small Causes. The Court refused to grant such leave, apparently on the ground that the defendant was living at a long distance from Calcutta, and that the suit was one for a small amount. *Held*, that, in refusing to grant such leave, the Judge of the Small Cause Court had not exercised the discretion vested in him under s. 18, and that the case was one in which the leave applied for should have been granted. *In the matter of* COLLETT *v.* ARMSTRONG . **I. L. R. 14 Calc. 526**

5. ———— Non-resident foreigner carrying on business by his munim in Bombay—*Presidency Towns Small Cause Courts Act (XV of 1882), s. 18.* Where a foreigner who did not reside in Bombay carried on business there by his munim :—*Held*, that, under s. 18 (*1*) of the Small Cause Courts Act (XV of 1882), the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court. *Per* SARGENT, *C.J.*—*Primâ facie* the word "defendants" in cl. (*b*) of s. 18 has the same meaning in each of the three cases in which that clause gives jurisdiction to the Court ; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are "carrying on business" within the limits. Although it is true that a non-British subject who does not personally carry on business within the territorial limits of the Court does not make himself personally subject to the municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business, and his property resulting from it, and may be fully regarded as submitting to the Courts of the country. GIRDHAR DAMODAR *v.* KASSIGAR HIRAGAR . **I. L. R. 17 Bom. 662**

6. ———— Splitting claim—*Omission to abandon excess—Act IX of 1850, s. 34. Held*, under s. 34 of Act IX of 1850, that an abandonment of excess not stated in the summons is a splitting of the claim, and the Court has no jurisdiction to amend its record where there is no abandonment so stated. GORACHUND CHUNDER BOSE *v.* CHARROO CHUNDER GHOSE . **Bourke O. C. 3 : Cor. 93**

7. ———— Splitting cause of action—*Act IX of 1850, s. 34.* The defendant, as broker for the plaintiffs, guaranteed all transactions entered into by the plaintiffs with native firms through the defendant. Some of these native firms, in respect of such transactions, became indebted to the plaintiffs, and the defendant wrote to the plaintiffs requesting them to sue such defaulting firms. The plaintiffs accordingly sued six of such firms, and sent a letter to the defendant claiming from him payment of the taxed costs incurred in all the suits, amounting to R7,553-10-6. The defendant having failed to pay, the plaintiffs sued him in the Small Cause Court to recover payment of the taxed costs incurred in one of the suits, amounting to R433. *Held*, that the plaintiffs, in doing so, were splitting their cause of action within the meaning of s. 34 of the Small Cause Courts Act (IX of 1850). BLACKWELL & Co. *v.* SUMAR AHMED
6 Bom. O. C. 88

See CHOCKALINGA PILLAI *v.* VIRUTHALAM
4 Mad. 334

8. ———— *Act IX of 1850, s. 34—Tradesman's account.* A tradesman cannot by keeping separate accounts of his dealings with a customer, split his cause of action so as to bring his suit within the jurisdiction of a Small Cause Court

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*a*) GENERAL CASES—*contd.*

in the Presidency towns. CASSUM JOOMA *v.* THUCKER LILADHUR KISSOWJI
I. L. R. 2 Bom. 570

9. ——— Valuation of suit—*Suit for damages under ₹1,000, on contract of more than ₹1,000.* In an action for damages on account of defendant's refusal to take delivery of goods of the value of R3,699-6-8 sold to him by plaintiff, which goods were afterwards re-sold at a loss of R344-5-9 :—*Held*, that the Court of Small Causes had jurisdiction, notwithstanding that the original contract was for more than R1,000. KUPPU CHETTI *v.* CHIDAMBARA MUDALI . . . . . **3 Mad. 170**

10. ——— *Act IX of 1850, s. 27—Liquidated damages—Earnest-money.* Where a contract for the sale and delivery of 2,000 baras of stone contained a provision that in case of breach by the purchaser a sum as liquidated damages was to be paid by him at the rate of R1 per bara, and the purchaser paid R1,000 earnest-money, but made default in accepting the stone :—*Held*, that, though in default of acceptance the earnest-money, R1,000, was forfeited, the vendor could not retain the earnest money and sue for the whole amount of the liquidated damages ; but that his proper course was to sue for the difference only, which suit could properly be brought in the Small Cause Court, being R1,000 only. MEHERVANJI MANCHARJI *v.* PUNJA VELJI . . . . . **5 Bom. O. C. 147**

11. ——— *Set-off—Deduction of amount of proceeds of goods not accepted.* The plaintiffs consigned goods to the defendant, and drew a bill for R2,711-9-6 against them on the defendant in favour of the Chartered Mercantile Bank. The bill was accepted by the defendant, and, when presented for payment, was dishonoured. The bill was paid for honour by the attorney of the plaintiffs. The goods arrived, and (the defendant having refused to pay the bill) were sold by the plaintiffs, after notice to the defendant, at his risk, and realized R1,655-15-4. The plaintiff refused to hold a survey on the goods unless the defendant paid the amount of the acceptance. The plaintiffs sued the defendant in the Small Cause Court for the amount of his acceptance, giving him credit for the proceeds of the goods, and abandoning the excess. *Held*, that the plaintiffs were not entitled to do so, as the claim on the bill was not brought within the jurisdiction of that Court by payment or admitted set-off. SHORTT *v.* ABDUL RAHIMAN
6 Bom. O. C. 53

12. ——— *Part payment—Set-off—Suit for balance of account.* The plaintiffs advanced R15,000 against the defendant's grain consigned to Hong-Kong, to be there sold on his account by the plaintiffs' agents. The plaintiffs subsequently gave credit to the defendant for R14,115-3-3, alleged to have been received by them as the proceeds of the sale, and sued him for the balance in the Bombay Small Cause Court, abandoning the excess so as to bring the claim within the Court's extended jurisdiction of R1,000. The defendant disputed the correctness of the account sales forwarded by the agents at Hong-Kong, and contended that the Court had no jurisdiction to try the case. The Judge, subject to the opinion of the High Court upon the facts as stated, struck the case out of the list for want of jurisdiction. *Held*, that, as both the plaintiffs and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant, the receipt by the plaintiffs of the amount, for which they gave credit in their particulars of demand, was in the nature of a part payment ; and that the suit was therefore on a balance of account, and within the jurisdiction of the Court of Small Causes. EWART, LATHAM & CO. *v.* MUHAMMAD SIDDIK
4 Bom. O. C. 133

(*b*) ARMY ACT.

13. ——— Stat. 44 & 45 Vict. C. 58, ss. 148, 151—*Act XV of 1882, s. 18—Leave to sue.* The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 44 & 45 Vict., c. 58, s. 151. WALLIS *v.* TAYLOR
I. L. R. 13 Calc. 37

14. ——— *Presidency Towns Small Cause Courts Act (XV of 1882)—Army Act, 1881 (44 & 45 Vict., c. 58), s. 151—Army (Annual) Act, 1888 (51 Vict., c. 4), s. 7—Leave to sue.* The jurisdiction given to Presidency Small Cause Courts by Act XV of 1882, s. 18, is not affected by 51 Vict., c. 4, s. 7. WATTS & CO. *v.* BLACKETT . . . **I. L. R. 18 Calc. 144**

15. ——— *Presidency Towns Small Cause Courts Act (XV of 1882), cl. 2, ss. 1, 18—Army Act (44 & 45 Vict., c. 58), sub-s. 1, s. 151—51 Vict., c. 4, s. 7.* The words of s. 7 of 51 Vict., c. 4, amending sub-s. 1 of s. 151 of 44 & 45 Vict., c. 58, are meant to restrict the words " within the jurisdiction, etc." (found in sub-s. 1 of s. 151) to persons resident within it, so as to meet and exclude the case of persons casually within the jurisdiction and not actually resident within it, and are limited to that purpose, and do not therefore affect the powers conferred by s. 18 of Act XV of 1882. WALLIS & CO. *v.* BAILEY
I. L. R. 18 Calc. 372

(*c*) BREACH OF PROMISE OF MARRIAGE.

16. ——— *Madras City Civil Court Act (VII of 1892), s. 3—Suit for " breach of promise of marriage "—Contract of marriage between intended bridegroom and parent of intended bride—Cognizable by Small Cause Court—Presidency*

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*c*) BREACH OF PROMISE OF MARRIAGE—*concld.*

Small Cause Courts Act (*XV of 1882*), *s. 90* (*q*). The phrase " breach of promise of marriage," which occurs in cl. (*q*) of s. 19 of the Presidency Small Cause Courts Act, has reference to the action as understood in English law, that is, between the parties who contemplate contracting the marriage, and not between an intended bridegroom and the parent of the intended bride. By s. 3 of the Madras City Civil Court Act, 1892, jurisdiction is conferred upon the City Civil Court to try all suits of a civil nature except, *inter alia*, suits cognizable by the Small Cause Court. By s. 19, cl. (*q*), of the Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for compensation for breach of promise of marriage. A suit was filed in the City Civil Court for compensation for breach of promise of marriage ; but the contract alleged to have been broken had been entered into between the parent of the intended bride and the intended bridegroom : *Held*, that the Court had no jurisdiction, inasmuch as such a suit was not exempted from the jurisdiction of the Small Cause Court. MUHAMMAD ASHRUFF HUSSAIN SAHEB *v.* MUHAMMAD ALI (1901) . **I. L. R. 24 Mad. 652**

(*d*) DAMAGES FOR BREACH OF CONTRACT.

17. ——— Contract for shipment and delivery of goods—*Divisible contracts—Construction of contract—Separate suits.* Where a contract provided for delivery of goods in two monthly shipments and the defendants refused to take delivery or pay for either of the shipments of the goods in accordance therewith ; and it appeared that the total amount of the damages sustained by reason of the two breaches alleged, if added together, exceeded R2,000, whereas, if taken separately, they were less than that amount :—*Held*, that on the true construction of the contract the plaintiff was entitled to bring two separate suits for the damages sustained in respect of each shipment, and that therefore the Presidency Small Cause Court had jurisdiction. VOLKART *v.* SABJU SAHEB **I. L. R. 19 Mad. 304**

18. ——— Value-payable article—*Breach of contract—Post Office Act* (*VI of 1898*), *s. 34—Liability of Government to sender when value not collected from addressee—Duty of post office to collect value-payable—Liability for neglect to do so.* The plaintiff delivered a parcel containing silver jewellery to the postal authorities for transmission to Colombo as a value-payable article. He also registered and insured it for R115. The fees were duly paid, receipts obtained, and the post office took charge of the parcel. By the mistake of a clerk the parcel was delivered to and accepted by the addressee without its value being collected from him. This suit was brought to recover the value of the parcel from the defendant, as the post office would neither pay the money to plaintiff nor return

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*d*) DAMAGES FOR BREACH OF CONTRACT—*concld.*

the article. The defendant relied, *inter alia*, upon s. 34 of the Indian Post Office Act, 1898. The proviso to s. 34 runs as follows :—Provided that the Secretary of State for India in Council shall not incur any liability in respect of the sum specified for recovery, unless and until that sum has been received from the addressee. *Held*, that the defendant was liable. The effect of the proviso is that the post office does not guarantee the collection of the money, but the proviso does not absolve the post office from the common law of liability to pay damages for delivering a parcel without collecting the money in pursuance of his undertaking to do so. By its contract the post office is bound to collect the money, when it delivers the article. If, for any reason, it neglects to do so, it commits a breach of contract for which it is liable in damages. The measure of the damages being the value of the article lost. A Small Cause Court has jurisdiction to entertain such a suit, it being a suit on contract and not on tort. MOTHI RUNGAYA CHETTY *v.* SECRETARY OF STATE FOR INDIA (1905) **I. L. R. 28 Mad. 213**

(*e*) DECREE, SUIT ON.

19. ——— Suit on decree of Small Cause Court—*Presidency Small Cause Courts Act* (*XV of 1882*), *ss. 1, 4, 94.* A judgment-creditor in the Court of Small Causes had not before the 1st July 1882 the right to sue in that Court on his judgment. MERWANJI NOWROJI *v.* ASHABAI **I. L. R. 8 Bom. 1**

(*f*) IMMOVEABLE PROPERTY.

20. ——— Question of title—*Act IX of 1850, s. 91 Act* (*XV of 1882, s. 41*)—*Summons to show cause on what title occupier holds, without leave of owner.* Upon a summons issued under section 91 of Act IX of 1850 by the Judge of the Small Cause Court to the occupier of a house to show by what title he claims to hold or occupy the same or part thereof :—*Held*, that the jurisdiction of the Small Cause Court was not ousted by the occupier appearing and showing as cause that which did not amount to an allegation of title in the occupier. *Held*, also, that the words in that section, " without leave of the owner," comprised a case where the original possession was with leave of the owner, but was afterwards withdrawn by his vendee, the subsequent owner. DADABHAI HUSSANJI *v.* KUVARBAI . . . . . **10 Bom. 386**

21. ——— *Act IX of 1850, ss. 91-93—Difficult or doubtful question of title.* Proof of the existence of a difficult or doubtful question as to the right to possession, *bonâ fide* raised by the person in possession, was *held* to be sufficiene cause shown to justify a Presidency Small Cause

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*f*) IMMOVEABLE PROPERTY—*contd.*

Court in refusing a warrant of ejectment under s. 93 of Act IX of 1850. Mere assertion of a title to possession is not sufficient. MUHAMMED ESUF SAHIB *v.* GEORGE . . **I. L. R. 4 Mad. 385**

ANONYMOUS . **I. L. R. 4 Mad. 389 note**

22. _____ *Title to immoveable property—Act IX of 1850, ss. 25, 91—Act XXVI of 1864, s. 2—Practice—Leave to amend summons and plaint.* In a suit brought under s. 91 of Act IX of 1850, the Bombay Court of Small Causes had no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit. *Aliter:* If the suit were brought under s. 25 of Act IX of 1850, as extended by s. 2 of Act XXVI of 1864, and the value of the property in dispute did not exceed R1,000. In a case involving a question of adverse title, the plaintiff should be allowed to amend the summons issued under s. 91 of Act IX of 1850, so as to render it conformable with a claim under s. 25 of Act XXVI of 1864 if the summons were issued in the mistaken form by the fault of the Clerk of the Court, and not of the plaintiff. NOWLA OOMA *v.* BALA DHURMAJI **I. L. R. 2 Bom. 91**

23. _____ *Act IX of 1850, s. 91—Equitable defence—Suit for ejectment.* The plaintiff in 1879 took out a summons under s. 91 of the Presidency Towns Small Causes Courts Act, IX of 1850, calling on his nephew, the defendant, to deliver up possession of certain premises in his occupation belonging to the plaintiff. The plaintiff alleged that he had purchased the premises in question in 1870 from one *N*, to whom the defendant had mortgaged them in 1866 with power of sale. The plaintiff produced the deed of mortgage to *N* and the conveyance to himself. It was admitted on his behalf that he had never received any rent from the defendant, and never had manual possession of the premises occupied by him. But the plaintiff produced a writing of attornment, dated April 1873, passed to him by the defendant, whereby the latter acknowledged that he was occupying the premises in question as the plaintiff's tenant and agreed to pay rent for the same at R25 a month. His defence was that the mortgage, the sale, and the writing of attornment were all merely colourable, executed for the purpose of defeating his creditors and screening the property from execution; that no money had passed between the parties; that the defendant had never been out of possession, and that the plaintiff now required the Court to assist him in turning his own wrong to his own advantage. At the hearing in the Court of Small Causes the defendant proposed to prove the above facts, and submitted that, under the circumstances, a *bonâ fide* question of title was raised which ousted the jurisdiction conferred on the Court by s. 91. The Court, however, refused to receive the evidence, and held that it had jurisdiction. On reference to the High Court: —*Held*, that the defendant was entitled to set up the defence which he had, and that it ousted the jurisdiction of the Court of Small Cause to proceed further with the action—inasmuch as such defence raised a question of adverse title, which in suits under s. 91 of Act IX, 1850, that Court had not jurisdiction to decide. LUCKMIDAS KHIMJI *v.* MULJI CANJI . . . **I. L. R. 5 Bom. 295**

24. _____ *Act XV of 1882 s. 41.—Landlord and tenant—Admission of tenancy —Suit in ejectment.* The plaintiff, alleging that the defendant was his tenant at a monthly rental of R52 and had refused to deliver up possession to the plaintiff, took out a summons against the defendant under s. 41 of the Small Cause Courts Act, XV of 1882. The defendant admitted the tenancy, but contended that he held under an unexpired lease for four years. The Judge of the Court of Small Causes was of opinion that a question of title was involved, and he dismissed the case on the ground that he had no jurisdiction to hear it. The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction. *Held*, that the case was within the jurisdiction of the Small Cause Court. DAVIDAS HARJIVANDAS *v.* TYABALLY ABDULALLY **I. L. R. 10 Bom. 30**

25. _____ *Presidency Towns Small Cause Courts Act (XV of 1882), ss. 22 and 41—Landlord and tenant—Suit to ejectment —Tender and payment into Court—Transfer of Property Act (IV of 1882), s. 114—Costs.* The plaintiff, a landlord, relying on a provision in a lease gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest, and costs.. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Courts. *Held*, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under Ch. VII, s. 41, of the Presidency Small Cause Courts Act, the plaintiff must pay the defendant's costs as between attorney and client under s. 22 of that Act. *Held*, on appeal (i) that there, having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under s. 114 of the Transfer of Property Act; (ii) that the suit not being cognizable by the Small Cause Court, s. 22 of Act XV of 1882 did not apply, an application under Ch. VII of that Act not being a suit under s. 22 thereof. KRISHNASAMI CHETTI *v.* NATAL EMIGRATION BOARD . **I. L. R. 17 Mad. 216**

26. _____ **Trespass to immoveable property**—*Act XV of 1882, ss. 18, 19, 38, 45.* The plaintiff brought a suit in the Calcutta Court of Small Causes to recover damages for trespass to certain immoveable property of which he proved he was in possession; the defendant contended that such a suit was one for the determination of a right

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*f*) IMMOVEABLE PROPERTY—*concld.*

to, or interest in, immoveable property, and was therefore not maintainable in the Small Cause Court. *Held*, that the Court had jurisdiction to entertain such a suit. PEARY MOHUN GHOSAUL *v.* HARRAN CHUNDER GANGOOLY **I. L. R. 11 Calc. 261**

27. ——— *Small Cause Courts Act (XV of 1882), s. 41—Mortgage—Mortgage sale—Ejectment—Suit, brought by purchaser at mortgage sale, to eject mortgagor—Right of purchaser to possession not derived from mortgagee.* The defendant, Mowji Dayal, mortgaged the house in question to one Lalji Doongersey in 1896. The defendant (mortgagor) remained in occupation of a part of the house, the rest of it being occupied by his tenants, who paid him rent. In October, 1900, Lalji Doongersey, the mortgagee, sold that house by auction, under his power of sale, and the plaintiff purchased it and obtained a conveyance on the 20th April, 1901. Subsequently the plaintiff (purchaser) brought this suit in the Small Cause Court, under s. 41 of the Small Cause Courts Act (XV of 1882), to eject the defendant (mortgagor), contending that he held as tenant-at-will or by permission of the plaintiff or of the mortgagee through whom he (the plaintiff) claimed. *Held*, that the case did not come within s. 41, and that the Small Cause Court had no jurisdiction to try the suit. A purchaser at a mortgage sale does not claim through the mortgagee for the purpose of s. 41 of the Small Cause Courts Act (XV of 1882). That section deals with the right to recover possession, rather than with title, and consequently the derivative claimant must establish that his right to possession is the same as that which was vested in his predecessor (the mortgagee). But the purchaser's right to recover possession is one which came into existence for the first time when he became absolute owner of the property. It is one which was not vested in the mortgagee, so that, though his present right to recover possession came into existence by virtue of something done by the mortgagee, it cannot be said that it passed from the mortgagee to him. Therefore, so far as relates to the purchaser's present right to recover possession, the mortgagee is not a person through whom the purchaser claims. CHABILDAS LALLUBHOY *v.* MOWJI DAYAL (1901) **I. L. R. 26 Bom. 82**

(*g*) INSOLVENCY.

28. ——— **Madras Small Cause Court**—*Civil Procedure Code (Act XIV of 1882), s. 8*——*Presidency Small Cause Courts Act (XV of 1882), ss. 2, 23.* The Madras Court of Small Causes has no jurisdiction in insolvency. The second paragraph of s. 8 of the Code of Civil Procedure, 1882, which authorized the Local Government, by notification published in the official Gazette, to extend to the Presidency Small Cause Court certain portions of the said Code, is repealed by the Presidency Small Cause Courts Act (s. 2 of Act XV of 1882), and consequently the notification of the Governor in Council of Fort St. George, dated 25th February 1879, conferring on the Madras Court of Small Causes jurisdiction in insolvency being repugnant to s. 8 of the Code of Civil Procedure, 1882, as amended, if otherwise valid, ceased to have effect when Act XV of 1882 came into force. *In re* WALLER . . . **I. L. R. 6 Mad. 430**

(*h*) LEGACY, SUIT FOR.

29. ——— *Presidency Towns Small Cause Courts Act (XV of 1882), s. 19—Suit for legacy—Equitable jurisdiction.* A suit to recover a legacy brought in the Small Cause Court in which there is no allegation that the executors were in possession of sufficient assets to pay the legacy or that they had ever assented to the payment of the legacy is one for the administration of an estate and for an account: such a suit the Small Cause Court has no jurisdiction to try. OKHOY COOMAR BONNERJEE *v.* KOYLASH CHUNDER GHOSAL . . . **I. L. R. 17 Calc. 387**

(*i*) MAINTENANCE, SUIT FOR.

30. ——— **Presidency Small Cause Courts Act (XV of 1882), s. 18.** Presidency Small Cause Courts, constituted under Act XV of 1882, are not debarred from entertaining suits for maintenance not based on contract or declaratory decree. POKALA *v.* MURUGAPPA **I. L. R. 10 Mad. 114**

(*j*) MOVEABLE PROPERTY.

31. ——— **Tiled huts**—*Act IX of 1850, ss. 58, 88—Goods and chattels.* Tiled huts were not "goods and chattels" within the meaning of s. 58, Act IX of 1850, and therefore could not be taken in execution under that section. Where tiled huts had been seized under a decree of the Small Cause Court, and a third party interpleaded under s. 88 of Act IX of 1850 and claimed the huts:—*Held*, that the Court, having no power to seize the huts, was right in dismissing the claim. KALLYPERSAUD SINGH *v.* HOOLAS CHUND . **10 B. L. R. 448 : 20 W. R. 8**

32. ——— **Fixtures**—*Act IX of 1850, s. 85—Seizure of goods and chattels in execution of decree—Engine in flour-mill—Landlord and tenant.* In a suit for damages for the removal of oil and flour mills and a steam-engine and boiler seized in execution of a decree of the Calcutta Small Cause Court:—*Held*, that such things were fixtures, and not goods and chattels, within the meaning of s. 58 of Act IX of 1850, and therefore could not be seized in execution. The question whether fixtures are removeable by a tenant as against his landlord has

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*j*) MOVEABLE PROPERTY—*contd.*

nothing to do with the question whether they are seizable in execution as goods and chattels. MILLER *v.* BRINDABUN
I. L. R. 4 Calc. 946 : 4 C. L. R. 460

33. ——— — Presidency Towns Small Cause Courts Act (XV of 1882), s. 28— *Presidency Small Cause Court Rules of Practice, 49, 50, 51—Tiled huts—"For the purposes of execution," Meaning of—Question of Title—Res judicata.* In execution of a decree of the Calcutta Small Cause Court against *N*, the judgment-creditors attached certain tiled huts which had been mortgaged by *N* to the plaintiff. Plaintiff thereupon filed his claim on the mortgage in the Small Cause Court, but his claim was disallowed, that Court being of opinion that the mortgage was a collusive transaction and not genuine. The plaintiff then brought this suit on his mortgage making the judgment-creditors as well as *N* defendants and praying as against the judgment-creditors that they be restrained from proceeding to a sale or other disposition of the mortgaged premises. A preliminary objection was taken that such a suit would not lie, and the suit was dismissed on that objection by the original Court. *Held*, that the words of s. 28 (Act XV of 1882), "for the purposes of execution," must mean for all purposes of execution, inclusive of the purposes of determining objections made to attachment. Tiled huts for all the purposes of execution are therefore moveable property under that section. The Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property, and that question is therefore *res judicata*. DENO NATH BATABYAL *v.* NUFFER CHUNDER NUNDY . . . **I. L. R. 26 Calc. 778 3 C. W. N. 590**

Held, on appeal by the plaintiff reversing the above decision, that tiled huts are immoveable property. That the words "for the purpose of the execution of the decree" in s. 28 of Presidency Small Cause Courts Act (XV of 1882) only mean that, as between the judgment-debtor and the judgment-creditor, property of this particular class (*i.e.*, tiled huts) shall, for the purposes of execution, be deemed to be moveable. That section does not contemplate that Small Cause Courts should deal, in execution-proceedings, with questions of title to or determine any right to or interest in tiled huts at any rate as between the attaching creditor and the mortgagee of the judgment-debtor. *Ismail Solomon Bhamji* v. *Mahomed Khan, I. L. R. 18 Calc. 296*, distinguished. That the Small Cause Court had no jurisdiction to go into the question of the validity of the plaintiff's mortgage, and neither the appellant nor the respondents, either or both, could by consent or otherwise give it jurisdiction. That the plaintiff was not estopped from now saying that the Small Cause Court had no jurisdiction to deal with the matter. DENO NATH BATABYAL *v.* ADHOR CHUNDER SETT . **4 C. W. N. 470**

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*j*) MOVEABLE PROPERTY—*concld.*

(*k*) REGISTRATION ACT, 1866, SS. 52, 53.

34. ——— Petition and decree under Registration Act. Small Cause Courts in the Presidency Towns had no jurisdiction to entertain petitions and make decrees under the provisions of ss. 52 and 53, Act XX of 1866. *In the matter of* ACT XX OF 1866. *In the matter of* NIL KAMAL BANERJEE *v.* MADHUSUDAN CHOWDRY
6 B. L. R. 177

S.C. NIL COMUL BANERJEE *v.* MUDOOSOODUN CHOWDHRY . . . . **14 W. R. 478**

(*l*) REVENUE.

35. ——— Matter concerning revenue —*Trespass by Collector—Action of Collector in preserving waste land—Act IX of 1850, s. 25.* The Collector of Bombay, *bonâ fide* believing that certain land upon which a quarry had been opened by the plaintiff was Government waste land, by his servants forcibly stopped the quarrying operations of the plaintiff "for the purpose, the Collector stated in his evidence, of preserving the land for Government, as land from which revenue might in future be collected." In an action for trespass brought against him by the plaintiff, it was *held* that the act of the Collector was not "a matter concerning revenue" within the meaning of s. 25 of Act IX of 1850, and that the jurisdiction of the Small Cause Court was therefore not excluded. NARAYAN KRISHNA LAUD *v.* NORMAN
5 Bom. O. C. 1

(*m*) SET-OFF.

36. ——— Claims arising out of the same transaction—*Presidency Small Cause Court —Jurisdiction—Equitable right of set-off—Civil Procedure Code (Act XIV of 1882), ss. 111, 126—Presidency Small Cause Courts Act (XV of 1882), ss. 18, expl. 1, 24.* In a suit in the Calcutta Small Cause Court to recover R1,197-5-6, the price of goods sold and delivered, the defendants claimed to set-off a sum of R2,738-4 being the loss which they alleged they had sustained by reason of the plaintiff's breach of contract, and claimed judgment for the sum of R1,540-14-6 after giving the plaintiff credit for the sum claimed by him. *Held*, that the defendants' claim could be set-off if it were one which the Small Cause Court had jurisdiction to try; the claim being to obtain credit for or receive the entire sum of R2,738-4 the Small Cause Court was without jurisdiction, and no set-off could therefore be allowed. An equitable right of set-off exists in this country when both the claim of the plaintiff

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*m*) SET-OFF—*concld.*

and that of the defendant arise out of the same transaction, although the claim sought to be set-off is not within the provisions of s. 111 of the Code of Civil Procedure. *Quœre:* Whether a decree could be passed in favour of the defendant for any balance which might be found due to him. BROJENDRA NATH DAS *v.* BUDGE-BUDGE JUTE MILL CO. . . . . **I. L. R. 20 Calc. 527**

37. ——— **"Admitted set-off"**—*Presidency Towns Small Cause Courts Act (XV of 1882), s. 18, expl.—Civil Procedure Code (Act XIV of 1882), s. 111.* The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to R2,148, but they deducted from this sum of R2,148, by way of set-off, a sum of R500 which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim to R1,648. The defendant admitted that the R500 was due to him by the plaintiffs, but did not, either before suit or at the trial, agree to its being set-off against the plaintiffs' claim. *Held*, by MACPHERSON and TREVELYAN, *JJ.* (PETHERAM, *C.J.*, dissenting), that the sum of R500 could not, under expl. I of s. 18 of Act XV of 1882, be set-off and that the suit must be dismissed as being beyond the jurisdiction of the Court. RAMDEO *v.* POKHIRAM **I. L. R. 21 Calc. 419**

(*n*) TITLE, QUESTION OF.

38. ——— **Questions of title incidentally raised**—*Act XV of 1882, s. 19, cl. (g)—Suit for rent—"Suits for determination of any right or interest in immoveable property."* When a suit is brought in a form cognizable by a Court of Small Causes, that Court cannot decline jurisdiction, because a question of title to immoveable property is incidentally raised. It is the nature of the suit as brought by the plaintiff, and not the nature of the defence, that determines whether or not the Court of Small Causes has jurisdiction. Cl. (*g*) of s. 19 of the Presidency Small Cause Courts Act (XV of 1882), refers to suits brought expressly for the purpose of obtaining a decree determining a right or interest in immoveable property, and cannot include a suit brought for moveable property, or money, in which a question of title may be raised by the defendant. The plaintiffs sued in the Presidency Court of Small Causes to recover fazendari rent from the holder of fazendari land. The defendant pleaded that no rent had been paid for the land since 1846, that the claim was time-barred, and that the plaintiffs had no title to the land in question. The Judges of the Court of Small Causes dismissed the suit, on the ground that the defence raised a *bonâ fide* question of title to immoveable property which ousted their jurisdiction. *Held*, reversing the lower Court's decision, that the suit was cognizable by the Court of Small Causes. BAPUJI RAGHUNATH *v.* KUVARJI EDULJI UMRIGAR . . **I. L. R. 15 Bom. 400**

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*contd.*

(*n*) TITLE, QUESTION OF—*concld.*

39. ——— *Jurisdiction of—Title suit—Presidency Small Cause Courts Act (XV of 1882), s. 69.* The Presidency Small Cause Court has jurisdiction to try questions of title, which arise incidentally in a suit, and even if such question be the principal, though not the sole one in the suit, the jurisdiction of the Small Cause Court is not ousted. To oust the jurisdiction of the Small Cause Court the question of title must be the sole and only one in the suit. RAJENDRA MULLICK *v.* NANDA LALL GUPTA (1904) **I. L. R. 31 Calc. 1001**

40. ——— *Small Cause Court, Presidency Towns—New trial—Tiled huts—Title to immoveable property—Presidency Small Cause Courts Act (I of 1895), s. 38—Civil Procedure Code (Act XIV of 1882), s. 622.* Ordinarily where property attached as being the property of a judgment-debtor is claimed by a third person, that third person may file a claim; and, where the Court has jurisdiction to try the question, the title to the property is determined in the execution-proceedings. Tiled huts are immoveable property. Under the present law the Small Cause Court has no jurisdiction to try a question of title to such huts, as between an attaching creditor and a third person, who alleges that the property belongs to him and not to the judgment-debtor. *Peary Mohun Ghosaul* v. *Harran Chandra Gangooly, I. L. R. 11 Calc. 216*, distinguished. *Jamnadas* v. *Bai Shivkor, I. L. R. 5 Bom. 572*, followed. AMRITA LAL KALAY *v.* NIBARAN CHANDRA NAYEK (1904) **I. L. R. 31 Calc. 340**

(*o*) TROVER.

41. ——— **Action for detinue and trover**—*Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Presidency Towns Small Cause Courts Act (XV of 1882), s. 18.* The plaintiff as executor of *D* sued the defendant in the Small Cause Court of Bombay to recover two Government promissory notes of the nominal value of R2,000, standing in the name of *D*. The defendant, who had been *D's* servant, alleged that the notes had been given to him by *D* as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by *D* to the defendant. It was then contended, on behalf of the plaintiff, that assuming there was evidence of a gift, such gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that, so far as the jurisdiction of that Court was concerned, the defendant had a right to retain the note. *Held*, by the High Court, that the

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

1. JURISDICTION—*concld.*

(o) TROVER—*concld.*

Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value. KHURSEDJI RUSTOMJI COLAH *v.* PESTONJI COWASJI BUCHA
I. L. R. 12 Bom. 573

2. PRACTICE AND PROCEDURE.

(*a*) GENERAL CASES.

[The practice and procedure of the Presidency Small Cause Courts is so different now from what it was under the former Acts IX of 1850 and XXVI of 1864 that most of the cases decided under those Acts have become useless as precedents. The procedure is now governed by Act XV of 1882 by which a great portion of the Civil Procedure Code has been extended to these Courts.]

1. ——— Dismissal of suit for want of jurisdiction—*Costs—Form of decree.* Where a plea to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the form, it should be stated that the suit abates or is dismissed " for want of jurisdiction." In such a case the Court has power to award costs to the defendant. FRECK *v.* HARLEY
I. L. R. 6 Calc. 418 : 7 C. L. R. 237

2. ——— Power to restore case struck off for default in appearance— *Act IX of 1850, s. 42.* A Court of Small Causes, constituted under Act IX of 1850, could, during the same day and at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42, though the order for striking off may have been duly recorded. In such a case it would be open to the defendant to apply to set aside such *ex parte* order, and the sufficiency of the grounds of the application would be a question for the discretion of the Judge. SHIB CHUNDER MULLICK *v.* KISSEN DYAL OPADHYA
I. L. R. 1 Calc. 476

(*b*) LEAVE TO SUE.

3. ——— Practice as to granting leave to sue person out of jurisdiction—*Power of High Court to make rules as to Small Cause Court—Stat. 24 & 25 Vict., c. 104, s. 15—Civil Procedure Code, 1882, s. 652—Presidency Towns Small Cause Courts Act (XV of 1882), ss. 6, 18, cls. (a) and (c), 33.* In 1885 the High Court made a rule under the Presidency Small Cause Courts Act, s. 33, whereby it was declared that the granting leave to sue a defendant out of the jurisdiction under s. 18, cls. (*a*) and (*c*), of that Act was a non-judicial or quasi-judicial act within the meaning of that

SMALL CAUSE COURT, PEESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*b*) LEAVE TO SUE—*concld.*

section, and might be done by the Registrar of the Court of Small Causes, Madras. *Held*, that the rule was *ultra vires* and void. RAJAM CHETTI *v.* SESHAYYA . . . **I. L. R. 18 Mad. 236**

(*c*) NEW TRIAL.

4. ——— Application for new trial—*Fresh evidence—Affidavits.* A party who applies for a rule for a new trial and obtains it on particular materials, ought not to be allowed to go into fresh evidence with a view to strengthen his case when the rule comes on for hearing. If on hearing both parties the Court thinks further inquiry necessary, it can, of course, make such inquiry in such manner as seems most fit to it. When new trials are moved for on allegation of facts, it would be very convenient that a practice should be introduced of requiring the facts to be stated by affidavit, and in like manner the answer to be supported by affidavit. MODHOOSOODUN KOONDOO *v.* MADHUBRAM SEWLOLL
15 W. R. 161

5. ——— *Presidency Towns Small Cause Courts Act (XV of 1882) (amended by I of 1895), Ch. VI, ss. 69 and 70—Jurisdiction.* Where the plaintiff requested the Chief Judge of the Presidency Small Cause Court to deliver his judgment contingent upon the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882), but subsequently abandoned the exercise of such right before the question to be referred was formulated or a reference made : —*Held*, that the plaintiff was not thereby deprived of his remedies under Ch. VI of the Act, and could still make an application for a new trial. *Held*, also, that the meaning of s. 70 is that, in failing to give security, the party shall be deemed to have submitted to the judgment as final and conclusive within the meaning of s. 37 of Act I of 1895, that is to say, the judgment becomes final and conclusive, save as provided by Ch. VI of Act XV of 1882. *Held*, therefore, that the Small Cause Court had jurisdiction to entertain the application by the plaintiff for a new trial. PROTAP CHUNDER SEN *v.* TUNSOOK DASS . . **I. L. R. 23 Calc. 967**

6. ——— Ground for new trial—*Want of jurisdiction.* A new trial may be granted on the ground of want of jurisdiction in the Court, though such ground was not formally raised or recorded at the original hearing. CHUNDEE CHURN DUTT *v.* EDULJEE COWASJEE BIJNEE
I. L. R. 8 Calc. 678 : 11 C. L. R. 225

7. ——— *Question of evidence—Power to reverse decree.* Where the question is one of evidence, the judgment of the original Court can be reversed, and new trial directed only when such judgment is manifestly against the weight of evidence. *Sadasook Gambir Chand* v.

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*c*) NEW TRIAL—*contd.*

Kannayya, I. L. R. 19 Mad. 96, followed. SASSOON *v.* HURRY DAS BHUKUT
I. L. R. 24 Calc. 455
1 C. W. N. 44

8. ——— *Presidency Towns Small Cause Courts Act (I of 1895), ss. 37 and 38—Powers of Bench sitting on application for new trial—Question of evidence.* The fourth Judge of the Presidency Small Cause Court, in a suit tried by him, delivered judgment for the plaintiff. The defendant applied under s. 38 of the Presidency Small Cause Courts Act (I of 1895) for a new trial and the Judges (the first and fourth) on such application set aside the judgment, and dismissed the plaintiff's suit with costs, and on the plaintiff's application the Full Bench of the Small Cause Court refused to interfere. *Held,* by the High Court, that the Judges exercised the powers of an Appellate Court in setting aside the original decree, and exceeded the jurisdiction vested in them by s. 38 of the Act, such jurisdiction being a revisional jurisdiction only. *Held,* also, that, where the question is one of evidence, the judgment of the original Court could be reversed, and a new trial directed only when such judgment is manifestly against the weight of evidence. *Sadasook Gambir Chand* v. *Kannayya, I. L. R. 19 Mad. 96,* followed. SASSOON *v.* HURRY DAS BHUKUT
I. L. R. 24 Calc. 455
1 C. W. N. 44

9. ——— **Difference of opinion between Judges as to allowing new trial.** In a case of difference of opinion between two Judges upon the point as to whether there should be a new trial, no rule can be granted. JARDINE, SKINNER & Co. *v.* MONEY . . . . **14 W. R. 312**

10. ——— **Application to set aside ex parte decree**—*Presidency Small Cause Courts Act (XV of 1882), s. 37—Ex parte decree.* S. 37 of the Presidency Small Cause Courts Act (XV of 1882) does not apply to an *ex parte* decree. An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of s. 108 of the Code of Civil Procedure. ROSHANLAL *v.* LACHMI NARAYAN
I. L. R. 17 Bom. 507

11. ——— **Power to reverse decree**—*Presidency Towns Small Cause Courts Act (XV of 1882), s. 37—Powers of Full Bench of Presidency Small Cause Court—Reversal of decree on question of fact.* One of the Judges of the Presidency Small Cause Court in a suit tried by him delivered judgment for the plaintiff. The defendant made an application to the Full Bench under the Presidency Small Cause Courts Act, s. 37, and the Court arrived at the conclusion that the judgment proceeded on a misappreciation of the evidence and reversed the decree. *Held,* by COLLINS, *C.J.* and SHEPHARD *J.* (BEST, *J.*, dissenting), that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the jurisdiction conferred by Act XV of 1882, s. 37, as the case was one on which different minds might not unreasonably have come to different conclusions. SADASOOK GAMBIR CHAND *v.* KANNAYYA . . . **I. L. R. 19 Mad 96**

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*c*) NEW TRIAL—*concld.*

12. ——— **Powers of Full Bench**—*Presidency Towns Small Cause Courts Act (XV of 1882), s. 37—Presidency Towns Small Cause Courts Amendment Act (I of 1895), s. 13—Appeal.* Act I of 1895, s. 13, does not empower the Full Bench of the Presidency Court of Small Causes to entertain appeals of questions of fact against the decree of one of the Judges of the Court. SRINIVASA CHARLU *v.* BALAJI RAU
I. L. R. 21 Mad. 232

13. ——— **Second new trial.** It is competent to the Judges of the Calcutta Small Cause Court to grant a second new trial of the same case. PURSON CHUND GOLACHA *v.* KAJOORAM
10 B. L. R. 355 : 19 W. R. 203

14. ——— *Second application for new trial—Presidency Towns Small Cause Courts Act (XV of 1882), s. 37—Act IX of 1850, s. 53.* The Judges of the Calcutta Small Cause Court have power to entertain in the same suit more than one application for a new trial. There is nothing in s. 37 of Act XV of 1882 prohibiting such a practice. It is in accordance with the practice of Courts in England to allow such applications. *Purson Chund Golacha* v. *Kajooram, 10 B. L. R. 355 : 19 W. R. 203,* followed. SURRUT COOMARI DASSEE *v.* RADHA MOHUN ROY
I. L. R. 22 Calc. 784

15. ——— *Presidency Small Cause Courts Act (XV of 1882, as amended by Act I of 1895), s. 38—New trial of contested cases—Application to set aside order restoring suit dismissed for default of appearance.* An application does not lie, under s. 38 of the Presidency Small Cause Courts Act, to set aside an order of a Judge of the Court setting aside his previous order dismissing a suit for default of the plaintiff's appearance. CHINNATHAMBI MUDALIAR *v.* VEERABADRIAH NAIDOO (1902) . . . **I. L. R. 26 Mad. 163**

16. ——— **Jurisdiction of Registrar.** The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for new trial to set aside an *ex parte* decree made by him for default. HALADHAR MAITI *v.* CHOYTONNA MAITI (1903)
I. L. R. 30 Calc. 588
s.c. 7 C. W. N. 547

(*d*) REFERENCE TO HIGH COURT.

17. ——— **Question of law.** Only questions of law in suits can be referred. MOHUN SING *v.* KAREEM OONISSA BEGUM . . **8 Mad. 57**

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*d*) REFERENCE TO HIGH COURT—*contd.*

The point of law referred should be expressly stated. JARDINE, SKINNER & Co. *v.* MONEY **14 W. R. 312**

18. ——— *Question of fact—Act XXVI of 1864, s. 7—Act IX of 1850, s. 55.* The question whether or not cotton fabrics bordered with silk, or having a portion of silk otherwise used in their manufacture, are "silks in a manufactured or unmanufactured state wrought up or not wrought up with other materials," within the meaning of s. 10, Act XVIII of 1854, was a question of fact to be decided on the evidence, and not a question of law to be referred for the opinion of the High Court under Act IX of 1850, s. 55, and Act XXVI of 1864, s. 7. LAKHMIDAS HIRACHAND *v.* G. I. P. RAILWAY COMPANY . . . . **4 Bom. O. C. 129**

19. ——— **Order rejecting application for new trial**—*Judgment contingent on opinion of High Court.* The decision of a Small Cause Court rejecting an application for a new trial, but making such rejection contingent upon the opinion of the High Court, was not such a judgment as could be referred under s. 7, Act XXVI of 1864. HALL *v.* JOAKIM . . . . . **12 B. L. R. 34**

See also MACKINTOSH *v.* GILL. **12 B. L. R. 37 : 20 W. R. 358**

20. ——— *Act XV of 1882, s. 69—Reference to High Court, question for—New trial, Application for—Difference of opinion between Judges—Contingent judgment.* An order rejecting an application for a new trial, subject to the decision of the High Court on certain point or points referred, is not a "contingent judgment" within the meaning of s. 69 of Act XV of 1882, nor can points of difference between the Judges at that stage form matter for reference. NUSSERWANJEE *v.* PURSOTUM DASS . **I. L. R. 4 Calc. 298**

[Under the Acts of 1850 and 1864, the Judge in referring a point was bound to make his judgment contingent on the opinion of the High Court.

See DOSABHAI KAVASJI *v.* KHERBADJI HORMASJI **7 Bom. O. C. 180**

But now under the Act of 1882, s. 69, he can either give judgment contingent on the opinion of the High Court or reserve his judgment.]

21. ——— **Stating case on application for a new trial**—*Presidency Towns Small Cause Courts Act (XV of 1882), ss. 37, 38, and 69.* When, upon an application to the Presidency Small Cause Court for a new trial, the Judges differ in their opinion as to any question of law, and the majority, without ordering a new trial, reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act. SESHAMMAL *v.* MUNUSAMI MUDALI **I. L. R. 20 Mad. 358**

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*d*) REFERENCE TO HIGH COURT—*contd.*

22. ——— *Presidency Towns Small Cause Courts Act (XV of 1882), ss. 37, 69—Application to Full Bench for new trial.* The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on the hearing of an application for a new trial made under Act XV of 1882, s. 37, such hearing not being the "hearing of a suit" within the meaning of s. 69 of that Act. OAKSHOTT *v.* BRITISH INDIA STEAM NAVIGATION COMPANY **I. L. R. 15 Mad. 179**

23. ——— *Presidency Small Cause Courts Act (XV of 1882), s. 69—Case stated for opinions of High Court—Mode of stating case—Question of law or usage.* In a suit brought in the Small Cause Court by the plaintiffs against the defendant for damages for breach of contract to deliver goods, the only dispute was as to the principle on which damages were to be assessed. The defendant paid into Court the sum of R779-10-0. At the close of the hearing, and before judgment was delivered, the plaintiffs' attorney informed the Chief Judge that he would require a case to be stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882), unless the decree were in his favour. The Judge thereupon desired him to state the exact question of law he would wish to be referred, but he declared himself unable to do so until after judgment was delivered. He said he could not then say anything more than that he would require a case to be stated for the opinion of the High Court on any question of law that might arise in the case. The Chief Judge thereupon stated the facts to the High Court, and referred the following general question for its opinion: "Whether, on the facts above set forth, the plaintiffs are entitled to recover, from the defendant any, and if so what, sum greater than R779-10-0 paid into Court by the defendant?" On the reference coming before the High Court, a preliminary objection was taken as to whether the reference was in proper form, no question of law or usage having the force of law having been formulated for the opinion of the Court. *Held* (FARRAN, *J.*, doubting), that the reference should be sent back to be amended by stating the precise question arising in the case. RALLI BROTHERS *v.* GOCULBHAI MULCHAND . . . **I. L. R. 15 Bom. 376**

24 ——— *Presidency Towns Small Cause Courts Act (XV of 1882), s. 69—Duty of the Judge in stating a case for opinion of the High Court—Question of law—Condition precedent to referring case.* Under s. 69 of the Presidency Small Cause Courts Act (XV of 1882), the existence of such a question of law or usage or construction as therein mentioned is a condition precedent to a reference to the High Court and if no such question arises, the Small Cause Court has no authority to refer and the High Court no jurisdiction

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*d*) REFERENCE TO HIGH COURT—*contd.*

to deal with the reference. The duty of drawing up the case, where a reference is made, is imposed on the Court, and it is responsible for the form of the case. ISHWARDAS TRIBHOVANDAS *v.* KALIDAS BHAIDAS . . . **I. L. R. 20 Bom. 779**

25. ——— *Presidency Towns Small Cause Courts Act (XV of 1882), s. 69—Requisition for reference, Time for making.* A party requiring a Judge of the Small Causes Court to make a reference to the High Court under s. 69 of the Small Cause Courts Act (XV of 1882) must do so before the Judge has delivered his judgment. BANK OF BENGAL *v.* VYABHOY GANGJI **I. L. R. 16 Bom. 618**

26. ——— *Judgment contingent upon opinion of the High Court—Presidency Small Cause Courts Act (XV of 1882), s. 69—Civil Procedure Code, 1882, ss. 373, 617, 618, and 619—Withdrawal of suit, Power to allow.* The Small Cause Court passed a decree for the plaintiff, but contingent upon the opinion of the High Court. On the reference the High Court decided that, upon the plaint before the Court, the plaintiffs could not recover. *Held*, that the Small Cause Court, on the receipt of the copy of the judgment of the High Court, was bound to enter judgment for the defendants. YULE & Co. *v.* MAHOMED HOSSAIN **I. L. R. 24 Calc. 129**

27. ——— **Defect in reference**—*No question of law referred—Presidency Small Cause Courts Act (XV of 1882), s. 69.* A reference can only be made under s. 69 of Act XV of 1882 for the opinion of the High Court upon some question of law or usage having the force of law or upon the construction of a document if any such question arises in a suit or proceeding in which the amount or value of the subject-matter is over R500, and either party requires such reference. A Small Cause Court making a reference under s. 69 should state the question of law, or usage having the force of law, or the construction of a document upon which the opinion of the High Court is sought. *Quære:* Whether s. 617 of the Code of Civil Procedure is to be read as incorporated with s. 69 of the Presidency Small Cause Courts Act. BENODE LALL ROY *v.* RIVER STEAM NAVIGATION COMPANY . **1 C. W. N. 143**

28. ——— **Deposit of security for costs**—*Act XXVI of 1864, s. 8.* A case should not be referred to High Court by a Judge of the Small Cause Court until security has been deposited in accordance with s. 8, Act XXVI of 1864, by the party against whom the judgment has been given. If such party do not deposit the security "forthwith," he must be taken to submit to the judgment of the Small Cause Court. Where, however, a case was sent up without security for costs being deposited, and before the case was heard the plaintiffs tendered a sum as security, which the Judge refused to accept as being too late, the High Court, on the sum being deposited, and it appearing that the defendant would not be prejudiced by such a course, allowed the case to be heard. FORNARO *v.* RAMNARAIN SOOKDEB **14 B. L. R. 180 : 23 W. R. 136**

29. ——— *Act XXVI of 1864, s. 8—Omission to deposit costs—Non-appearance.* Where a case had been referred from the Small Cause Court, for the opinion of the High Court at the request of the plaintiffs, and they neither deposited any security for the cost of the reference, nor appeared in the High Court:—*Held*, that the defendants, who appeared, were entitled to judgment and to an order that the plaintiffs should pay the costs of reference and other expenses connected therewith. DISSENT *v.* JUSTICES OF THE PEACE FOR THE TOWN OF CALCUTTA **5 B. L. R. Ap. 24 : 20 W. R. 349 note**

In a similar case, however, the reference was *held* not to be properly before the Court, and an application for costs by the defendant was refused. RAJKUMAR PARAMANICK *v.* STEWART **5 B. L. R. Ap. 23**

[These cases were under the old procedure. Under Act XV of 1882, if security is not deposited, the party against whom the contingent judgment has been given is to be taken to have submitted to it.]

30. ——— **Case referred at request of party**—*Non-appearance of such party before High Court—Costs.* When a case is referred by the Small Cause Court, for the opinion of the High Court, at the request of one of the parties, and such party does not appear in the High Court, the decision must be given against him, whether security has been given for the costs of the reference and the amount of the judgment or not, and he must pay the cost of the reference. WILLIAMSON *v.* ARAB ISMAIL KHAN **11 B. L. R. 415 : 20 W. R. 349**

31. ——— **Costs of reference to High Court**—*Costs—Practice—Presidency Towns Small Cause Courts Act (XV of 1882), s. 69—Civil Procedure Code (Act XIV of 1882), ss. 220, 617, 620.* Under s. 620 of the Civil Procedure Code, the cost of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the cost of the suit. They are, however, in the direction of the Court, and need not necessarily follow the event of the suit. NICOL *v.* MATHOORA DASS DUMANI **I. L. R. 15 Calc. 507**

32. ——— *Presidency Small Cause Courts Act (XV of 1882), ss. 69, 70—Contingent judgment—Security for the amount of the judgment and the costs of reference—Time for furnishing such security—Power to extend time to furnish the security.* In cases of reference from the Presidency Small Cause Court, the provisions of the Statute which governs the matter should be strictly com-

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SMALL CAUSE COURT, PRESIDENCY TOWN—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*d*) REFERENCE TO HIGH COURT—*concld.*

plied with. In a suit for damages, the Officiating Chief Judge of the Presidency Small Cause Court, on May 28, 1900, gave judgment for the plaintiff, contingent upon the opinion of the High Court and a reference was made to the High Court, under s. 69 of the Presidency Small Cause Courts Act. The defendants, at whose request the contingent judgment was given, did not fully deposit the amount of the judgment and the costs of the reference until November 14, 1900. A preliminary objection having been taken to the hearing of the reference, on the ground that it was not properly before the Court :—*Held*, that, as security for the amount of the judgment and the costs of the reference was not furnished "at once," as required by s. 70 of the Presidency Small Cause Courts Act, the preliminary objection must prevail, and that the reference must be dismissed, the defendants paying the costs of the reference. *Fornaro* v. *Ramnarain Sookdeb, 14 B. L. R. 180*, discussed. *Quœre :* Whether there is any power in the High Court to extend the time for furnishing such security. JUGAL KISSORE *v.* SEWMUK ROY (1901) . **I. L. R. 28 Calc. 260**

33. ——— Conditions imposed upon Judge of Small Cause Court in stating case for opinion—*Presidency Small Cause Courts Act (XV of 1882), s. 69—Civil Procedure Code (Act XIV of 1882), ss. 617 and 621—High Court, power of—Amendment—Remand.* Before the High Court can give an opinion upon a matter referred to it by the Presidency Small Cause Court under s. 69, three conditions must be complied with :—(i) that the Court referring the matter entertains a reasonable doubt upon some question of law, (ii) that it states what the point is upon which the doubt is entertained, and (iii) that it gives a statement of the facts, containing an expression of opinion on the point which is referred to the decision of the High Court. When such a course has not been adopted, the High Court can, under s. 621 of the Code of Civil Procedure, return the case to the lower Court for amendment. GARLING *v.* SECRETARY OF STATE FOR INDIA (1903) **I. L. R. 30 Calc. 458**

(*e*) RE-HEARING.

34. ———Re-hearing, application for—*Practice—Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 71—Compliance with requirements of Act subsequently to application for re-hearing—Rule of High Court, No. 208—Limitation Act, 1877, s. 5.* An application to the High Court for a re-hearing under s. 38 of the Presidency Small Cause Courts Act (XV of 1882) must be in writing. A decree was passed against the petitioner by the Court of Small Causes on the 9th December 1887. On the 16th December Counsel on his behalf was instructed to apply to the High Court under s. 38 of Act XV of 1882 for re-hearing of the suit.

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*e*) RE-HEARING—*contd.*

The Court was then engaged in re-hearing appeals ; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days, their Lordships, before rising, allowed the application to be then formally made, but adjourned the hearing to a subsequent day. When the case came on, it appeared (i) that the petition had not been signed and declared until the 17th December 1887, *i.e.*, the day after the application had been made in Court ; (ii) that the affidavit in support of the application, as required by s. 38, had not been filed until two days after the application in Court ; and (3) that the Court-fees, which by s. 71 of Act XV of 1882 should be paid prior to the application, had not been paid until the 20th December 1887, *i.e.*, four days after the application. *Held*, that the application for a re-hearing must be rejected. The application, although nominally made on the 16th December, was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the requirements of the Act could not place him in a better position than he occupied when the application was made. *In re* JAI KISSOONDAS PURSHOTAMDAS **I. L. R. 12 Bom. 408**

35. ——— *Presidency Small Cause Courts Act, s. 38—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence —Practice.* On an application for a re-hearing by the High Court, under s. 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court :—*Held*, by the High Court, that, the evidence being of a very conflicting character and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused. S. 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed an inclination of opinion. HASSANBHOY VISRAM *v.* BRITISH INDIA STEAM NAVIGATION COMPANY **I. L. R. 12 Bom. 579**

36. ——— *Presidency Towns Small Cause Courts Act (XV of 1882), ss. 38, 71—Stamp—Petition insufficiently stamped —Deficiency of stamp, power to make good, after period of limitation allowed for presentation of application.* On the 7th April being the last day on which such application could be made under the provisions of s. 38 of the Presidency Small Cause

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*e*) RE-HEARING—*contd.*

Courts Act, an application was made to the High Court under that section for the re-hearing of a suit which had been dismissed by the Small Cause Court. The application was made by petition at the rising of the Court, and not being a regular motion day the hearing of the matter was postponed till the 9th April. On that day, on the application being brought on, it appeared that the petition only bore a 7-rupee stamp instead of one of the much larger value required by s. 71 of the Act. It was contended on behalf of the petitioner that the deficiency could then be made up, and that he was entitled to have the application heard. *Held*, that this could not be done. The eight days allowed by s. 38 expired on the 7th April, and had the application been then considered, it could not have been received, but must have been rejected, as s. 71 requires the proper fee to be paid before the application can be received. Although the consideration of the application was deferred to the 9th April, that made no difference, as the eight days had expired before the petition was in such a condition that it could be received. NORENDRANATH BOSE *v.* ABINASH CHUNDER ROY . **I. L. R. 18 Calc. 445**

37. ——————— *Miscarriage or failure of justice—Withdrawal before judgment of request to refer case for the opinion of the High Court.* In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under s. 69 of Act XV of 1882. The Judge was willing to do so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a re-hearing under s. 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of law as applicable to the facts. *Held*, that, even if that were the case, there was no "miscarriage or failure of justice" within the meaning of s. 38, and that the plaintiffs were not entitled to re-hearing. VASSONJI TRICUMJI & Co. *v.* SOUTHERN MARATHA RAILWAY COMPANY . **I. L. R. 17 Bom. 14**

38. ——————— *Presidency Small Cause Courts Act (XV of 1882), s. 38—Dismissal for default—Remedy of plaintiff—Civil Procedure Code, 1882, ss. 100, 102, 103—Appearance and non-appearance of parties—Appearance by counsel or pleader to obtain adjournment.* S. 38 of the Presidency Small Cause Courts Act (XV of 1882) does not preclude a plaintiff whose suit has been dismissed for default from applying under s. 103 of the Civil Procedure Code (Act XIV of 1882) to have the order of dismissal set aside. There is no inconsistency between the two sections. A plaintiff whose suit has been dismissed for default has two separate remedies under different enactments. If he chooses to apply for a new trial under s. 38, he must do so within eight days. If he professes to apply for an order setting aside the dismissal under

SMALL CAUSE COURT, PRESIDENCY TOWNS—*contd.*

2. PRACTICE AND PROCEDURE—*contd.*

(*e*) RE-HEARING—*contd.*

s. 103 of the Civil Procedure Code, he can do so within thirty days (Limitation Act XV of 1877, Sch. II, Art. 163). A suit and cross-suit between the same parties were on the board of a Judge of the Presidency Small Cause Court for hearing on the 23rd April 1898. On that day *A*, the counsel who was instructed for the defendants in the first suit and for the plaintiffs in the second, was unable to attend, and *B*, another counsel, held his brief and appeared on his behalf and applied, for two months' adjournment of both suits. The munim of his clients was then in Court. *B* was unable to state what was the defence, if any, to the claim of the plaintiffs in the first suit. The adjournment was refused, and *B* said he withdrew from the case. Both suits were then and there disposed of, the claim of the plaintiffs in the first suit being decreed, the second suit being dismissed for non-appearance. On the 7th May following, an application was made for a re-hearing of both suits. The Court, regarding the decrees as *ex parte* decrees, granted a rule for a new trial, which was made absolute. On appeal to the Full Court, the matter was referred to the High Court. *Held*, that under the circumstances the suits were to be considered as having been disposed of under ss. 100 and 102 of the Civil Procedure Code (Act XIV of 1882) respectively, and that, whether or not they, or either of them, fell within the category of contested suits as defined by s. 38 of the Presidency Small Cause Courts Act (XV of 1882), the remedy under s. 103 of the Civil Procedure Code was open to the plaintiffs in the cross-suit. SOONDERLAL *v.* GOORPRASAD **I. L. R. 23 Bom. 414**

39. ——————— *Small Cause Court—Presidency Small Cause Courts Act (XV of 1882), ss. 9 and 38—Decision by a single Judge on evidence—Reversal of decree by Full Court—Jurisdiction—Practice.* One of the Judges of the Presidency Small Cause Court at Bombay having dismissed the plaintiff's suit on the evidence, the decree of the Judge was reversed by the Full Court (composed of two Judges), as being manifestly against the weight of the evidence, on an application by the plaintiff under s. 38 of the Presidency Small Cause Courts Act (XV of 1882). A question arose as to whether the decision of the Full Court was *ultra vires* and void, there being nothing in the rules framed under s. 9 of the Act providing for the exercise by the Full Court, composed of two or more Judges, of any powers conferred on the Small Cause Court. *Held*, that, although the rules of procedure and practice of the Presidency Small Cause Court at Bombay were silent as to the exercise by the Full Court, consisting of more than one Judge, of any powers under the Act, it did not follow that the sittings of the Full Court were therefore *ultra vires*. Although no rules were framed as to the procedure to be followed, still, by long practice, the procedure had become well-defined

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SMALL CAUSE COURT, PRESIDENCY TOWNS—*concld.*

2. PRACTICE AND PROCEDURE—*concld.*

(*e*) RE-HEARING—*concld.*

and fully known, the practice being that the Full Court should consist of two Judges—the Chief Judge, and in his absence the senior Judge, presiding. The Judge against whose decree any application is made is generally the second member, if he is present in Court. If he is absent, the Chief Judge and the second, or the Chief and any other Judge, hear and dispose of the application. Such being the unwritten rules of practice, they must be deemed to be "Rules treated as in force in the Court on 31st December, 1894," under cl. (2) of s. 9 of the Act, and to be validly in force. They fall within the principle that an inveterate practice amounts to a rule of law. *Held*, further, that the power to alter, set aside or reverse the decree under s. 38 of the Act includes the power of the Full Court to pass a decree in favour of the party in whose favour the application is granted. The practice of the Court of Small Causes at Bombay, of reviewing the decree in cases in which the notes of evidence are sufficient to enable the Full Court to undertake that review, and of setting aside a wrongful dismissal of the suit where the decision is manifestly against the weight of evidence, is not contrary to law. BEHRAM KAIKHUSHRU IRANI *v.* ARDESHIR KAVASJI (1903)
I. L. R. 27 Bom. 563

SMALL CAUSE COURT, RANGOON.

1. ———— **Establishment of**—*Act XXI of 1863—Act XI of 1865—Local Government.* Act XXI of 1863, after establishing Recorder's Courts in British Burma, and fixing the limits of their jurisdiction, enacted by s. 10 that, "save as in this Act provided, no Court other than the Recorder's Courts shall have or exercise any civil jurisdiction whatever within the limits for the time being fixed as aforesaid." Act XI of 1865, after declaring that the words "Local Government" should denote "the person authorized to administer the Executive Government in such part," enacted by s. 3 that the Local Government may, with the previous sanction of the Governor General in Council, constitute Courts of Small Causes under that Act at any place within the territories under such Government. By s. 3 the Judge of such Small Cause Court was to be appointed by the Local Government. Act XI of 1865 did not repeal s. 10 of Act XXI of 1863. By notification dated 1st September 1869 the Governor General appointed a Judge of the Small Cause Court at Rangoon, extended the provisions of Act III of 1864 to British Burma and invested the Chief Commissioner of British Burma with the powers conferred on a Local Government by that Act. By notification of 2nd October 1869 the Governor General in Council sanctioned the establishment of a Court of Small Causes in Rangoon under s. 3, Act XI of 1865, extended the jurisdiction of the said Court to an amount not exceeding R1,000, and notified that the territorial jurisdiction would be co-extensive

SMALL CAUSE COURT, RANGOON —*concld.*

with that of the existing Small Cause Court jurisdiction of the Recorder's Court at Rangoon. *Held*, that the Small Cause Court at Rangoon so established was properly constituted. There is nothing to show that the words "Local Government," as used in Act XI of 1865, were intended to include a Chief Commissioner. KO SHOAY DOON *v.* SHOAY GAN . **6 B. L. R. 196 : 14 W. R. 331**

2. ———— **Jurisdiction of**—*Foreign ship—Suit by sailor for wages—Mofussil Small Cause Court Act (XI of 1865), s. 8 (expl. a).* Civil Courts have, as a general rule, jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction. A captain of a ship, who was at the time loading or unloading his vessel within the local limits of the Small Cause Court at Rangoon, was sued by one of his sailors (who had contracted to serve on a voyage from Bremerhaven to East India) for wages in the Small Cause Court of Rangoon. *Held*, that the sailor's cause of action arose within the local limits of the Small Cause Court where the defendant was residing when the suit was brought, and that therefore the Small Cause Court had jurisdiction to hear the suit. OLNER *v.* LAVEZZO
I. L. R. 10 Calc. 887

SMUGGLING.

See STOLEN PROPERTY—OFFENCES RELATING TO **18 W. R. Cr. 63**
19 W. R. Cr. 37

SNAKE-CHARMERS.

———— **death caused by—**

See MURDER.
3 B. L. R. A. Cr. 25 : 12 W. R. Cr. 7
I. L. R. 5 Calc. 351 : 4 C. L. R. 580

SOCIETIES REGISTRATION ACT (XXI OF 1860).

———— **s. 20**—*Charitable society—Religious society existing for the management of a public mosque.* A religious purpose may be a charitable purpose, and a society for religious purposes will ordinarily be a society for charitable purposes. Charitable purposes are not restricted to the giving of alms or other charitable reliefs, but the words have a much wider legal meaning. *In re White : White* v. *White*, [*1893*], *2 Ch. D. 41*, followed. *Held*, that a religious society which had for its object the control and management of, and the protection of the property appertaining to, a certain public mosque, was a society, which might legally be registered under the provisions of the Societies Registration Act, 1860. ANJUMAN ISLAMIA OF MUTTRA *v.* NASIR-UD-DIN (1906)
I. L. R. 28 All. 384

SOLDIER.

See CANTONMENTS ACT (III OF 1880), S. 14 . . **I. L. R. 3 All. 214**

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SOLDIER—*concld.*

———— **residence of**—

See JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.
I. L. R. 1 All. 51

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MILITARY MEN.
5 W. R. S. C. C. Ref. 21
6 Mad. 83

———— **Army Act, 1881, s. 144**—*Sub-Conductor, Ordnance Department—Service of summons—Civil Procedure Code, s. 468.* A Sub-Conductor of Ordnance in the Madras Establishment of Her Majesty's Indian Military forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover R183-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, and his reason for such action. *Held*, that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881. ABRAHAM *v.* HOLMES
I. L. R. 11 Mad. 475

SOLEHNAMAH.

See CRIMINAL PROCEDURE CODE, 1882, s. 145 . . . **13 C. W. N. 601**

See MORTGAGE. **I. L. R. 34 Calc. 886**

———— **unregistered**—

See LANDLORD AND TENANT.
I. L. R. 34 Calc. 456

SOLICITOR.

See ATTORNEY.

See ATTORNEY AND CLIENT.

See PRIVILEGED COMMUNICATION.

———— **receiving instructions from client without a solicitor**—

See ADVOCATE **I. L. R. 34 Calc. 729**

———— **duty of**—*Attorney and client.* It is the duty of a solicitor who has once undertaken a cause to carry it to a conclusion. *In re* A SOLICITOR . . . **4 B. L. R. P. C. 29**

This was an observation made in some remarks addressed by the Judicial Committee to a solicitor who, having obtained a final order in an appeal, had abstained from carrying that order to its proper termination. It was intimated subsequently that it was not intended to have any judicial authority being only a personal admonition addressed to the solicitor and having reference to the peculiar circumstances of his case. *In re* A SOLICITOR . . . **4 B. L. R. P. C. 51**

SOLICITOR—*contd.*

———— **lien of, for costs**—

See COSTS—COSTS OUT OF ESTATE.
I. L. R. 10 Bom. 248

———— **suit for costs of**—

See ATTORNEY AND CLIENT.
I. L. R. 35 Calc. 171

See HIGH COURT RULES.
I. L. R. 32 Bom. 428

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 178 **I. L. R. 32 Bom. 1**

1. ———— **Solicitor's lien for costs**—*Summary jurisdiction of Court over suitors—Compromise by parties without knowledge of solicitor—Solicitor's right to oppose motion—Negotiable security—Transfer of Negotiable security by debtor to his creditor—Effect.* By a private compromise between Cullianji, the plaintiff in the first suit, and Lakshmibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshmibai certain immoveable property and R15,853 in full settlement of her claim and a further sum of R500 for her solicitor's costs. On the 21st February 1904, possession of the immoveable property was given and a sum of R500 paid to Lakshmibai. Cullianji also gave to her 3 hundis for R5,000, R5,000 and R5,853, respectively, but the hundis were dishonoured on their due dates. In March and April, 1904, the plaintiff paid two sums of R5,000 to Lakshmibai, by cheque, in lieu of the two hundis for R5,000. On the 4th June, 1904, Lakshmibai's solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of R15,853 agreed to be paid by the plaintiff to his client. On the 22nd of June, 1904, the plaintiff paid the sum of R5,853 to Lakshmibai, in cash, in respect of the hundi for R5,853, which was dishonoured. The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property alleging that he had settled and satisfied the claims of Lakshmibai. Lakshmibai's solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the sum of R9,000 as security for the same. *Held*, that in the absence of fraud or collusion between the parties the solicitor was entitled to be paid his taxed costs, by the plaintiff, up to R5,853, being the amount paid by the plaintiff after notice of the lien. The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English law. Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party, against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction. *Devkabai* v. *Jafferson, Bhaishankar and Dinsha, I. L. R. 10 Bom. 248*, and

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SOLICITOR—*concld.*

Khetter Kristo Mitter v. *Kally Prosunno Ghose, I. L. R. 25 Calc. 887*, followed. *Ramdoyal Serowgee* v. *Ramdeo, I. L. R. 27 Calc. 269*, dissented from. *Held*, also, that the giving of a negotiable security by the plaintiff to Lakshmibai operated as a conditional payment only and not as a satisfaction of the debt. *In re Romer and Haslam, 1893*] *2 Q. B. 286, 296*, followed. CULLIANJI *v.* RAGHOWJI (1904) . . . . **I. L. R. 30 Bom. 27**

2. ——— **Taxation**—*Work not ordinarily falling upon Solicitors—Work of meritorious character.* *K* was the solicitor for the defendant in a suit brought to obtain probate of the will of one Damji Lakhmichand. The defence set up was that the will was a forgery. Being unable to procure the services of an expert, *K*, after special study for the purpose, himself carefully studied every letter of the alleged will, and despite counsel's opinion that he had no chance of succeeding, he eventually succeeded in satisfying the trying Judge that the will was a forgery. In his bill for attorney and client's costs, *K* claimed extra payment for the additional and unusual work incurred by him. *Held*, in review of taxation, that *K* was entitled to be separately remunerated for the special work done by him, as it was in fact a charge for work done which would not ordinarily fall upon a Solicitor in the preparation of the brief. DAHIBAI *v.* SOONDERJI (1907) . **I. L. R. 31 Bom. 430**

SOLICITORS ACT, 1877 (40 & 41 VICT. C. 25), S. 9.

See ATTORNEY **I. L. R. 35 Calc. 915**

SOLITARY CONFINEMENT.

See SENTENCE—SOLITARY CONFINEMENT.
3 B. L. R. A. Cr. 49
I. L. R. 6 All. 83

SOMAJ.

See BRAHMO SAMAJ.

——— **breach of agreement to join—**

See CONTRACT ACT, s. 23—ILLEGAL CONTRACTS—GENERALLY.
2 B. L. R. S. N. 4

——— **exclusion from—**

See JURISDICTION OF CIVIL COURT—SOCIETIES . . **3 B. L. R. A. C. 91**

SONTHAL PARGANAS.

See GUARDIAN **I. L. R. 34 Calc. 569**

See SETTLEMENT OFFICER.
6 C. L. R. 555

See TRANSFER OF CRIMINAL CASE—GENERAL CASES . **I. L. R. 18 Calc. 247**

——— **appeals in cases from—**

See APPEAL—REGULATIONS—BENGAL REGULATION III OF 1872
6 C. L. R. 555

SONTHAL PARGANAS—*concld.*

——— **appeals in cases from**—*contd.*

See APPEAL IN CRIMINAL CASES—ACTS—ACT XXXVII OF 1855 **17 W. R. 11**
I. L. R. 12 Calc. 536

See HIGH COURT, JURISDICTION OF—CALCUTTA—CIVIL.
I. L. R. 3 Calc. 298
I. L. R. 10 Calc. 761

——— **trial of suit for land in—**

See JURISDICTION—SUITS FOR LAND—PROPERTY IN DIFFERENT DISTRICTS.
I. L. R. 4 Calc. 222

See SUBORDINATE JUDGE, JURISDICTION OF . . . **5 C. L. R. 128**

SONTHAL PARGANAS JUSTICE REGULATION (V OF 1893).

s. 15.

See SANCTION FOR PROSECUTION—REVOCATION OF SANCTION.
I. L. R. 30 Calc. 916

——— **s. 24.**

See SONTHAL PERGUNNAHS SETTLEMENT REGULATION, s. 6.
I. L. R. 26 Calc. 238

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872).

See PARTITION—RIGHT TO PARTITION—PARTITION OF PORTION OF PROPERTY.
5 C. W. N. 185

——— **ss. 3, 4**—*Act XXXVII of 1855, s. 2—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887)—Suit exceeding ₹1,000 in value—Officer invested with power of a Civil Court—"Court."* The effect of s. 2 of Act XXXVII of 1855 and s. 3 of Regulation III of 1872 is to make the general laws and regulations, including the provisions of the Code of Civil Procedure, applicable in the Sonthal Pergunnahs to suits exceeding ₹1,000 in value without any qualifications, provided that such suit are tried in the Courts established under the Civil Courts Act (XII of 1887). An officer in the Sonthal Pergunnahs invested by Local Government with the powers of a Civil Court under s. 4 of Regulation III of 1872 is a Court established under Act XII of 1887 within the meaning of s. 3 of the Regulation. DUNGARAM MARWARY *v.* RAJKISHORE DEO . . **I. L. R. 18 Calc. 133**

1. ——— **s. 5**—*Jurisdiction of Civil Court—Settlement proceedings.* During the time of the settlement in the Sonthal Pergunnahs, certain proceedings were instituted, with the permission of the Settlement Officer, by the plaintiff to get possession of certain land, and came before the Subordinate Judge, by whom they were treated as a regular suit. The decision was not pronounced until the settlement had been completed. *Held*, that s. 5 of Regulation III of 1872 did not apply, and that, under the circumstances, the

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SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872) —*contd.*

——— s. 5—*concld.*

proceedings must be taken to have been regularly commenced, and that they might be completed as proceedings in the ordinary Civil Court. *Held*, further, that the proceedings were not necessarily irregular by reason of the fact that issues had not been framed under s. 5 of the Regulation. SONAMONI DASI *v.* LILANUND SINGH **11 C. L. R. 30**

2. ——— *Appeal from settlement proceedings—Notification of the Lieutenant-Governor of the 7th May 1872—Act XXXVII of 1855, s. 2.* The officer appointed under s. 2 of Act XXXVII of 1855, and not the Settlement Officers as such, are the persons empowered to try such suits as are referred to by Regulation III of 1872, s. 5, and to certify issues to the Civil Courts under that section. The notification of the Lieutenant-Governor, dated the 7th May 1872, being still in force, the Settlement Officers have no power to deal with such cases. Where a Settlement Officer referred certain issues to a Deputy Commissioner as a Civil Court under Regulation III of 1872, s. 5, to be dealt with by him, and he gave a decision thereon and certified the same to the Settlement Officer, and it appeared that the Deputy Commissioner had previously been invested with the powers of a Settlement Officer, and the proceedings were subsequently returned to him for the settlement record to be amended in conformity with his findings, he being thoroughly conservant with all the facts of the case, and he accordingly passed an order and amended the record defining the areas to which the plaintiffs were entitled. On appeal against that order,—*Held*, that, so far as he was acting as a Civil Court, the Deputy Commissioner had no jurisdiction to try the issues sent him or deal with the case, but that, inasmuch as he was vested with the powers of a Settlement Officer, and was fully competent as such to deal with the case himself, seeing that the parties could not in any way be prejudiced by the irregularity committed, the High Court would not interfere to set aside the order. *Held*, also, that, treating the action of the Deputy Commissioner as that of a Settlement Officer, the High Court had no jurisdiction to hear the appeal. TARINI PERSHAD MISRA *v.* MAHAMUD CHOWDHRY . . **I. L. R. 7 Calc. 376**

S.C. TARINI PROSAD MISSER *v.* HURRISH CHUNDER CHOWDHRY . . **8 C. L. R. 548**

——— **s. 6.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 83, 84.

I. L. R. 36 Calc. 840

——— **s. 6 as amended by s. 24, Sonthal Pergunnahs Justice Regulation (V of 1893)**—*Illegal Contract—Compound interest—"Unlawful" consideration, meaning of.* There is no law or regulation laying down that an agreement between any two persons living in the Sonthal Pergunnahs to pay compound interest upon

SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872) —*contd.*

——— s. 6—*concld.*

the amount borrowed is "unlawful" within the meaning of s. 23 of the Contract Act. All that the law provides is that compound interest will not be decreed by any Court. Referring to the Sonthal Regulations, s. 6 of Regulation III of 1872 and s. 24 of Regulation V of 1893, it was *held*, in respect of an agreement to pay interest on an amount composed partly of the principal and interest due on a former debt, that such agreement is not void under s. 24 of the Contract Act, and that the obligee may recover such sums of money as he is entitled in law to recover, notwithstanding that part of the consideration is compound interest. SHAMA CHARAN MISSER *v.* CHUNI LAL MARWARI

I. L. R. 26 Calc. 238

1. ——— **ss. 11, 25**—*Suit regarding matter decided by Settlement Court—Settlement Officer, Finding of—Jurisdiction of Civil Court—Right of suit—Suit to set aside settlement and for possession.* Where a suit was brought to establish by avoiding the instrument under which he held, that the defendant was not a tenant of the lands in dispute, and to oust him from possession, and he had been recorded in the record-of-rights made by the Settlement Officer as a tenant of such lands:—*Held*, that the suit was one regarding a matter decided by the Settlement Court "within the meaning of s. 11 of the Sonthal Pergunnahs Settlement Regulation (III of 1872)," and was therefore not maintainable. The introductory words of cl. 4 of s. 25 of the Regulation, which impose a personal limitation on the jurisdiction of the Civil Courts, apply to suits of all the three classes to which the cause relates; so that the bar to the jurisdiction can take effect on a suit in the third of the three classes only when it is both "a suit to contest the finding or record of the Settlement Officer," and involves also the determination of "the rights of zamindars or other proprietors as between themselves." RAM CHURN SING *v.* DHATURI SING . **I. L. R. 18 Calc. 146**

2. ——— *"Proprietor," Meaning of—Suit for establishment of lakhiraj title and amendment of record-of-rights—Jurisdiction of Civil Court—Onus of proof.* In proceedings for settlement of rent and record-of-rights under the Sonthal Pergunnahs Settlement Regulation (III of 1872) certain lands claimed by the plaintiffs as lakhiraj were ordered to be recorded as mal and assessed with rent, the Commissioner of the Division stating that the plaintiffs might, if they chose, bring a suit in the Civil Court. The defendant (zamindar) obtained an *ex parte* decree for rent on the basis of the jumma-bandi prepared in the said proceedings. In a suit brought to establish the plaintiff's lakhiraj title and for an order directing the record-of-rights and jumma-bandi to be amended:—*Held*, that a lakhirajdar is a proprietor within the meaning of s. 25 of the Regulation, and ss. 11 and 25 did not bar the jurisdiction of the Civil Court in this case. *Ram Charan Singh* v. *Dhaturi Singh*, *I. L. R. 18 Calc. 146*, distinguished. *Held*,

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SONTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872) —*concld.*

——— ss. 11, 25—*concld.*

also that in the present case the onus was on the plaintiffs to prove their alleged lakhiraj title. RAMRANJAN CHUCKERBUTTY *v.* NANDA LAL LAIK **I. L. R. 22 Calc. 473**

1. ——— **ss. 24, 25**—*Suit to set aside order of Settlement Officer—Non-publication of record-of-rights.* Where, in December 1884, a suit was brought to set aside an order of the Settlement Officer under Regulation III of 1872, made in December 1875, after disposing of the plaintiff's objections to the defendant's title, and it was found that no record-of-rights had been published in accordance with s. 24 of the Regulation :—*Held*, that the suit was not barred under s. 25 as not having been brought within three years from the date of the order. The final order referred to in that section must be one subsequent to or not preceding the publication of the record-of-rights. RAM NARAIN SINGH *v.* RAM RUNJUN CHUCKERBUTTY **I. L. R. 13 Calc. 245**

2. ——— *Suit to set aside order of Settlement Officer—Non-publication of record-of-rights—Onus of proof.* In a suit instituted in January 1887 by a plaintiff to set aside a settlement made under Regulation III of 1872 and to recover khas possession of a mouzah, alleging that the defendant held the lands as chakran and that the services for which he held them had ceased, the defendant pleaded that the tenure was dur-mokurari, that the land had been settled as such in June 1877, and that the suit was consequently barred by the special limitation provided by s. 25 of the Regulation. The plaintiff sought to set aside the settlement on the ground of the non-publication of the record-of-rights and the fraud of the defendant, and both the lower Courts found that the record-of-rights had not been published by its being posted conspicuously in the village as required by s. 24. On special appeal it was contended on behalf of the defendant that such publication was not essential, but that it was open to the Settlement Officer to publish the record in such manner as might be convenient. *Held*, that posting the record conspicuously in the village is an essential part of the publication, and that the suit was not barred by limitation. It was further contended that the onus of proving the tenure to be dur-mokurari, which had been thrown on the defendant, had been wrongly so thrown on him, as the suit was substantially one to set aside a decree. *Held*, that the onus of proving the validity and propriety of the settlement-proceedings upon which he relied had been properly thrown on the defendant. NADIAR CHAND SINGH *v.* CHUNDER SIKHUR SADHU . . . **I. L. R. 15 Calc. 765**

SOUTH CANARA.

——— **Forest and waste lands**—*Rebuttable presumption of Government ownership—Conclusive presumption under Hindu and Mahomedan Law—Warg land—Right of wargdar over waste lands adjacent to his cultivated land—Kumaki and Netticut rights—Acts of user and occupation consistent with proprietary right of Government.* There is a general presumption that forest and immemorial waste land in South Canara, not exclusively occupied by any person or body of persons, is the property of the Government. In the case of the large tracts of immemorial forest on the ghats and elsewhere in South Canara, there is a presumption of fact, that they are Government forests, though such a presumption is rebuttable, by proof of private ownership, in regard to any particular part of the forest. In the case of forests and secondary growth, the presumption will usually be that they belong to some private owners, but this may be rebutted by showing that any portion forms part of a warg that was abandoned or forfeited or escheated to Government, or by showing that it was not part of a warg, but was cultivated as Kumri. In order to rebut the presumption of Government ownership in forest and immemorial waste land it is necessary that there should be proof of the exercise both in the past and in the present, of acts of undoubted ownership, such, for instance, as the granting of leases to tenants for cultivation, and the cutting of valuable timber trees for sale and not such acts as the Government permits in forest and waste land for the benefit of the adjacent cultivation. "Kumaki" and "Netticut" privileges, which are conceded to all wargdars for the better enjoyment of their warg lands adjacent to Government forest do not by any means prove exclusive proprietary right as against Government. "Netticut" privileges are enjoyed by such wargdars as have their wargs situated in valleys lying between the slopes or ridges of hills. Each ridge or Netticut forms a natural boundary, within which a cultivator grazes his cattle. Kumaki lands are lands which are allowed to be used in assisting cultivation and they are intended to afford to the ryots the means of procuring leaves for manure and to furnish fodder for their cattle. History of the Revenue System obtaining in the District of South Canara reviewed. *Subbaraya* v. *Krishnappa*, *I. L. R. 12 Mad. 422*, approved. *Bhaskappa* v. *The Collector of North Canara*, *I. L. R. 3 Bom. 452*, approved and followed. THE SECRETARY OF STATE FOR INDIA *v.* KRISHNAYYA (1905) . . . **I. L. R. 28 Mad. 257**

SOVEREIGN PRINCE.

——— **suit against—**

See JURISDICTION OF CIVIL COURT—FOREIGN AND NATIVE RULERS.

See RES JUDICATA—COMPETENT COURT—GENERAL CASES.

I. L. R. 15 Mad. 494

SPECIAL BENCH.

See ATTORNEY **I. L. R. 35 Calc. 915**

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See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—REGISTERS.
I. L. R. 22 Calc. 112

———— Jurisdiction—*Beng. Reg. III of 1828—Release of resumed lands—Mesne profits.* In 1855 the Privy Council decided against the right of the Bengal Government to resume and re-assess the ghatwali lands in the zamindari of Kurruckpore. In 1860 the Sudder Court, acting as Special Commissioners under Regulation III of 1828, at the instance of the zamindar, directed the release of the resumed lands, but did not decide as to the right to the mesne profits which the Government had received from the Ghatwals during the period of resumption, deeming this question beyond their competency as Special Commissioners. The zamindar having appealed to the Privy Council, complaining of the omission, and contending that the mesne profits should have been wholly adjudged to him:—*Held*, that the Special Commissioners had jurisdiction to decide upon the true title to the whole money in dispute and to direct the payment and disposition of the same with interest. LEELANUND SINGH *v.* GOVERNMENT OF BENGAL
1 W. R. P. C. 20 : 9 Moo. I. A. 479

SPECIAL CONSTABLE.

———— *Grounds of appointment—Police Act (V of 1861), ss. 17, 19.* The circumstances, which justify an order under s. 17 of the Police Act (V of 1861) are that a disturbance of the peace is apprehended, and that the police force available is insufficient to preserve the peace and protect the inhabitants of the place, where the disturbances are apprehended. Where upon the report of a Sub-Inspector of Police that there was a dispute about certain land, in which the petitioners were concerned, which was likely to lead to a breach of the peace, the Magistrate appointed them special constables under s. 17 of Act V of 1861, and they refused to receive their letters of appointment, but were afterwards told that their services would not be necessary: *Held*, that the order of appointment of the petitioners under s. 17 and their convictions under s. 19 were illegal. NANDA KISHORE SINGH *v.* EMPEROR (1908) . **I. L. R. 35 Calc. 454**

SPECIAL COURT AT RANGOON.

See APPEAL IN CRIMINAL CASES—ACTS—BURMA COURTS ACT.
I. L. R. 4 Calc. 667

SPECIAL DAMAGE.

See CIVIL PROCEDURE CODE, 1882, s. 199.
I. L. R. 30 Bom. 241

See DEFAMATION **I. L. R. 34 Calc. 48**

See LIMITATION ACT, 1877, s. 26 (1871, s. 27) . **I. L. R. 1 Mad. 335**

See RIGHT OF SUIT—OBSTRUCTION OF PUBLIC HIGHWAY.

See RIGHT OF WAY **6 C. W. N. 197**

See SLANDER **I. L. R. 28 Calc. 452**

SPECIAL DAMAGE—*concld.*

———— allegation of—

See JURISDICTION OF CIVIL COURT—ABUSE, DEFAMATION, AND SLANDER.

See JURISDICTION OF CIVIL COURT—PUBLIC WAYS, OBSTRUCTION OF.

See RIGHT OF SUIT—OBSTRUCTION TO PUBLIC HIGHWAY.

See SLANDER.

———— Damages for loss of reputation caused by defaming wife—*Special reputation caused by defaming a wife damages—Cause of action.* *A* instituted a suit against *B* for defamation. The words used alleged unchastity on the part of *A's* wife. *A* alleged (*a*) special damage, (*b*) that the words were defamatory in themselves, (*c*), that he himself was defamed and was therefore entitled to sue. *Held*, that the words used by *B* were defamatory in themselves and did not amount to mere verbal abuse and that, therefore, *A* was entitled to damages without proving special damage. *Girish Chunder Mitter* v. *Jatadhari Sadukhan, I. L. R. 26 Calc. 653*, distinguished. *Ibin Hosein* v. *Haidar, I. L. R. 12 Calc. 106; Trailakya Nath Ghose* v. *Chundra Nath Dutt, I. L. R. 12 Calc. 424; Jogeswar Sarma* v. *Dinaram Sarma, 3 C. L. J. 140*, and *Parvati* v. *Manner, I. L. R. 8 Mad. 175*, referred to. *Held*, also, that the cause of action having arisen in the mofussil the suit was not governed by the rule laid down in *Bhoonimoney Dossee* v. *Natobar Biswas, I. L. R. 28 Calc. 452.* SUKKAN TELI *v.* BIPAD TELI (1906) . . **I. L. R. 34 Calc. 48**

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See APPEAL—ACTS—BENGAL TENANCY ACT . . **I. L. R. 17 Calc. 326**

See BENGAL TENANCY ACT, s. 102.
I. L. R. 22 Calc. 244

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I. L. R. 21 Calc. 521

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I. L. R. 16 Calc. 596
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——— power of High Court in—

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COMPETENT COURTS—REVENUE COURTS . 5 C. W. N. 798

1. ORDERS SUBJECT OR NOT TO APPEAL.

1. ——— Law applicable to special appeals—*Civil Procedure Code, 1877, ss. 588, 591.* Second appeals to the High Court must either come within Ch. XLII or ss. 588 and 591 of Act X of 1877. HIRDHAMUN JHA *v.* JINGHOOR JHA . . I. L. R. 5 Calc. 711

2. ——— Order improperly adding plaintiffs to suit—*Civil Procedure Code, 1882, s. 591.* An appeal lies, under s. 591 of the Civil Procedure Code, from an order improperly adding a person as a plaintiff in a suit. GOOGLEE SAHOO v. PREMLAL SAHOO . I. L. R. 7 Calc. 148

3. ——— Order for attachment for contempt—*Civil Procedure Code, 1882, s. 591.* An order for attachment for contempt is not an order in the exercise of the High Court's civil jurisdiction, and therefore does not come within the provisions of s. 591 of the Civil Procedure Code. NAVIVAHOO *v.* NAROTAMDAS CANDAS . I. L. R. 7 Bom. 5

4. ——— Decision of Political Agent in a regular appeal—*Political Agent of Southern Maratha Country.* A special appeal lies from the decision of the Political Agent of the Southern Maratha Country passed in regular appeal. NILOWA *v.* FAKIRAPPA . 6 Bom. A. C. 75

5. ——— Decision of the District Court on appeal from the Talukdari Settlement Officer. A decision of the District Court on appeal from the Talukhdari Settlement Officer is subject to second appeal to the High Court. JAMSANG DEVABHAI *v.* GOYABHAI KIKABHAI . . . . . I. L. R. 16 Bom. 408

6. ——— Order for penalty under Stamp Act—*Civil Procedure Code, 1877, s. 588—Act VIII of 1859, s. 365.* A decision of a Judge directing a penalty to be enforced under the Stamp Act is not "an order as to a fine" within the meaning of s. 365 of Act VIII of 1859 (with which

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

s, 588 of Act X of 1877 corresponds). S. 365 was not intended to apply to penalties under the Stamp Act, but only to fines which may be levied under the Code itself. SONAKA CHOWDHRAIN *v.* BHOOBUNJOY SHAHA . . **I. L. R. 5 Calc. 311**

7. _____ **Order as to compensation for land**—*Land Acquisition Act (X of 1870), ss. 15, 39—Dispute as to right to compensation.* Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the Land Acquisition Act has been referred to the Civil Court under s. 15 of that Act, a second appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred. ATRI BAI *v.* ARNOPOORNA BAI
I. L. R. 9 Calc. 838 : 12 C. L. R. 409

8. _____ **Order directing plaint to be returned for presentation in proper Court**—*Civil Procedure Code, 1882, s. 57.* A Munsif dismissed a suit, on the ground that, if it had been properly valued, it would not have come within his jurisdiction. The District Judge affirmed the Munsif's judgment, and directed the plaint to be returned for presentation to the proper Court under s. 57 of the Civil Procedure Code. This was not done. *Held*, that a second appeal would lie. JOYNATH ROY *v.* LALL BAHADOOR SINGH
I. L. R. 8 Calc. 126 : 10 C. L. R. 146

9. _____ **Order as to execution of decree under R5,000, but with interest, etc., exceeding R5,000**—*Second Class Subordinate Judge—Subject-matter of suit under R5,000 and within jurisdiction.* The plaintiffs obtained a decree in the Court of a Second Class Subordinate Judge for a sum less than R5,000, which with accumulations of interest subsequently exceeded R5,000. The plaintiffs applied in execution to recover the total amount. The application was rejected by the Subordinate Judge on the ground that the Court had no jurisdiction under s. 24 of Act XIV of 1869. On appeal, the District Judge made an order confirming the decision of the Subordinate Judge. The plaintiffs filed a second appeal in the High Court. *Held*, that no second appeal lay to the High Court from such an order. The subject-matter of the suit was within the jurisdiction of the Subordinate Judge, and his jurisdiction continued, whatever might be the result of the suit, in all such matters in the suit as were within his cognizance, amongst which were matters in execution in the suit. The mere circumstance that the amount actually due by process of accumulation exceeded R5,000 could not oust him from the jurisdiction he hitherto had over the suit. SHAMRAV PANDOJI *v.* NILOJI RAMAJI
I. L. R. 10 Bom. 200

10. _____ **Regular appeal heard ex parte.** A special appeal lies from a regular appeal heard *ex parte*. TARA CHAND GHOSE *v.* ANAND CHANDRA CHOWDHRY
2 B. L. R. A. C. 110 : 10 W. R. 450

RAMSHET BIN BACHASHET *v.* BALKRISHNA BIN ABABHAT . . . . **6 Bom. A. C. 161**

PARAN CHUNDER GHOSE *v.* CHUKKUN LALL ROY . . . . **20 W. R. 402**

11. _____ **Appeal from ex parte decree**—*Appeal improperly admitted.* Where a decree is passed *ex parte* in an original suit, the defendant has no right to a special appeal, even though his appeal has been entertained by the Civil Court. CHIDAMBARA PILLAI *v.* KAMAN
1 Mad. 189

12. _____ **Decree ex parte.** A second appeal lies from an *ex parte* decree of a lower Appellate Court. MARUTI *v.* VITHU.
I. L. R. 16 Bom. 117

13. _____ **Order refusing to set aside ex parte decree**—*Civil Procedure Code (Act X of 1877), ss. 588, 622.* After a decree has been made *ex parte*, the defendant applied to have it set aside. The Subordinate Judge refused the application, but his order was reversed by the District Judge. *Held*, that the order of the District Judge was final under s. 588, and that no second appeal would lie, nor would the Court interfere under s. 622 of the Code. AUBINASH CHUNDER MOOKERJEE *v.* MARTIN . . **I. L. R. 8 Calc. 832**

14. _____ **Order of remand**—*Order under s. 354, Civil Procedure Code, 1859.* A special appeal did not lie from an order of remand under s. 354, Civil Procedure Code. COLLECTOR OF AGRA *v.* BULJEETA . . . . **3 Agra 368**
Agra F. B. Ed. 1874, 161

15. _____ **Order on inquiry in case of obstruction in execution of decree**—*Miscellaneous appeal—Civil Procedure Code, 1859, s. 229.* Where an inquiry had been held under s. 229, Code of Civil Procedure, and a regular appeal lay to the High Court under s. 231, a miscellaneous appeal could not be entertained. GOOROO DOSS ROY *v.* PUNCHANUN BOSE . . **9 W. R. 337**

16. _____ **Order refusing to admit appeal presented after time.** A special appeal will not lie against an order of the Judge refusing to admit a regular appeal presented after the expiration of the time provided for preferring appeals. PHOOLHAREE *v.* BISHESHUR PERSHAD **3 Agra 301**

17. _____ *Case decided ex parte.* A special appeal does not lie from the orders of a Judge declaring that sufficient cause has not been shown to his satisfaction for presenting after time an appeal from an *ex parte* judgment of a Deputy Collector. ROGHOONATH SINGH *v.* MOHUN LAL MITTER . . . . **7 W. R. 296**

(*Contra*) SUDEROODDEEN *v.* HURONATH SEIN
8 W. R. 87

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

18. ——— **Order dismissing appeal as presented out of time**—*Civil Procedure Code, 1882, s. 584—Limitation Act, 1877, s. 4.* An order dismissing an appeal as being presented out of time under s. 4 of the Limitation Act, 1877, is a " decree passed in appeal " within the meaning of s. 584 of the Civil Procedure Code, 1882. A second appeal will therefore lie from such order. GUNGA DASS DEY *v.* RAMJOY DEY **I. L. R. 12 Calc. 30**

19. ——— **Refusal to restore appeal withdrawn.** No special appeal lies from the order of a Judge refusing an application to restore an appeal that had been withdrawn. MODHOOMUTTY DEBIA *v.* DHUNPUT SINGH **13 W. R. 167**

20. ——— **Order dismissing appeal on failure of appellant to deposit costs of notice**—*Act XXIII of 1881, ss. 5 and 6.* A special appeal lay from an order passed under ss. 5 and 6 of Act XXIII of 1861 dismissing an appeal for non-service of notice in consequence of failure to deposit the cost of issuing the same. DINOBUNDHOO CHUTTERAJ *v.* BEHAREE LAL MOOKERJEE **3 W. R. Mis. 23**

INDUR CHUNDER BABOO *v.* OOZEER ALI KHAN. **7 W. R. 338**

21. ——— **Order re-admitting appeal dismissed for want of prosecution**—*Civil Procedure Code, 1859, s. 347.* A special appeal lay from an order under s. 347 of Act VIII of 1859 re-admitting an appeal dismissed for want of prosecution. DINOBUNDHOO CHUTTERAJ *v.* BEHAREE LALL MOOKERJEE . . . **3 W. R. Mis. 23**

22. ——— **Order rejecting application for re-admission of appeal dismissed for default of prosecution**—*Proof of illegality of order—Civil Procedure Code, 1859, s. 347.* A special appeal will lie from an order of a Judge rejecting an application for the re-admission of an appeal dismissed for default of prosecution, provided the order be shown to be illegal. HALOO *v.* ATWARO . . **7 W. R. 81**

23. ——— **Order rejecting application for re-admission of appeal dismissed for want of prosecution**—*Civil Procedure Code 1859, s. 347.* A special appeal lay from an order rejecting an application, under the provisions of s. 347 of Act VIII of 1859, for the re-admission of an appeal dismissed for default of prosecution, if it appears that the Court below has not exercised the discretion which it possessed under the section. The lower Appellate Court, without inquiry and without recording any reasons, summarily refused an application under s. 347. The order of refusal was set aside in special appeal, and the application remanded for proper consideration and disposal. LALL SINGH *v.* ZAHURIA . . . **6 N. W. 222**

24. ——— **Order dismissing appeal for non-appearance of appellant**—*Civil Procedure Code, 1859, s. 346.* A special appeal lay to the High Court from an order passed under s. 346 of the Civil Procedure Code, dismissing the appellant's regular appeal for non-appearance of the appellant in person or by pleader. *Devappa Setti* v. *Ramanandha Bhatt, 3 Mad. 109*, commented on. CHINNAPPA CHETTI *v.* NADARAJA PILLAI . . **6 Mad. 1**

DEVAPPA SETTI *v.* RAMANANDHA BHATT. **3 Mad. 109**

25. ——— **Order dismissing appeal for default**—*Civil Procedure Code, 1882, s. 584.* No appeal will lie under s. 584 of the Code of Civil Procedure in a case where an appeal has been dismissed for default, inasmuch as an appeal cannot be brought within any of the grounds therein mentioned. ANWAR ALI *v.* JAFFER ALI **I. L. R. 23 Calc. 827**

26. ——— **Order refusing to admit appeal dismissed for default**—*Application for re-admission.* No special appeal lay to the High Court from the order of a Judge refusing to re-admit an appeal dismissed for default by a Principal Sudder Ameen. The application for re-admission should be made to the Principal Sudder Ameen. KISTO PERSAD DUTT *v.* COWIE . **W. R. 1864, 315**

27. ——— **Order refusing to re-admit appeal**—*Dismissal of appeal for default—Pleader asking for time to go on with a case—Civil Procedure Code, 1882, ss. 556, 558.* The provisions of ss. 556 and 558 of the Civil Procedure Code do not apply, when the pleader for the appellant not merely informs the Court that he has no instructions, but makes an application for postponement, which is refused, and the appeal is thereupon dismissed. A second appeal does not therefore lie in such a case from an order of the first Appellate Court refusing to re-admit an appeal under the provisions of s. 558 of the Code of Civil Procedure. WATSON & Co. *v.* AMBICA DASI . . **I. L. R. 27 Calc. 529**
4 C. W. N. 237

28. ——— **Order refusing to confirm a sale** —*Subsisting decree—Code of Civil Procedure (Act XIV of 1882), ss. 588, 316, 244.* A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale on the ground that there was no subsisting decree at the date when the confirmation of the sale as applied for, the order being not one provided for by s. 588 of the Code of Civil Procedure, and the question raised in the case being a question relating to the execution or satisfaction of the decree within the meaning of s. 244 of the Code. *Prosunno Kumar Sanyal v. Kalidas Sanyal, I. L. R. 19 Calc. 863; L. R. 19 I. A. 166*, referred to. DOYAMOYI DASI *v.* SARAT CHUNDER MOJUMDAR **I. L. R. 25 Calc. 175**
1 C. W. N. 656

29. ——— **Order affirming or reversing order confirming sale**—*Civil Procedure Code, 1859, s. 257.* No special lay from the decision affirming or reversing an order under s. 257, Act

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

VIII of 1859, confirming a sale. JACKSON, *J.*, dissented. KOOLDEEP NARAIN SING *v.* LUCKHUN SING
B. L. R. Sup. Vol. 917 : 9 W. R. 218

ABDOOL KUREEM *v.* OGHUN LAL.
6 W. R. Mis. 119

30. ——— Order confirming sale complained of for irregularity—*Civil Procedure Code, 1859, s. 257.* A defendant complained, under s. 257 of the Civil Procedure Code, of irregularity in conducting the sale of his lands taken in execution of a decree against him. The sale was confirmed by the Court of first instance, and the order was affirmed on appeal by the Civil Judge. *Held*, that a special appeal to the High Court did not lie. VARADHA REDDI *v.* VENKATA SUBBA REDDI
5 Mad. 213

31. ——— Order of Appellate Court confirming a sale—*Civil Procedure Code, 1882, s. 312.* An order of an Appellate Court under s. 312 confirming a sale cannot be the subject of a second appeal. NANA KUMAR ROY *v.* GOLAM CHUNDER DEY . . . **I. L. R. 18 Calc. 422**

32. ——— Order setting aside sale—*Order on regular appeal.* The High Court has no power to entertain a special appeal from an order passed in regular appeal by a Judge setting aside a sale in execution, and reversing the order of a Munsif confirming such a sale. RUGHOONATH SINGH *v.* TOODEY SINGH . . . . **5 N. W. 19**

33. ——— *Civil Procedure Code, 1882, ss. 312 and 622—Superintendence of High Court.* No second appeal lies against an order under s. 312 of the Code setting aside a sale. *Nana Kumar Roy* v. *Golam Chunder Dey, I. L. R. 18 Calc. 422*, followed, and the Court refused under the circumstances to interfere under s. 622. AUBHOYA DASSI *v.* PUDMO LOCHUN MONDOL
I. L. R. 22 Calc. 802

LACHMIPAT *v.* MANDIL KOER **3 C. W. N. 333**

34. ——— *Order setting aside sale under s. 294, Civil Procedure Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civil Procedure Code, 1882, ss. 244 and 588.* No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under s. 294 of the Civil Procedure Code, notwithstanding that s. 244 bars a separate suit in such a case ; that s. 244, whilst it precludes a right of suit does not enlarge the right of appeal which is limited strictly by s. 588. BHAGBUT LALL *v.* NARKU ROY . . . **I. L. R. 21 Calc. 789**

35. ——— Order overruling objections to confirmation of sale—*Civil Procedure Code, 1859, s. 257.* A judgment-debtor having preferred various objections to the Court of the Subordinate Judge which was executing the decree against him, his objections were rejected, and the Court proceeded to sell the property attached in execution. The judgment-debtor then preferred an appeal to the Judge against the order which threw out his objections, but without expressly objecting to the confirmation of the sale. *Held*, that the Judge was entitled to deal with the case as an appeal against the sale which had taken place before the appeal was preferred, and no further appeal therefore lay to the High Court. SONAMONEE DOSSIA *v.* MOTEE SINGH
14 W. R. 385

36. ——— Order passed in appeal reversing lower Court's order setting aside a sale in execution of decree—*Civil Procedure Code, 1882, s. 588.* Under the provisions of s. 588 of the Code of Civil Procedure no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity. GOPI KOERI *v.* GOPI LAL . **I. L. R. 21 Calc. 799**

37. ——— Order made on application to set aside sale in execution where the auction-purchaser is a benamidar for judgment-debtor—*Civil Procedure Code, 1882, ss. 244 and 311—Bengal Tenancy Act, s. 173.* Where the auction-purchaser is a benamidar for the judgment-debtor, in an application to set aside a sale under ss. 173 of the Bengal Tenancy Act and 311 of the Code of Civil Procedure, a second appeal lies to the High Court from the order made on the application, as the application is one under s. 244 of the Code. CHAND MONEE DASYA *v.* SANTO MONEE DASYA . . . **I. L. R. 24 Calc. 707**
1 C. W. N. 534

38. ——— Order made under s. 311 of Civil Procedure Code, 1882, on application to set aside sale. No second appeal lies from an order made under s. 311 of the Civil Procedure Code. NARAYAN *v.* RASULKHAN
I. L. R. 23 Bom. 531

39. ——— Order refusing to set aside a sale—*Appeal from an order remanding a case—Code of Civil Procedure, 1882, s. 588, cls. (16) and (28) and s. 562.* Though orders under s. 562 of the Code of Civil Procedure are appealable under cl. 28 of s. 588, yet the provisions of the latter section are subject to its last paragraph, which says that orders passed under this section shall be final ; and therefore no second appeal lies from an order passed under s. 588, cl. 16, notwithstanding that it is an order passed by the lower Appellate Court remanding the case under s. 562, inasmuch as the order was made in a case which was itself an appeal from an order allowed by s. 588 of the Code. MATHURA NATH GHOSE *v.* NOBIN CHANDRA BISWAS
I. L. R. 24 Calc. 774
1 C. W. N. 674

40. ——— *Orders refusing to set aside sale in execution of decree—Civil Procedure Code, 1882, ss. 2 and 588.* A judgment

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SPECIAL OR SECOND APPEAL—*contd.*

1.—ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

debtor, whose property had been sold in execution of a decee and purchased by the decree-holder, applied that the sale be set aside on the ground that the person at whose instance execution had proceeded had been improperly brought on to the record. The application was rejected by the Court of first instance, and an appeal by the applicant was dismissed. *Held*, that no second appeal lay to the High Court. DAIVANAYAGAM PILLAI *v.* RANGASAMI AYYAR . . . **I. L. R. 19 Mad. 29**

41. ———— *Civil Procedure Code, 1882, ss. 244, 311, and 588—Decree—Fraud —Question relating to the execution of the decree between parties to the suit—Auction-purchaser a third party.* An application was made by the judgment-debtor against the decree-holder and the auction-purchaser, who was a third party, to have a sale set aside, on the ground of irregularity in publishing or conducting the sale, as also on the ground of fraud. The Court of first instance rejected the application, and refused to set aside the sale. On appeal to the Subordinate Judge, he reversed the decision of the first Court. On a second appeal to the High Court by the auction-purchaser, an objection was taken that no second appeal lay at his instance. *Held*, that, inasmuch as the application was under s. 244 of the Civil Procedure Code, a second appeal would lie. The question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or nor the case is one within s. 244 of the Code. HIRA LAL GHOSE *v.* CHUNDRA KANTO GHOSE. **I. L. R. 26 Calc. 539**

See BHOBA MOHAN PAL *v.* NUNDA LAL DEY. **I. L. R. 26 Calc. 324**

and MOTI LAL CHAKRABUTTY *v.* RUSSICK CHANDRA BAIRAGI . . **I. L. R. 26 Calc. 326 note**

42. ———— *Civil Procedure Code, 1882, ss. 244, 311—Application to set aside sale on ground of fraud.* Where a judgment-debtor applies to have an execution sale set aside and alleges circumstances which, if found in his favour, would amount to fraud on the part of the decree-holder or auction-purchaser, the case comes under s. 244 of the Civil Procedure Code, and a second appeal lies therein. NEMAI CHAND KANJI *v.* DENO NATH KANJI . . . **2 C. W. N. 691**

43. ———— **Order of remand made under s. 562 of Civil Procedure Code, 1882,** —*Order made in an appeal under s. 588 from an order for attachment under s. 485. Held*, that no appeal would lie from an order of remand made under s. 562 of the Code of Civil Procedure when such order was itself made in an appeal under s. 588 from an order under s. 485 of the Code. *Mathura Nath Ghose* v. *Nobin Chandra Kundu Biswas, I. L. R. 24 Calc. 774*, followed. JHANDYA LAL *v.* SARMAN LAL . . **I. L. R. 21 All. 291**

44. ———— **Order passed by Appellate Court on appeal from order granting a review of judgment**—*Civil Procedure Code (Act*

SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR. NOT TO APPEAL —*contd.*

XIV of 1882), ss. 624, 626, 629. No second appeal lies against an order passed under s. 629 of the Civil Procedure Code. An application was made by a plaintiff for review of a judgment dismissing his suit as against all the defendant, which application was granted. Against that order the defendants appealed, and the lower Appellate Court confirmed the lower Court's order, granting the review as against one of the defendants, but set it aside as against the other defendants. *Held*, that no second appeal lay against such order. THAN SINGH *v.* CHUNDUN SINGH . . . **I. L. R. 11 Calc. 296**

See AUKHOY CHURN MOHUNT *v.* SHAMANT LOCHUN MOHUNT . . . **I. L. R. 16 Calc. 788**

and cases there cited.

45. ———— **Order on application to review**—*Civil Procedure Code, 1882, s. 629—Appeal from decree as amended—Practice.* A second appeal lies against an order of a lower Appellate Court passed under s. 629 of the Civil Procedure Code (Act XIV of 1882) where the appeal to the lower Appellate Court has been, not from the order allowing a review, but from the original decretal order itself as amended by the original Court on the application for review. *Than Singh v. Chundun Singh, I. L. R. 11 Calc. 296*, distinguished. *Semble:* The words of s. 629, "an order of the Court for rejecting the application shall be final," *primâ facie* apply to the Court which has passed the original decree, but in spirit they would seem properly to apply also to an order of an Appellate Court. BALA NATHA *v.* BHIVA NATHA . **I. L. R. 13 Bom. 496**

46. ———— **Order on appeal affirming order granting application for review of judgment**—*Civil Procedure Code, ss. 584, 629.* No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment. GOPAL DAS *v.* ALAF KHAN . . **I. L. R. 11 All. 383**

47. ———— **Order setting aside order granting review**—*Civil Procedure Code, 1882, ss. 591, 623, and 629.* No second appeal to the High Court lies from an order setting aside an order granting a review of judgment. KANTI CHUNDER MUKERJEE *v.* SALIGRAM . **I. L. R. 24 Calc. 319**

IMAM BUX *v.* MAHOMED GOPE. **I. L. R. 24 Calc. 319 note**

48. ———— **Order imposing fine for avoiding of summons to attend as witness** —*Civil Procedure Code, 1859, s. 365—Witness absconding—Right of appeal.* By the words of s. 365 of Act VIII of 1859, the Legislature must have intended to give the person aggrieved by any order of a Civil Court imposing a fine on him as a punishment for keeping out of the way in order to avoid service of summons to attend as a witness the right of appeal to the High Court, whether the order was

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

strictly referable to s. 160 of that Act or not. *In re* GAJADHAR PRASAD NARAYAN SINGH
1 B. L. R. A. C. 187

S.C. GUJADHUR PERSHAD NARAIN SINGH *v.* JUGDEO NARAIN . . . .10 W. R. 233

49. ——— Order of a District Court under s. 26 of the Succession Certificate Act (VII of 1889)—*Succession Certificate Act, s. 19—Jurisdiction of High Court and District Court.* S. 26 of the Succession Certificate Act confer on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by s. 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case. SABBA RAO *v.* PALANIANDI PILLAI . I. L. R. 17 Mad. 167

50. ——— Order on application for revival of suit—*Act LIII of 1860, s. 2—Civil Procedure Code, 1859, s. 378.* The Zillah Judge reversed a decree in the plaintiff's favour on the ground that the suit was barred by the period of limitation prescribed by s. 30 of Act X of 1859; subsequently to this decree Act LIII of 1860 came into operation, which by ss. 1 and 30 provided that suits for causes of actions which had accrued before the 1st of August 1859 might be instituted within two years from that day; and by s. 2 that suits or appeals dismissed on the ground that they had not been commenced within the period prescribed by the Act of 1859 might be revived. The Zillah Judge rejected an application under the Act of 1860 to revive the suit. *Held*, that this was not an application for a "review of judgment" within s. 378 of Act VIII of 1859, as to which the order of the Court was final; but being for the revival of a suit under the provisions of the latter law, his order was the subject of an appeal. BUNGSHEEDHUR MUNDUL *v.* PUDDOLOCHUN ROY Marsh. 38 : W. R. F. B. 11
1 Ind. Jur. O. S. 5 : 1 Hay 90

51. ——— Decree in rent suit under R100—*Bengal Rent Act (VIII of 1859), s. 102—Bengal Tenancy Act (VIII of 1885), s. 5—Effect of repeal.* In a suit between landlord and tenant a decree was passed by the lower Appellate Court on the 28th July 1885. Under the provisions of the Act then in force—namely, Bengal Act VIII of 1869, s. 102—a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November, 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November 1885. *Held*, that no appeal lay. HURROSUNDARI DABI *v.* BROJOHARI DAS MANJI . . . I. L. R. 13 Calc. 86

52. ——— Order in suit entertained without jurisdiction—*Subsequent Act passed giving jurisdiction—Appeal brought after passing of such Act.* A suit had been dismissed by a lower Appellate Court on the ground that the Court of first instance had no jurisdiction to entertain such suit. An Act was subsequently passed declaring that all suits which had been similarly entertained without jurisdiction should be deemed to have been duly preferred. The plaintiff, after the passing of the Act, filed a special appeal, in which he urged that the decision of the Court of first instance was no longer illegal, and that the suit should be heard by the lower Appellate Court on its merits. *Held, per* TURNER, *J.*, that, as at the time the lower Appellate Court gave the decision from which the special appeal was presented the Act had not been passed, it must be held that its judgment was correct, and that a new law, passed since the decision could not make that decision wrong, which was, and still is, with reference to the law then in force, right, and that the appeal should be dismissed. *Held, per* SPANKIE, *J.*, that a special appeal would lie, the decision being contrary to a law in force at the time the special appeal was instituted, which law the Court was bound to enforce. BULDEO *v.* LUCHMUN
5 N. W. 106

53. ——— Order in execution of a decree. Under Act VIII of 1859, there was no special appeal from orders passed in execution of a decree. ANONYMOUS . 1 Ind. Jur. O. S. 50

ANONYMOUS . . 1 Ind. Jur. O. S. 68

But there is now since the passing of Act XXIII of 1861.

See MAHOMED HOSSEIN *v.* AFZUL ALLY.
B. L. R. Sup. Vol. Ap. 1 : Marsh. 296
W. R. F. B. 83 : 2 Hay 293

BAGUBAI *v.* NIZMUDDIN . 6 Bom. A. C. 205

VIRASAMY MUDALI *v.* MANOMMANY AMMAL. VENKATA BALAKRISHNA CHETTI *v.* VIJIARAGUNADHA VALAJI KRISHNA GOPALER 4 Mad. 32

54. ——— *Act XXIII of 1861, ss. 11 and 44—Act VIII of 1859, ss. 257, 269, and 372.* A special appeal will lie from an order passed on appeal in relation to the execution of a decree. MAHOMED HOSSEIN *v.* AFZUL ALI
B. L. R. Sup. Vol. Ap. 1 : Marsh. 296
W. R. F. B. 83 : 2 Hay 293

55. ——— *Decree in suit on bond registered under s. 53, Act XX of 1866.* No second appeal lay to the High Court against an order passed on an application for execution of a decree made in a suit under s. 53 of Act XX of 1866. *Quœre:* Whether an appeal lay at all against such an order passed in proceedings taken in execution of such decree. SRI BULLOV BHATTACHARJI *v.* BABURAM CHATTOPADHYA
I. L. R. 11 Calc. 169

56. ——— *Civil Procedure Code, 1877, s. 244—Registration Act, 1866, s. 53.* An application was made to a District Munsif on the 16th July 1877 to issue execution on a decree dated 6th November 1869, obtained on a bond registered under s. 53 of the Registration Act of 1866.

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

He made an order refusing execution, the decree being one passed, not in a regular suit, but in a summary suit, and governed by the period of limitation prescribed by Art. 166, Sch. II, Act IX of 1871. On appeal the Subordinate Judge reversed the order of the Munsif, holding that Art. 167, Sch. II of Act IX of 1871, applied. On application to the High Court :—*Held*, that, as s. 588 of Act X of 1877 provided that orders passed in appeal from orders under s. 244 should be final, no second appeal lay. SURYAPRAKASA RAU *v.* VAISYA SANNYASI RAZU . . . I. L. R. 1 Mad. 401

57. ——— **Appeal from portion of decree disallowing objection**—*Civil Procedure Code, 1882, ss. 561, 584.* A preliminary objection taken by a respondent that no second appeal lies from so much of the decree of a Subordinate Judge as disallowed objections filed by the appellant under s. 561 of the Code of Civil Procedure was *held* to be without weight. GANAPATI *v.* SITHARAMA I. L. R. 10 Mad. 292

58. ——— **Decision as to title to land —Appeal to High Court from decision of District Court on appeal**—*Madras Forest Act, s. 10.* An appeal lies to the High Court from a decision of District Court passed under s. 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer. KAMARAJU *v.* SECRETARY OF STATE FOR INDIA I. L. R. 11 Mad. 309

59. ——— **Arbitration**—*Civil Procedure Code, ss. 521, 522, and 582—Revocation of submission—Appellate decree in accordance with award.* By reason of s. 582 of the Civil Procedure Code, where a Court of first instance wrongly sets aside an arbitration award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in s. 521, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of s. 522, and cannot be made the subject of second appeal. *Pureshnath Dey* v. *Nobin Chunder Dutt, 12 W. R. 93*, and *Rughoober Dyal* v. *Maina Koer, 12 C. L. R. 564*, dissented from. NAURANG SINGH *v.* SADAPAL SINGH I. L. R. 10 All. 8

60. ——— **Order reviewing and setting aside order rejecting objection to execution of decree**—*Civil Procedure Code, s. 629.* When a Munsif sets aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refuse to interfere :—*Held*, that no second appeal lay to the High Court. PAPAYYA *v.* CHELAMAYYA I. L. R. 12 Mad. 125

61. ——— **Order of Special Judge as to settlement of rents**—*Superintendence of High Court—Bengal Tenancy Act (VIII of 1885), ss. 194, cl. (2), 105, 106, 108—Rule 33 of the Rules made under the Act—Jurisdiction—Record-of-right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622.* The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents. SHEWBARAT KOER *v.* NIRPAT ROY I. L. R. 16 Calc. 596

62. ——— *Decision of Settlement Officer—Settlement of rent under Bengal Tenancy Act (VIII of 1885), s. 104.* No second appeal lies to the High Court from a decision of a Revenue Officer settling rents under s. 104 of the Bengal Tenancy Act. ACHHA MIAN CHOWDHRY *v.* DURGA CHURN LAW I. L. R. 25 Calc. 246 2 C. W. N. 137

63. ——— *Rent-suit—Bengal Act VIII of 1869, s. 102—Bengal Tenancy Act (VIII of 1885), s. 153—General Clauses Act (I of 1868), s. 6.* The word "proceedings" in s. 6 of Act I of 1868, as applied to a suit, means the suit as an entirety, that is, down to the final decree. A second appeal, therefore, to the High Court, on a question of the amount due as rent, will not lie when the suit was instituted previously to the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act. *Hurrosundari Debi* v. *Bhojohari Das Manji, I. L. R. 13 Calc. 86*, approved. SATGHURI *v.* MUJIDAN I. L. R. 15 Calc. 107

64. ——— **Appeal from order of District Judge**—*Bengal Tenancy Act (VIII of 1885), s. 153—Appeal in rent-suits.* In certain rent-suits, the amount claimed being under R100, the question was raised as to whether the plaintiff was entitled to the whole 16 annas of the rent or only to a 10 annas share thereof. Upon this point the first Court gave the plaintiff decrees for the full amount claimed, holding that the question was *res judicata*. Upon appeal the District Judge held that the question was not *res judicata*, and remanded the suits for trial on the merits. The plaintiff preferred a second appeal to the High Court. *Held*, that, having regard to the provisions of s. 153 of the Bengal Tenancy Act, no appeal lay, as the question was not one relating to title to land or to some interest in land as between parties having conflicting claims thereto, nor was it a question of the amount of rent annually payable by a tenant;" these words in the section meaning the total amount of rent annually payable in respect of a holding, and not the amount of rent which may be payable to any particular co-sharer in the property. PRASANNA KUMAR BANERJEE *v.* SRINATH DAS . . . I. L. R. 15 Calc. 231

65. ——— **Appeal in cases under R100**—*Bengal Tenancy Act (VIII of 1885) s. 153—Cesses, Suit for—Bengal Act IX of 1880*

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

s. 47. A suit to recover cesses for an amount not exceeding R100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals. MOHESH CHUNDER CHUTTOPADHYA *v.* UMATARA DEBY **I. L. R. 16 Calc. 638**

66. ——— Order of Special Judge on appeal from Settlement Officer—*Bengal Tenancy Act, Ch. X, ss. 104, cl. 2, 106, 107, and 108, cl. 2.—Dispute as to entries in record-of-rights—Question as to status of raiyats—Civil Procedure Code, s. 622.* Under Ch. X of the Bengal Tenancy Act, there is to be (i) a framing of the record-of-rights ; (ii) a draft publication for a period of one month, during which time objections may be preferred ; and (iii) a final publication, previous to which publication " disputes " as to the correctness of the entries in the record-of-rights, other than entries of rents settled, are to be heard and decided. Under s. 107, the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of decrees, and under s. 108, cl. 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer ; but it is only in cases under s. 106 decided by the Special Judge on appeal from the Settlement Officer that a second appeal lies to the High Court, and such cases can only relate to disputes regarding the correctness of entries other than the entries of rent settled. Where a decision of the Settlement Officer in a case under s. 104, cl. 2, of the Act dealt with the question of the status of the raiyats, and was passed before the record had been framed ; and after the record had been framed, there was no dispute as to the correctness of any entry, except the entries of the rent settled :—*Held*, that the order of the Special Judge on appeal from such decision of the Settlement Officer was not one passed in a case under s. 106, and therefore no second appeal lay from it to the High Court. *Shewbarat Koer v Nirpat Roy, I. L. R. 16 Calc. 596 ; Lala Kirat Narain* v. *Pulakdhari Pandey, I. L. R. 17 Calc. 326*, referred to. *Held*, also, that the case was not one which required the interference of the High Court under s. 622 of the Civil Procedure Code. GOPI NATH MASANT *v.* ADOITA NAIK **I. L. R. 21 Calc. 776**

67. ——— Special Judge, order of—. *Bengal Tenancy Act (VIII of 1885), ss. 106 and 108—Boundary dispute—Bengal Survey Act (Beng. Act V of 1875), Part V, s. 40—Settlement Officer acting as Survey Officer.* A second appeal only lies to the High Court under s. 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under s. 106 of the Act. No second appeal therefore lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (Bengal Act V of 1875). IRSHAD ALI CHOWDHRY *v.* KANTA PERSHAD HAZAREE **I. L. R. 21 Calc. 935**

SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

68. ——— *Bengal Tenancy Act (VIII of 1885), Ch. X, ss. 106 and 108—Record-of-rights, Dispute prior to the preparation of—Standard of measurement, question of.* In a proceeding under Ch. X of the Bengal Tenancy Act, a dispute arose between the parties, before the preparation of record-of-rights, on the question of the local standard of measurement. The Settlement Officer decided the case in favour of the plaintiffs, and, on appeal to the Special Judge, the decision was upheld. *Held*, that the order of the Settlement Officer was not one under s. 106 of the Bengal Tenancy Act, and under cl. 3 of s. 108 no second appeal lay to the High Court. *Gopinath Masant* v. *Adoita Naik, I. L. R. 21 Calc. 776*, referred to ANAND LAL PARIA *v.* SHIB CHUNDER MUKERJEE **I. L. R. 22 Calc. 477**

69. ——— *Special Judge, decision of —Revenue Officer, decision of—Bengal Tenancy Act (VIII of 1885), ss. 105, 106, and 108 (3)—Record-of-rights, dispute prior to completion of—Dispute about proposed entry or omission in the record.* The respondent, in the course of proceedings for the record-of-rights in the village, of which he was the landlord, applied for the settlement of fair rents. The appellant claimed to be a raiyat holding at a fixed rent. The respondent denied the validity of the claim. This dispute gave rise to a case between them which was decided by the Revenue Officer against the appellant, who then appealed to the Special Judge, with the result that the decision on that question was confirmed. At the time of the Revenue Officer's decision no record-of-rights had been completed under s. 105 (*1*) of the Bengal Tenancy Act. On appeal to the High Court, the respondent took the preliminary objection that no appeal lay under s. 108 (*3*), as the case was not one under s. 106. *Held*, that the decision of the Revenue Officer was a decision in a proceeding under s. 106 of the Bengal Tenancy Act, and that a second appeal lay from the decision of the Special Judge to the High Court. *Gopi Nath Masant* v. *Adoita Naik, I. L. R. 21 Calc. 776*, and *Anand Lal Paria* v. *Shib Chunder Mukerjee, I. L. R. 22 Calc. 477*, so far as they decide that a second appeal would not lie in such a case, overruled. DENGU KAZI *v.* NOBIN KISSORI CHOWDHRANI **I. L. R. 24 Calc. 462 1 C. W. N. 294**

70. ——— *Bengal Tenancy Act (VIII of 1885), ss. 104, 106, 108—Special Judge under the Bengal Tenancy Act—Question of standard of measurement, area of lands and liability to pay rent—Decision of the Special Judge.* Under the terms of s. 108 of the Bengal Tenancy Act (VIII of 1885), a second appeal lies from the decision of the Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants, and the liability of the tenants to pay rent on account of any excess lands in their possession. MATHURA MOHUN LAHIRI *v.* UMA SUNDARI DEBI **I. L. R. 25 Calc. 34**

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

71. ——— *Bengal Tenancy Act (VIII of 1885), ss. 105, 106, 108—Order of Special Judge as to standard of measurement of lands.* An order of the Special Judge as to the length of the standard of measurement to be used in measuring certain lands is not a decision in a case under s. 106 of the Bengal Tenancy Act, and therefore no second appeal lies from such an order to the High Court. *Mathura Mohun Lahiri* v. *Umu Sundari Debi, I. L. R. 25 Calc 34,* and *Dengu Kazi* v. *Nobin Kissori Chowdhrani, I. L. R. 24 Calc. 462,* distinguished. NAROHARY JANA *v.* HARI CHARAN PRAMANICK . **I. L. R. 26 Calc. 553**

72. ——— *Bengal Tenancy Act (VIII of 1885), s. 153—Execution of rent decree valued at less than R100—Civil Procedure Code (Act XIV of 1882), s. 647.* Where the original suit is a suit for rent valued at less than R100 and the decree or order made in it does not decide a question relating to title to land or some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant, no second appeal will lie in respect of an order made in execution proceedings relating thereto. SHYAMA CHARAN MITTER *v.* DEBENDRA NATH MUKERJFE **I. L. R. 27 Calc. 484**
4 C. W. N. 269

73. ——— *Bengal Tenancy Act (VIII of 1885), s. 153—Determination of annual rent payable—Rate of rent.* Where the lower Appellate Court, in deciding the question as to the amount of rent annually payable, found that the plaintiff had failed to prove the rate of rent claimed by him, and therefore gave him a decree at the rate admitted by the defendant :—*Held,* that this was not a determination of the annual rent payable, and therefore no second appeal lay. NEIKAJEE *v.* NANDA DULAL
1 C. W. N. 711

74 ——— *Suit for rent—Interest on rent—Bengal Tenancy Act (VIII of 1885), ss. 3, cl. (5), and 153.* Interest on rent is not rent within the meaning of s. 3, cl. (*5*), of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the question is one relating to rate of interest and the value of the subject-matter of the suit is less than R100. KOYLASH CHANDRA DE *v.* TARAK NATH MANDAL
I. L. R. 25 Calc. 571 note

75. ——— *Bengal Tenancy Act (VIII of 1885), s. 153—Rent payable by the tenant not in issue in the appeal.* Under s. 153 of the Bengal Tenancy Act, a second appeal lies in a rent suit whenever the decree of the Appellate Court has decided a question of the amount of rent annually payable by a tenant ; it is not necessary that the amount of rent payable by the tenant should be a matter in issue in the second appeal. RAI CHURN GHOSE *v.* KUMUD MOHAN DUTTA CHAUDHURI
1 C. W. N. 687

SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

In the same case in review :—*Held,* that the question relating to instalments, though it affects the question of interest on the rent, is not a question of " the amount of rent annually payable " within the meaning of s. 153 of the Bengal Tenancy Act. Therefore no second appeal would lie in a case where the value of the suit is less than R100, even if there is a question as to the instalment of rent. *Koylash Chandra De* v. *Tarak Nath Mandal, I. L. R. 25 Calc. 571 (note),* referred to. RAI CHARAN GHOSE *v.* KUMUD MOHAN DUTTA CHOWDHRY
I. L. R. 25 Calc. 571
2 C. W. N. 297

76. ——— **Appeal from District Judge** *—Proceeding to be adopted when a District Court erroneously returns an appeal-petition for presentation in High Court—Civil Procedure Code, 1882, ss. 57, 588, 589, 622.* Certain members of a Moplah family sued the others in a Subordinate Court to recover their distributive share under Mahomedan law. The property to be divided was more than R5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation to the High Court. The appellants preferred a second appeal to the High Court against the decision of the District Judge, and also presented a petition praying for the revision of his proceedings under the Civil Procedure Code, s. 622. *Held,* that neither a second appeal (which did not lie in such a case) nor a petition under the Civil Procedure Code, s. 622, was the appropriate proceeding to be adopted by the appellants, but an appeal as from an order made under the Civil Procedure Code, ss. 57, 582, which would lie under ss. 588, cl. (*c*), and 589. The error of the appellants being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court, and directed to District Judge to receive and dispose of the appeal from the Subordinate Judge. KUNHIKUTTI *v.* ACHOTTI
I. L. R. 14 Mad. 462

77. ——— **Suits under Chota Nagpur Landlord and Tenant Procedure Act (Beng. Act I of 1879), ss. 37, 137**—*Arrears of rent and ejectment, suit for.* In suits instituted under Bengal Act I of 1879 for arrears of rent and ejectment on account of the non-payment of arrears of rent, a second appeal lies to the High Court, this class of cases not being within the provisions of s. 137 of the same Act. RAMJAN KHAN *v.* RAMAN CHAMAR . **I. L. R. 10 Calc. 89**

78. ——— **Suit for arrears of rent**— *Chota Nagpore Landlord and Tenant Procedure Act (Beng. Act I of 1879), ss. 37, 38, 47, 49—56, 62—67, 76, 98, 135, 137, 144—Civil Procedure Code (Act XIV of 1882), ss. 3, 4, 534.* No second appeal lies in a suit for arrears of rent brought under the provisions of the Chota Nagpore Landlord and Tenant Pro-

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

cedure Act (Bengal Act I of 1879). The cases of *Ramjan Khan* v. *Raman Chamar, I. L. R. 10 Calc. 89 : 11 C. L. R. 480,* and *Priag Nath Sah Deo* v. *Muri Munda, I. L. R. 24 Calc. 249,* so far as they held that a second appeal did lie in cases of this nature arising under Bengal Act I of 1879, were wrongly decided. KHEDU MAHTO *v.* BUDHUN MAHTO . . . **I. L. R. 27 Calc. 508**
4 C. W. N. 333

(*Contra*) PRIAG NATH SAHA DEO *v.* MURA MUNDA **I. L. R. 24 Calc. 249**

79. ——— Arrears of rent—*Suit—Act X of 1859, ss. 23, 77, 153, 160, 161—Act VIII of 1859, ss. 284, 372—Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), ss. 37, 144.* A second appeal lies to the High Court from an appellate decree of the District Judge in a suit for arrears of rent instituted under Act X of 1859 and tried by the Deputy Collector. *Hallodhur Biswas* v. *Mohesh Chunder Haldar, (1861), S. D. A. Decisions, p. 144,* followed. *Khedu Mahto* v. *Budhun Mahto, I. L. R. 27 Calc. 508,* distinguished. SADAI NAIK *v.* SERAI NAIK (1901)
I. L. R. 28 Calc. 532
s.c. 5 C. W. N. 279

80. ——— Compensation for illegal notices—*Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, cl. 35 (j)—Civil Procedure Code (Act XIV of 1882), s. 586—Second appeal—Limitation—Rent Recovery Act (Madras Act VIII of 1865), s. 78—Cause of action complete on date of illegal distress.* A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendant, that they had raised a crop of paddy measuring about 6 *garces* and stored it in three heaps on the land, that one of the plaintiffs had paid all the *kist* that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy, measuring about 5 *garces,* under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 *garces* of grain, worth R250 at R50 per *garce,* in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January, 1896, and the suit was instituted on 25th July of the same year :—*Held,* that the suit was in substance one for compensation for illegal distress or attachment, and not for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by a Court of Small Causes, and a second appeal lay. *Held,* also, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made. *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan, I. L. R. 24 Mad. 339,* distinguished. PAMU SANYASI *v.* ZAMINDAR OF JAYAPUR (1901)
I. L. R. 25 Mad. 540

81. ——— Decision of Sub-Judge, where no appeal lies to him—*Appeal—Second appeal from decision of Sub-Judge when no appeal lies to him, if maintainable—Decree on an award—Civil Procedure Code (Act XIV of 1882), ss. 540, 562, 622.* When no appeal lies to the Subordinate Judge, a second appeal to the High Court does not lie from his decision. When, therefore, a decree was passed by the Munsif upon an award, and an appeal was preferred to the Subordinate Judge, who set aside the decree of the Munsif on the ground that the award was bad, and sent the case back for the trial of the case on the merits :—*Held,* that, the award being good and valid, no appeal lay to the Subordinate Judge, and no appeal lay to the High Court against his order, and the remedy lay under s. 622, Civil Procedure Code. GANGA CHARAN ROY *v.* SASTI MANDAL (1901) **6 C. W. N. 614**

82. ——— Discretion of Court—*Appeal—Civil Procedure Code, 1882, s. 584—Indian Limitation Act (XV of 1877), s. 5.* *Held* that no second appeal will lie where a Court of first appeal has disallowed the appellant's plea of excuse for not having filed his appeal within limitation, exercising therein a judicial discretion, after consideration of the facts, and not arbitrarily. TULSA KUNWAR *v.* GAJRAJ SINGH (1902) . . **I. L. R. 25 All. 71**

83. ——— Order absolute for foreclosure—*Second Appeal—Civil Procedure Code (Act XIV of 1882), ss. 244 and 588—Decree, execution of.* When an order absolute for foreclosure of mortgaged property has been made, any question that arises afterwards as to that order absolute is not a question relating to the execution of a decree, within the meaning of s. 244 of the Civil Procedure Code. Therefore no second appeal lies from an order disposing of such a question. *Akikunissa Bibee* v. *Roop Lall Dass, I. L. R. 25 Calc. 133* referred to. TARA PADO GHOSE *v.* KAMINI DASSI (1901) . . . **I. L. R. 29 Calc. 644**

84. ——— Order as to costs. A second appeal lies, as to costs, against an appellate decree BHUGOBATI PAL *v.* MAHOMED ALI (1903)
7 C. W. N. 647

85. ——— Order dismissing suit for default of appearance—*Decree—Civil Procedure Code (Act XIV of 1882), s. 2—Remand.* An order dismissing a suit for default of appearance is not a decree within the meaning of s. 2 of the Civil Procedure Code, and therefore no first or second appeal lies therefrom. *Jagarnath Singh* v. *Budhan, I. L. R. 23 Calc. 115 ; Anwar Ali* v. *Jaffer Ali, I. L. R. 23 Calc. 827,* and *Gilkinson* v. *Subramania, I. L. R. 22 Mad. 221,* referred to. A suit was dismissed for default of appearance. On appeal by the plaintiff, the lower Appellate Court set aside the dismissal of the suit, and as a necessary consequence directed the Court of first instance to proceed to try it. *Held,* that this was not such an order as could be passed under the remand section of the Civil Procedure Code, and, the order of the Court of first instance not being appealable,

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

the lower Appellate Court acted without jurisdiction in setting aside the decision of the first Court. AMRITO LAL MUKHERJEE *v.* RAM CHANDRA ROY (1901) . . . . **I. L. R. 29 Calc. 60**

86. ———— Bengal Tenancy Act (VIII of 1885), *ss.* 106, 109A. *Civil Procedure Code (Act XIV of 1882), ss. 558, 560—Appeal from Order under s. 106 of the Bengal Tenancy Act, if lies to High Court.* Section 588 of the Code of Civil Procedure does not apply to orders under s. 106 of the Bengal Tenancy Act. *Held*, further, that s. 109A, sub-s. (*3*) of the Bengal Tenancy Act limits the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or s. 560 of the Code of Civil Procedure. *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose, 7 C. W. N. 440*, relied on. MATHURA NATH ROY CHAUDHURI *v.* BASANTA KUMAR CHAKRAVARTI (1908) . . . . **I. L. R. 36 Calc. 510**

87. ———— Order passed in appeal under Civil Procedure Code, s. 588—*Civil Procedure Code (Act XIV of 1882), ss. 493, 588—Order by Munsif, dismissing petition under s. 493 to commit for disobedience to injunction—Appeal to District Court under s. 588—Reversal of Munsif's order, and remand to Munsif for disposal—Appeal to the High Court—Maintainability of appeal.* A petition was filed in the Court of a District Munsif, under s. 493 of the Code of Civil Procedure, praying for the committal of the counter-petitioner for disobedience to an injunction of the Court. The Munsif having dismissed the petition, the petitioner appealed, under s. 588, to the District Judge, who set aside his order and remanded the petition to the Munsif. Against this order the counter-petitioner preferred an appeal to the High Court : *Held*, that every order passed in an appeal under s. 588 is final, and that no appeal lay. VENKATAPATHI NAIDU *v.* TIRUMALAI CHETTI (1901) . . **I. L. R. 24 Mad. 447**

88. ———— Order setting aside sale in execution of decree—*Bengal Tenancy Act (VIII of 1885), s. 153—Landlord and tenant—Suit for rent, order in—Order setting aside a sale—Rent decree valued at less than R100—Execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 244, 588 (16).* No appeal lies from an order passed by a District Judge, setting aside a sale in execution of an *ex parte* decree for rent valued at less than one hundred rupees. *Shyama Charan Mitter* v. *Debendra Nath Mukerjee, I. L. R. 27 Calc. 484*, followed. *Semble*—An order setting aside a sale is as much an order relating to the execution of a decree as an order confirming a sale. MONMOHINI DASI *v.* LAKHINARAIN CHANDRA (1900) **I. L. R. 28 Calc. 116**

89. ———— *Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 311, 312, 588—Fraud, allegation of.* No second appeal lies from an order setting aside a sale under s. 312, Code of Civil Procedure, although an allegation of fraud is made

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1. ORDERS SUBJECT OR NOT TO APPEAL —*contd.*

in the application for setting aside the sale, when no attempt is made to substantiate the allegation. *Rojoni Kant Bagchi* v. *Hossain Uddin Ahmed, 4 C. W. N. 538*, discussed and explained. *Nava Kumar Roy* v. *Golam Chunder Dey, I. L. R., 18 Calc. 422 ; Abhoya Dassi* v. *Pudmo Luchun Mandol, I. L. R. 22 Calc. 802*, and *Daivanayogam Pillai* v. *Rangusami Aiyar, I. L. R. 19 Mad. 29*, followed. UMAKANTA ROY *v.* DINO NATH SANYAL (1900) . . . **I. L. R. 28 Calc. 4 ; s.c. 5 C. W. N. 124**

90. ———— Rate of rent—*Bengal Tenancy Act (VIII of 1885), s. 153—Appeal—Second appeal—Rent suit—Pleadings.* In a suit for rent for less than R100, the defendant pleaded that he was the tenant, not of the plantiffs but of some other persons, at a rate lower than that claimed in the suit. No issue was raised as to the rate of rent, and the lower Court merely decided that the defendant was plaintiffs' tenant, and decreed the suit. *Held*, that the question of the rate of rent not having been raised and decided, no second appeal lay. BAIDYA NATH BAHARA *v.* DHON KRISHNA SIRCAR (1900) . . **5 C. W. N. 515**

91. ———— Appeal., erroenous dismissal of—*Civil Procedure Code (Act XIV of 1882), s. 548.*—A second appeal lies from an order of the lower Appellate Court erroneously dismissing an appeal on the ground that no appeal lay, provided a second appeal is otherwise entertainable having regard to the nature of the original suit. *Venkatarayadu* v. *Rangayya Appa Rau, I. L. R. 21 Mad. 152*, distinguished and dissented from. MATHURA MOHAN PAL *v.* AMIRUDDI SHILALOO (1904) **8 C. W. N. 64**

92. ———— Award, decree in accordance with—*Arbitration—Inquiry into grounds for setting aside award—Objection to award—Civil Procedure Code (Act XIV of 1882), ss. 521, 522, 582, 588.* A second appeal lies from a decree of a lower Appellate Court made in accordance with an award by an arbitrator, to whom the case had been referred by the first Court, and whose award the first Court had set aside. *Paresh Nath Dey* v. *Nobin Chandra Dutt, 12 W. R. 93*, and *Rughubar Dayal* v. *Maina Koer, 12 C. L. R. 562*, followed. *Naurang Singh* v. *Sadapal Singh, I. L. R. 1 All. 8*, dissented from. SHYAMA CHARAN PRAMANIK *v.* PROLHAD DURWAN (1904) . . . . . **8 C. W. N. 390**

93. ———— *Bengal Tenancy Act (VIII of 1885), ss. 106, 109A—The words "a decision settling a rent"—Evidence Act (I of 1872), s. 21—Sale certificate, statement in—Admission.* The words "a decision settling a rent" in s. 109A of the Bengal Tenancy Act do not mean and include any decision upon the question what is or what ought to be the rent. They mean only a decision settling a fair and equitable rent in place of the existing rent, and the words do not include a decision determining what the existing rent is. *Mathura Mohan Lahiri*

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SPECIAL OR SECOND APPEAL—*contd.*

1. ORDERS SUBJECT OR NOT TO APPEAL —*concld.*

v. *Uma Sundari Debi, I. L. R. 25 Calc. 34*, referred to. A second appeal lies to the High Court, from a decision of a Special Judge reversing or affirming a decision of a Settlement Officer, who decided under s. 106 of the Bengal Tenancy Act what was the rent payable by the plaintiff, it not being "a decision settling a rent" within the meaning of s. 109A of the Bengal Tenancy Act. Any statement, as to rent payable for a holding, made by a person in a sale certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission, cannot be used as evidence on his behalf, as such a statement does not come within the exception to s. 21 of the Evidence Act. RAMANI PERSAD NARAIN SINGH *v.* MAHANTH ADAIYA GOSSAIN (1904) **I. L. R. 31 Calc. 380**

94. ——— Order setting aside a sale —Fraud, allegation of—*Civil Procedure Code (Act XIV of 1882), ss. 241, 244 (c), 290, 311, 312, and 588—Non-compliance with the provisions of s. 290 of the Code of Civil Procedure—Limitation —Date of sale.* Where an application is made to set aside a sale, the main basis of which is fraud, such an application comes under s. 241 of the Civil Procedure Code; and a second appeal lies to the High Court against an order passed by the Court of first instance setting aside a sale on the ground of fraud, although the Lower Appellate Court found that there was no fraud in the case. *Umakanto Roy* v. *Dino Nath Sanyal, I. L. R. 28 Calc. 4*, distinguished. *Bhuban Mohun Pal* v. *Nunda Lal Dey, I. L. R. 26 Calc. 234*, and *Hira Lal Ghose* v. *Chandra Kanto Ghose, I. L. R. 26 Calc. 539*, followed. Mere noncompliance with the provisions of s. 220 of the Civil Procedure Code in conducting a sale does not *ipso facto* make the sale a nullity; therefore limitation would run in such a case from the date of the sale. *Gobind Lal Roy* v. *Ram Janam Misser, I. L. R. 21 Calc. 70 : L. R. 21 I. A. 165*, and *Tasaduk Rasul Khan* v. *Ahmed Husain, I. L. R. 21 Calc. 66 : L. R. 20 I. A. 176*, referred to. KOKIL SINGH *v.* EDAL SINGH (1904) . . . **I. L. R. 31 Calc. 385**

95. ——— Order passed in execution—*Chutia Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879, as amended by Bengal Act V of 1903)*—No second appeal lies from an order passed in execution under the Chutia Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879), as amended by Bengal Act V of 1903. ISWAR LAL SINGH *v.* JAGOO SAHU (1905) **I. L. R. 33 Calc. 378**

96. ——— *Suit of the nature cognizable in the Court of Small Causes—Execution of decree.* No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes. *Shyama Charan Mitter v. Debendro Nath Mukerji, I. L. R. 27 Calc. 484*, followed. NARAYAN *v.* NAGINDAS (1905) **I. L. R. 30 Bom. 113**

SPECIAL OR SECOND APPEAL—*contd.*

2. RIGHT OF APPEAL.

1. ——— Appeal by one defendant against another. A special appeal cannot be entertained by one defendant against another. RAMESSUR GHOSE *v.* AZEEM JOARDAR **17 W. R. 373**

2. ——— Right of parties not appealing from first Court's decisions—*Ground of appeal.* Parties who did not appeal from the decision of the first Court cannot bring a special appeal against the decision of the lower Appellate Court on the ground that the decision of the first Court prejudiced their rights. BOYKANT RAM SAHOO *v.* POORNO CHUNDER DASS **W. R. 1864, Act X, 97**

3. ——— Right of defendant not appearing as respondent on appeal. A defendant who obtains a judgment in his favour in the Court of first instance, and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a re-hearing, may, under Act X of 1877, present a second appeal against the decree of the lower Appellate Court, *Ex parte* MODALATHA . . **I. L. R. 2 Mad. 75**

4. ——— Party dissatisfied with findings in judgment—*Civil Procedure Code (Act X of 1877), ss. 540 and 584.* An appellant who has obtained a decree setting aside the decision of the Court of first instance is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the lower Appellate Court, an appeal from an appellate decree under s. 584 being strictly restricted to matters contained in the decree alone KOYLASH CHUNDER KOOSARI *v.* RAM LALL NAG **I. L. R. 6 Calc. 206**

3. ADMISSION OR SUMMARY REJECTION OF APPEAL.

1. ——— Summary rejection of memorandum—*Civil Procedure Code, ss. 54, 543, 551, 582, 584—Reasons for rejection. Per* EDGE, *C.J.* —A Judge to whom a memorandum of appeal from an appellate decree is presented for admission is entitled to consider whether any of the grounds mentioned in s. 584 of the Code of Civil Procedure in fact exist and apply to the case before him, and, if they do not, to reject the memorandum of appeal summarily. S. 551 of the Code of Civil Procedure applies to appeals which have been admitted. *Per* AIKMAN, *J.*—When a memorandum of appeal is summarily rejected, whether under s. 543 or under s. 54 read with s. 582 of the Code of Civil Procedure, the reasons for such rejection should be recorded: *sed quære*, whether, unless it appears from the memorandum of appeal taken by itself that a second appeal does not lie, a second appeal can be summarily rejected, and should not rather be dealt with under s. 551 of the Code. *Semble:* That a ground of appeal to the effect that the lower Appellate Court has misconstructed

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SPECIAL OR SECOND APPEAL—*contd.*

3. ADMISSION OF SUMMARY REJECTION OF APPEAL—*concld.*

a document is not one of the grounds of second appeal contemplated by s. 584 of the Code of Civil Procedure. RUDR PRASAD *v.* BAIJNATH **I. L. R. 15 All. 367**

2. ——— **Confirmation of decree in effect**—*Civil Procedure Code (1882), s. 551.* The decision of the Full Bench in *Puhuvayyangar* v. *Seshayyangar, I. L. R. 18 Mad. 214,* where it was held that the jurisdiction of a Court of first instance to amend a decree under s. 206 of the Civil Procedure Code is ousted by the confirmation of that decree on appeal, applies equally to second appeals dismissed under s. 551 of the Code and to second appeals tried after notice to the respondent. MUNISAMI NAIDU *v.* MUNISAMI REDDI **I. L. R. 22 Mad. 293**

4. SMALL CAUSE COURT SUITS.

(*a*) GENERAL CASES.

1. ——— **Frame of suit**—*Civil Procedure Code, s. 586.* For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance. KIAM-UD-DIN *v.* RAJJO **I. L. R. 11 All. 13**

2. ——— **Cases in which appeal is taken away**—*Act XXIII of 1861, s. 27—Civil Procedure Code, 1859, s. 387.* S. 27, Act XXIII of 1861, took away special appeal in all those cases that were expressly alluded to therein, thus overriding s. 387, Act VIII of 1859. The provision applied in execution of decree, as well as in suits themselves, and to suits and proceedings in execution commenced before 1861, or even before 1859. RAM JADUB CHATTERJEE *v.* RASH MONEE DOSSEE **8 W. R. 321**

MOBARUKOONISSA BEGUM *v.* OZEER JEMADAR. **8 W. R. 107**

SOORJO COOMAR SURMA ROY *v.* KRISTO COOMAR CHOWDHRY. **12 B. L. R. 224 : 14 W. R. F. B. 30**

3. ——— **Order in execution of decree**—*Suit brought before Act XLII of 1860.* No special appeal lay from a regular appeal from an order made in execution of a decree passed in a suit of a nature cognizable by a Small Cause Court, though the suit was instituted before the passing of Act XLII of 1860. GORA CHAND MISSER *v.* BOYKANTO NARAIN SINGH **12 B. L. R. F. B. 261 : 20 W. R. 421**

BHICHUK SINGH *v.* NAGESHAR NATH. **I. L. R. 2 All. 112**

4. ——— *Act XXIII of 1861, s. 27—Execution proceedings arising out of decision in regular appeal.* S. 27, Act XXIII of

SPECIAL OE SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*a*) GENERAL CASES—*contd.*

1861, barred a special appeal in execution-proceedings arising out of decisions passed on regular appeal in suits of a nature cognizable by Courts of Small Causes. ANUND CHUNDER ROY *v.* SIDHY GOPAL MISSER . . . . . **8 W. R. 112**

DEBEE PERSHAD SINGH *v.* DELAWAR ALI **12 W. R. 86**

5. ——— *Civil Procedure Code, s. 586—Orders in execution of decrees in Small Cause suits.* No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed R500 AITHALA *v.* SUBBANNA . **I. L. R. 12 Mad. 116**

6. ——— *Suit of the nature cognizable in Court of Small Causes—Civil Procedure Code, 1882, ss. 586, 622—Superintendence of High Court.* For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. Therefore where execution was applied for in the Munsif's Court in respect of a sum of R422-14-0, the value of the matter in dispute in the original suit (which was of the nature cognizable by a Court of Small Causes) having been above R500 the Munsif's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court. *Held,* that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge. NAZAR HUSAIN *v.* KESRI MAL **I. L. R. 12 All. 581**

7. ——— *Suit of the nature cognizable in Courts of Small Causes—Transfer of decree—Civil Procedure Code, ss. 223, 228, 586.* Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject matter of the suit does not exceed R500 in value, no second appeal will lie in respect of an order made in execution-proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. *Nazar Husain* v. *Kesri Mal, I. L. R. 12 All. 581,* approved. HARAKH *v.* RAM SARUP . **I. L. R. 12 All. 579**

8. ——— *Order in execution of decree in suit cognizable by Small Cause Court.* Where the original suit is a suit of the nature cognizable in Courts of Small Causes and the subject-matter of the suit does not exceed R500 in value, no second appeal will lie in respect of an order made in execution-proceedings relating thereto. *Harakh* v. *Ram Sarup, I. L. R. 12 All. 579,* approved. *Sri Bullov Bhattacharji* v. *Baburam Chattopadhya, I. L. R. 11 Calc. 169,* and *Arithala*

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*a*) GENERAL CASES—*contd.*

v. *Subbanna, I. L. R., 12 Mad. 116*, referred to. DIN DAYAL *v.* PATRA KHAN
I. L. R. 18 All. 481

9. ——— *Suit of nature cognizable in Courts of Small Causes—Execution of decree—Transfer of decree for execution—Civil Procedure Code (Act XIV of 1882), ss. 223, 224, 228, 586.* A suit not exceeding R500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes, and that Court passed a decree and transferred it for execution to the Munsif under ss. 223 and 224 of the Civil Procedure Code : the Munsif passed an order in execution, and the order was confirmed in appeal. *Held*, that the words "suit of the nature cognizable in Courts of Small Causes" in s. 586 of the Code is equally applicable, whether the suit be brought in a Court of Small Causes or in any other Court, that s. 586 controls s. 228 in a case of this kind, and no second appeal would lie from the Munsif's order. *Harakh* v. *Ram Sarup I. L. R. 12 All. 579*, cited and approved. LALA KANDHA PERSHAD *v.* LALA LAL BEHARY LAL
I. L. R. 25 Calc. 872

See SHYAMA CHARAN MITTER *v.* DEBENDRA NATH MUKERJEE . . **I. L. R. 27 Calc. 484**
4 C. W. N. 269

10. ——— **Case wrongly decided to be not cognizable by Civil Court**—*Act XXIII of 1861, s. 27.* S. 27, Act XXIII of 1861, which barred a special appeal in suits below R500, as being of a nature cognizable by a Small Cause Court did not apply to a case in which the lower Appellate Court had wrongly decided that the case was not cognizable by any Civil Court. GUREEBOOLLAH *v.* SYEFOOLLAH . . . . . **7 W. R. 41**

11. ——— **Suit instituted in ordinary Civil Court, though cognizable by Small Cause Court**—*Civil Procedure Code, 1877, s. 586—Questions incidentally arising.* S. 586 of the Code of Civil Procedure precludes a second appeal in a suit for damages under R500, although the suit has been instituted in the District Munsif's Court and not in a Court of Small Causes, and although a question of title has been raised by the defendant and decided. *Per* MUTTUSAMI AYYAR, *J.* —The question what is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Civil Procedure Code has reference to the mode of adjudication, and not to the forum, and the fact that the suit is instituted in the District Munsif's Court, and not in a Court of summary jurisdiction makes no difference for the purposes of that section. If the matter adjudicated on in a suit is only incidentally in issue or cognizable, the adjudication is final, whether by a Court of concurrent or limited jurisdiction only for the purpose and object of that suit. MANAPPA MUDALI *v.* MC CARTHY . . . . **I. L. R. 3 Mad. 192**

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*a*) GENERAL CASES—*contd.*

12. ——— *Civil Procedure Code, 1882, s. 586.* Where a suit, though one cognizable by a Small Cause Court, was instituted and dealt with in the ordinary Civil Courts, it was contended that a second appeal would lie. *Held*, that no second appeal would lie. A small cause is such wherever it is instituted, and, the nature of the cause not being variable in any way according to the Court in which it is brought, the circumstance that it has been instituted in an ordinary Civil Court and dealt with there would not for that reason admit of a second appeal which in such a case is expressly excluded by s. 586 of the Code of Civil Procedure (Act XIV of 1882). KALIAN DAYAL *v.* KALIAN NARER
I. L. R. 9 Bom. 259

13. ——— **Suit transferred to regular side**—*Civil Procedure Code, s. 585—Provincial Small Cause Courts Act (IX of 1887), s. 23.* A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of the Civil Procedure Code, s. 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under the Provincial Small Cause Courts Act, s. 23, on the ground that the suit involved questions of title. A second appeal therefore does not lie in such a case. MUTTUKARUPPAN *v.* SELLAN
I. L. R. 15 Mad. 98

14. ——— **Question of Jurisdiction**—*Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882), ss. 586, 646B—Civil Procedure Code Amendment Act (VII of 1888), s. 60.* Notwithstanding s. 16 of the Provincial Small Cause Courts Act, the High Court has, on a case being submitted to it under s. 646B of the Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction :—*Held*, on a second appeal to the High Court, that s. 646B of the Civil Procedure Code must be read with s. 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken in appeal to the District Court : both parties having submitted to the jurisdiction, it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void. SURESH CHUNDER MAITRA *v.* KRISTO RANGINI DASI . . **I. L. R. 21 Calc. 249**

15. ——— **Character of the suit**—*Small Cause suit—Civil Procedure Code (Act XIV of 1882), s. 586.* In determining whether no second appeal lies under the provisions of s. 586 of the Civil Procedure Code (Act XIV of 1882), the original character of the suit is to be regarded rather than the character it may subsequently

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*a*) GENERAL CASES—*concld.*

assume by operation of the findings of the Court. *Ramchandra Gopal v. Sadashib Narayan*, (*1882*) *P. J. 219*, followed. LAKSHMANDAS *v.* ANNA LANE (1904). . . . **I. L. R. 32 Bom. 356**

(*b*) ACCOUNT.

16. ——— Suit for balance of account —*Act XXIII of 1861, s. 27—Suit in Civil Court in local jurisdiction of Small Cause Court.* Where a suit for a balance due on account of rents collected from the plaintiff's zamindaris by the defendant's father acting as agent of the plaintiffs for an amount under R500 was entertained by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lay to the High Court, s. 27 of Act XXIII of 1861 only applying to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to try it. DYEBUKEE NUNDUN SEN *v.* MUDDEE MUTTY GOOPTA . **I. L. R. 1 Calc. 123 : 24 W. R. 478**

17. ——— Suit against agent for account—*Suit for account, or, in default, for damages.* Plaintiff, a talukdar, sued her late husband's agent for the delivery of certain account papers and documents, for an account of his agency, and, in default of account, for R500 as damages. *Held*, that the suit was of a nature cognizable by a Small Cause Court, and that consequently no special appeal would lie. HURRI NARAIN ROY CHOWDHURY *v.* JOY DURGA DASSI . . **2 C. L. R. 17**

(*c*) AWARD.

18. ——— Decision on award—*Award of cognizable nature and value.* When the subject-matter of an award is as to its nature and value cognizable by a Court of Small Causes, no special appeal will lie to the High Court against the decree of an ordinary Civil Court in respect of such award. BANU *v.* NARAYAN SAHU
4 B. L. R. Ap. 82 : 13 W. R. 233

19. ——— Suit on award—*Award dealing with matters not within cognizance of Small Cause Court—Act XXIII of 1861, s. 27.* *G* and *R* referred to arbitration disputes between them regarding the partition of their paternal estate. The award found that a sum of R338 was due by *G* to *R*, and contained other provisions which could not be dealt with by a suit in a Small Cause Court. *Held*, that a suit to recover the money due under the award could not be brought in the Small Cause Court, and that s. 97, Act XXIII of 1861, therefore did not bar a special appeal. GAURI SAHAI *v.* RAM SAHAI
7 N. W. 157

(*d*) CONTRACT.

20. ——— Suit to recover collections from co-sharer—*Agreement to pay share to other co sharers.* A suit by a co-sharer to recover from the defendant collections which are in his charge and which he is under agreement to pay to the other co-sharers is a suit for due under a contract, and, if less than R500, is cognizable by a Small Cause Court. ALI AHMED *v.* OODHRAJ RAM
10 W. R. 79

21. ——— Suit against agent for money—*Money received for plaintiff—Act XXIII of 1861, s. 27.* In a suit to recover the balance, unaccounted for, of the plaintiff's money in the hands of the defendant, who had been employed as a law agent on a salary to conduct and look after the plaintiff's law suits and to receive and disburse moneys connected with such suits, it was *held* that the case might be brought under the terms "claim for money due under a contract" in Act XI of 1865 s, 6, and that therefore under Act XXIII of 1861, s. 27, a special appeal would not lie. JOOGUL KISHORE ROY *v.* RUGHOO NATH SEAL **20 W. R. 4**

22. ——— Suit on implied contract—*Suit against co-sharers for share of rent—Civil Procedure Code, 1871, s. 586.* *A* was the proprietor of 9 annas of a mouzah, *B* and his family of 1 anna and *C* and others of the remaining 6 annas. *B* and his family, having occupied and enjoyed, to the exclusion of their co-shareholders, 54 bighas of the mouzah, failed to pay any rent in respect of such occupation. *A* instituted a suit against them (making *C* and the other holders of the 6 annas share defendants to the suit) to recover the sum of R412-8 as the sum justly due to him after making all proper deductions, including as well the share of the rent of the 54 bighas to which the 6 annas share-holders were entitled as also the share which *B* and his family were entitled to retain as proprietors of a 1 anna share. *Held*, that the facts showed an implied contract on the part of *B* and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them : and that, inasmuch as the total amount sought to be recovered in the suit by *A* did not exceed R500, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 586 of the Code of Civil Procedure. ASMAN SINGH *v.* DOORGA ROY . **I. L. R. 6 Calc. 284 : 7 C. L. R. 94**

23. ——— *Contract Act* (*IX of 1872*), *ss. 69, 70—Small Cause Court Act* (*XI of 1865*), *s. 6—Patni rent—Implied contract.* The plaintiff, a purchaser in execution of a patni right, brought a suit in a Munsif's Court to recover from the defendant, a former holder of the patni right, a sum of money which she had been compelled to pay to the zamindar for rent which had accrued due prior to the date of her purchase. The Munsif gave the plaintiff a decree, which, however, on appeal to the District Judge, was reversed. On appeal to the High Court :—*Held*, that, assuming the suit to lie independently of any express promise, it was one cognizable by a Court of Small Causes and no appeal

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*d*) CONTRACT—*concld.*

would therefore lie. *Rambux Chittangeo* v. *Madhoosoodun Paul Chowdhry, B. L. R. Sup. Vol. 675 : 7 W. R. 377*, distinguished. Cases falling within the provisions of ss. 69 and 70 of the Contract Act are cognizable by a Court of Small Causes under s. 6 of Act XI of 1865. *Nath Prasad* v. *Baij Nath, I. L. R. 3 All. 66*, approved. KRISHNO KAMINI CHOWDHRANI *v.* GOPI MOHUN GHOSE HAZRA
I. L. R. 15 Calc. 652

24. ———— *Mofussil Small Cause Courts Act, s. 6—Civil Procedure Code, s. 586—Suit against sons of Hindu debtor, on a bond executed by father, not cognizable by Small Cause Court—Hindu law—Liability of son for debt of living father.* In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. *Held*, by the Full Bench, that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. *Held*, further, by the Divisional Bench that the decree against the sons was bad. NARASINGHA *v.* SUBBA
I. L. R. 12 Mad. 139

25. ———— *Civil Procedure Code, s. 586—Provincial Small Cause Courts Act, Sch. II, Art. 41—Suit relating to contract—Contract Act, s. 69—Suit for contribution—Joint property.* Lands of which part belongs to the plaintiffs and part to the defendant were comprised in a pottah which ran in the names of the plaintiffs and another. The defendant's share of the assessment fell into arrear, and was collected from the plaintiffs, who now sued to recover R200, being the amount so paid together with interest. *Held*, that the suit was of a nature cognizable by a Court of Small Causes, and therefore no second appeal lay. *Krishno Kamini Chowdhrani* v. *Gopi Mohun Ghose Hazra, I. L. R. 15 Calc. 652*, followed. SRINIVASA *v.* SIVAKOLUNDU
I. L. R. 12 Mad. 349

(*e*) CONTRIBUTION.

26. ———— Suit for contribution for revenue paid to save estate. A claim for money below R500 paid as revenue by one partner in an estate on account of another, in order to save the whole estate from sale, arises under an implied contract between them, and therefore is cognizable by a Small Cause Court. No special appeal lay in such a case under s. 27, Act XXIII of 1861. RAM MONEY DOSSIA *v.* PEAREE MOHUN MOZOOMDAR
6 W. R. 325

27. ———— Civil Procedure Code (Act XIV of 1882), s. 586. In suits for contribution no second appeal will lie under s. 586 of the Code of Civil Procedure if the subject-matter of the suit is less than R500. In determining whether second appeals lie in such cases in execution-proceedings, the amount of subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration. MAVULA AMMAL *v.* MAVULA MARACOIR (1906)
I. L. R. 30 Mad. 212

(*f*) CUSTOMARY PAYMENT.

28. ———— Suit by zamindar against patnidar for dâk expenses—*Act XXIII of 1861, s. 27.* A case in which a zamindar sues a patnidar for dâk expenses, according to his patni jumma, is of a nature cognizable by a Court of Small Causes ; and as such, by s. 27, Act XXIII of 1861, no special appeal will lie. DHERAJ MAHTAB CHUND BAHADOOR *v.* RADHA BINODE CHOWDHRY
8 W. R. 517

ERSKINE *v.* TRILOCHUN CHATTERJEE.
9 W. R. 518

(*g*) DAMAGES.

29. ———— Suit for damages—*Damages to moveable or immoveable property.* No special appeal lies in a suit for damages below R500, whether the damages are on account of moveable or immoveable property. BHEENUCK LALL MAHTOON *v.* RUNG LALL MAHTON . **11 W. R. 369**

30. ———— Suit where claim for damages exceeds R500, but decree is given for less than R500—*Act XXIII of 1861, s. 27.* Where the damages claimed in a suit exceeded R500, and the Court gave the plaintiff less than R500 damages :—*Held*, that the right of appeal was not taken away by Act XXIII of 1861, s. 27. NEELMONEE SINGH DEO *v.* GORDON, STUART & CO.
1 Ind. Jur. N. S. 356 : 6 W. R. 152

31. ———— Suit for damages for illegal arrest—*Proceedings in execution of decree against surety.* A decree-holder having taken out execution the judgment-debtor paid a sum of money in satisfaction of the decree and got a surety to execute a security-bond on his behalf. The decree-holder thereupon took out proceedings under s. 204, Act VIII of 1859, had the surety arrested, and realized from him the amount due under the decree. The surety then brought an action to recover damages for illegal arrest, the sum claimed not exceeding R500. *Held*, that the suit was cognizable by a Small Cause Court, and that under s. 27, Act XXIII of 1861, no appeal would lie. TOOLSEE RAM *v.* NUND KISHORE LALL . . **12 W. R. 471**

32. ———— Suit for damages for assault—*Absecne of pecuniary injury.* No suit for damages occasioned by personal injury will lie in the Small Cause Courts, unless actual pecuniary loss has resulted from such injury to the plaintiff. When there is no such pecuniary loss, the suit for damages will lie in the ordinary Civil Courts, and a

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*g*) DAMAGES—*contd.*

special appeal will lie to the High Court, although the damages claimed are below R500. ALI BUKSH *v.* SAMIRUDDIN
4 B. L. R. A. C. 31 : 12 W. R. 477

RAJ CHUNDER CHUCKERBUTTY *v.* PUNCHANUN SURMAH CHOWDHRY . . . **4 W. R. 7**

33. ——— Suit for damages for personal injury—*Actual pecuniary damage.* The plaintiff, in a suit for damages laid at R200, claimed R50 on account of medical expenses caused by an assault committed on him by the defendants, R50 as the costs of a criminal prosecution which he had brought against them, and R100 for injury to his reputation and feelings. *Held*, that, inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to s. 6, proviso (3), of the Mofussil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under s. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Gunga Narain Moitro* v. *Gudadhur Chowdhry, 13 W. R. 434*, referred to. JIWA RAM SINGH *v.* BHOLA
I. L. R. 10 All. 49

34. ——— Suit for money paid by unsuccessful claimant to attached property—*Civil Procedure Code, 1859, s. 246.* A suit for money paid by an unsuccessful claimant, under s. 246, Act VIII of 1859, in order to save from sale his share of an estate which had been attached in execution of a decree, is in reality a suit for damages, and (the value being below R500) is in the nature of a Small Cause Court suit in which no special appeal will lie. POORSUTTUM CHUNDER *v.* GOUR SOONDER PANDEY . . . **18 W. R. 283**

35. ——— Suit to recover money attached—*Removal of attachment on wrongful objection to attachment of property. C*, a decree-holder, alleging that *K*, a lambardar of a village, had objected to the attachment in his hands of money due as profits to the judgment-debtor, a co-sharer, on the ground that he had paid such money to the judgment-debtor before the attachment, by reason whereof the attachment had been removed, and that such objection was dishonest and wrongful, inasmuch as such money was still in *K's* hands, sued *K* for the amount of such money and the costs of the attachment proceedings. *Held*, that the suit was one for damages, and, the amount claimed not exceeding R500, one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie. KALIAN SINGH *v.* CHUNNI LAL . . . **I. L. R. 6 All. 10**

36. ——— Suit for money lent to redeem mortgage—*Suit for damages as on breach of contract—Act XXIII of 1861, s. 27.* Defendants borrowed a sum of money below R500 from the plaintiff, with a view to redeem a mortgage on

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*g*) DAMAGES—*contd.*

condition that, after redemption, he would sell the property to the plaintiff. He did not, however, redeem the property. *Held*, that plaintiff's suit to recover his dues was one for damages as upon a breach of contract in which, under s. 27, Act XXIII of 1861, no special appeal would lie. KHULLEEL MAHOMED *v.* FURZAM ALLY . **12 W. R. 269**

37. ——— Suit for damages for breach of contract controlling terms of decree. No special appeal lies in a suit for damages for breach of a private arrangement by which the parties agree to control the terms of a decree, when the amount is within the jurisdiction of the Small Cause Court. CHUNDY PERSAD DOSS *v.* KASSEENATH DOSS
W. R. 1864, 346

38. ——— Suit for damages to crops by inundation—*Omission to cut bund—Act XLII of 1860, s. 3.* Under s. 3, Act XLII of 1860, a suit for damages of any kind below R500 (*e.g.*, a suit for damages, for not cutting through a bund whereby plaintiff's crops were destroyed in consequence of accumulation of water) was cognizable by a Small Cause Court; and consequently, under s. 27, Act XXIII of 1861, no special appeal lay in such a case. GOPEENATH PAUL *v.* GEORGE
6 W. R. 7

39. ——— Suit for damages for inadequate sale of decree—*Act XXIII of 1861, s. 27.* No special appeal lay under s. 27, Act XXIII of 1861, for damages for inadequate sale of a decree. KRISTOMONEE THAKOOR *v.* BISHAMBHUR DOSS
5 W. R. 215

40. ——— Suit for defamation of character—*Absence of pecuniary injury.* Suits for defamation of character, where there has not been any actual pecuniary loss, were not, under cl. 3, s. 6, Act XI of 1865, cognizable by the Small Cause Courts, and therefore in such a suit a special appeal would lie under Act XXIII of 1861, s. 27. BHAIRAB CHANDRA CHUCKERBUTTY *v.* MAHENDRA CHANDRA CHUCKERBUTTY
4 B. L. R. Ap. 59 : 13 W. R. 118

41. ——— ——— *Absence of pecuniary damages. Quœre :* Before a suit can lie in a case of defamation of character, is it necessary to presume that actual pecuniary damage has resulted? DHURMO DOSS KOONDOO *v.* KOYLASH KAMINEE DOSSIA . . . . . **12 W. R. 372**

42. ——— Suit for malicious prosecution—*Absence of pecuniary damage.* The defendant laid a charge of assault against the plaintiff before the Magistrate, and the charge was heard and dismissed. The plaintiff then brought a suit for damages occasioned to his reputation by the false and malicious charge, laying the damages at R150; but no actual pecuniary loss in consequence of the charge was alleged. *Held*, that it was not a suit cognizable by the Small Cause Court, and therefore

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*g*) DAMAGES—*contd.*

a special appeal would lie. PRANKRISHNA BANERJEE *v.* NADIAR CHAND CHATTERJEE **4 B. L. R. A. C. 35 note : 10 W. R. 115**

43. ———— *Injury to reputation.* The defendant charged the plaintiff with plotting to murder him, and the case came before the Magistrate and was dismissed. The plaintiff then sued in the Munsif's Court for damages on account of the injury "to his reputation and pain of body and mind" caused by the malicious prosecution, and laid the damages at R100. A special appeal to the High Court was dismissed on the ground that it was a suit cognizable by a Small Cause Court. NADIAR CHAND ROY *v.* BAIKANT NATH MISSER . **4 B. L. R. A. C. 33 note**

44. ———— **Suit for damages for loss of reputation and business.** A suit for damages not exceeding R500 on account partly for injury to reputation and partly for loss in business and professional position was *held* to come within the provisions of s. 6, Act XI of 1865, and was not open to special appeal. BROJO SOONDUR BHADOOREE *v.* ESHAN CHUNDER ROY . . **15 W. R. 179**

45. ———— **Suit for money paid as rent to save estate from sale**—*Enforced payment where rent had been already paid—Act XXIII of 1861, s. 27—Act XI of 1865, s. 6—Act X of 1859, s. 32, cl. 2.* The plaintiff, the holder of a patni talukh, by an arrangement with the defendants, his zamindars, paid the Government revenue and the road-cess tax for the year 1874, and then tendered the balance of the rent for that year to the defendants, but they refused to accept it; and he therefore deposited it in the Munsif's Court in accordance with s. 46 of Bengal Act VII of 1869. One of the defendants then took proceedings under Bengal Regulation VIII of 1819 to recover his share of the rent, and, notwithstanding the protest of the plaintiff that the rent had been already paid, obtained an order for the sale of the tenure, and to prevent the sale the plaintiff had to pay the sum claimed for rent. In a suit brought to recover that amount with interest:—*Held*, that it was a suit cognizable by a Court of Small Causes under s. 6 of Act XI of 1865, and therefore a special appeal was barred by s. 27, Act XXIII of 1861. It was not a suit for "damages on account of illegal exaction of rent" within the meaning of cl. 2, s. 23, of Act X of 1859. KRISHNA KISHORE SHAHA *v.* BIRESHUR MOZOOMDAR . **I. L. R. 4 Calc. 595 : 3 C. L. R. 177**

46. ———— **Suit for payments made on account of rent**—*Refusal to allow for such payments in rent account.* A suit to recover certain cash and the value of certain grain which the defendants had persuaded the plaintiff to pay them, engaging that the lambardar would allow the same in his account (as part payment of rent), but which the lambardar refused to do, is practically a suit for

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*g*) DAMAGES—*concld.*

damages, and, the amount in question being cognizable by a Small Cause Court, no special appeal can be entertained. YACOOB ALI *v.* KOOER SINGH **2 N. W. 111**

47. ———— **Suit to recover a share of malikana**—*Act XXIII of 1861, s. 27.* A suit to recover a share of malikana, which the defendant had realized from the Collector, is a suit for recovery of a sum of money which has been taken away by the defendants to the damage of the plaintiff, and is therefore cognizable by the Small Cause Court; and under s. 27, Act XXIII of 1861, no special appeal lies from a judgment passed in appeal in such a suit. LASMANIA DEBIA *v.* MAHOMED HAFEZULLA **3 B. L. R. Ap. 96**

S. C. RASMONEE DEBIA *v.* MAHOMED HAFEZOOLLAH . . . . . **12 W. R. 29**

48. ———— **Suit for profits of land**—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 31. Civil Procedure Code, s. 586.* The plaintiff sued on the Small Cause side of a Subordinate Court before the Provincial Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit R500, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree, which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under the Civil Procedure Code, s. 586. *Held*, that the objection should prevail, since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1887. ANNAMALAI *v.* SUBRAMANYAN **I. L. R. 15 Mad. 298**

(*h*) DEBTS.

49. ———— **Suit for division of debt due to estate of deceased.** *Held*, that a suit for division of debts due to the deceased's estate (the sum being ascertained) was cognizable by a Small Cause Court, and no special appeal lay to the High Court. OODEYTA *v.* GOPAL . **2 Agra 234**

(*i*) DECLARATORY DECREE.

50. ———— **Suit to have property made over to plaintiff on an adjusted account.** Where, on an adjusted account between two parties, one claims from the other some money and some grain which are shown to be due to him and asks in effect that they may be made over to

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*i*) DECLARATORY DECREE—*concld.*

him, the suit is not a suit for declaratory decree and a special appeal does not lie in such a suit to the High Court under s. 27, Act XXIII of 1861. BULDEO SINGH *v.* RAM SURUN LALL **25 W. R. 234**

(*j*) DECREE.

51. ——— **Decree for land under a compromise in a suit cognizable by a Small Cause Court**—*Act XXIII of 1861, s. 27.* In a suit for recovery of a sum of money below R500, the parties entered into a compromise, whereby the defendant made over a certain piece of land in lieu of the money claimed, and a decree was passed accordingly. In execution of the decree, disputes arose between the parties. Upon special appeal by the judgment-debtor to the High Court:—*Held*, that under s. 27, Act XXIII of 1861, no special appeal lay to the High Court. TALAN BIBI *v.* TENU BIBI **6 B. L. R. Ap. 82 : 15 W. R. 65**

(*k*) IMMOVEABLE PROPERTY.

52. ——— **Suit for kattubadi and karnam's emoluments**—*Civil Procedure Code, 1882, s. 586—Provincial Small Cause Courts Act (IX of 1887), Sch I, Art. 13.* Where plaintiff sued for arrears of kattubadi and karnam's emoluments, the value of the suit being less than R500 :—*Held*, that kattubadi and karnam's emoluments are neither a charge on, nor interest in, immoveable property, and that no second appeal lay. MULLAPUDI BALAKRISHNAYYA *v.* VENKATANARASIMHA APPA RAU . . **I. L. R. 19 Mad. 329**

See VENKATARAMA DOSS *v.* MAHARAJAH OF VIZIANAGRAM . . . **I. L. R. 19 Mad. 103**

(*l*) MAINTENANCE.

53. ——— **Suit by widow for maintenance**—*Act XXIII of 1861, s. 27.* A Hindu widow who had been supported by her father-in-law after his death sued his eldest son for maintenance and obtained a decree for R150, notwithstanding the defendant's objection that, being one of three brothers who inherited their father's estate, he was not solely liable for the maintenance claimed. *Held*, that, as this was a Small Cause Court suit, an appeal did not lie. RAMCHANDRA DIKSHIT *v.* SAVITRIBAI . . . **4 Bom. A. C. 73**

JUDAL KOM RANCHHOD MULJI *v.* HIRA MULJI **4 Bom. A. C. 75**

(*m*) MESNE PROFITS.

54. ——— **Suit for mesne profits**—*Act XXIII of 1861, s. 27—Suit under R500.* A suit for the recovery of mesne profits (not amounting to R500) is cognizable by a Court of Small Causes. A special appeal therefore does not lie in such a suit. KAKAJI SAKHARAM *v.* GOBIND GANESH **8 Bom. A. C. 96**

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*m*) MESNE PROFITS—*contd.*

55. ——— *Act XI of 1865, s. 6—Act XXIII of 1861, s. 27.* In a suit brought in the Sudder Ameen's Court for R133 for mesne profits, it was objected on appeal that under s. 27, Act XXIII of 1861, no special appeal would lie, the suit being cognizable by the Small Cause Court. *Held*, that, it being merely a suit for mesne profit and no question of right or title arising in it, it was a suit for damages within s. 6, Act XI of 1865, and therefore cognizable by the Small Cause Court. RAM PYARI DEBI *v.* DINANATH MOOKERJEE **2 B. L. R. S. N. 13 : 10 W. R. 375**

56. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31.* Where the plaintiff, after obtaining a decree in a suit for possession of certain land of which he had been dispossessed by the defendants, brought a suit in the Munsif's Court for mesne profits for the period during which he had been kept out of possession, and the suit, though partly decreed by the Munsif, was dismissed by the District Judge :—*Held*, that such a suit was not cognizable by a Small Cause Court, and therefore a second appeal in the suit would lie to the High Court. SRIRAM SAMANTA *v.* KALIDAS DEY . . **I. L. R. 18 Calc. 316**

57. ——— *Suit for mesne profits where the value of the subject-matter in dispute is less than R500—Provincial Small Cause Courts Act (IX of 1877), Sch. II, Art. 31—Small Cause Court, mofussil, jurisdiction of. Held*, by the Full Bench (GHOSE and BANERJEE, *JJ.*, dissenting), that no second appeal lies in a suit for mesne profits where the value of the subject-matter in dispute is less than R500. *Sriram Samanta* v. *Kalidas Dey, I. L. R. 18 Calc. 316*, overruled. KUNJO BEHARY SINGH *v.* MADHUB CHUNDRA GHOSE **I. L. R. 23 Calc. 884**

58. ——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit for mesne profits under R500—Civil Procedure Code (Act XIV of 1882), s. 586.* A suit for mesne profits is cognizable in Courts of Small Causes where the value of the subject-matter in dispute is less than R500, and Art. 31 of Sch. II of the Provincial Small Cause Courts Act does not apply thereto. Such a suit falls within the provisions of s. 586 of the Civil Procedure Code, and no second appeal lies from a decision in it. SESHAGIRI AYYAB *v.* MARAKATHAMMAL . . **I. L. R. 22 Mad. 196**

LINGAYYA AYYAVARU *v.* MALLIKARJUNA AYYAVARU . . **I. L. R. 22 Mad. 196 note**

59. ——— *Civil Procedure Code (Act XIV of 1882), s. 586—Suit of a nature cognizable in a Court of Small Causes—Suit for mesne profits—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. (31).* A suit for mesne

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*m*) MESNE PROFITS—*concld.*

profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under cl. (*31*) of Sch. II to the Provincial Small Cause Courts Act. There is no second appeal from a decision in such a suit. SUBBA RAO *v.* SITARAMAYYA (1900)
I. L. R. 24 Mad. 118

(*n*) MONEY.

60. ——— Suit for money had and received for the plaintiff's use. *C*, a mortgagee, the mortgage having been foreclosed, sued *D*, the mortgagor, for possession of the mortgaged property and obtained a decree for possession thereof. He subsequently agreed with *D* to surrender the mortgaged property to him, if he deposited the mortgage money in Court by a specified day. *D* borrowed the money for this purpose by means of a conditional sale of the property to *L*, and deposited it in Court. The deposit was made after the specified day, and consequently *C* took possession of the property. The money deposited by *D* remained in deposit, and while there, *C* caused it to be attached in execution of a money decree he held against *D*, and it was paid to him. *L* thereupon sued *C* in the Munsif's Court to recover such money, which amounted to R350. *Held*, that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes. LACHMAN PRASAD *v.* CHAMMI LAL . . . **I. L. R. 4 All. 6**

COLLECTOR OF CAWNPORE *v.* KEDARI
I. L. R. 4 All. 19

61. ——— Suit to recover purchase-money—*Act XXIII of 1861, s. 27. Held*, that the suit to recover R200 paid in respect of the purchase of land which was not completed was a suit of the description cognizable by the Small Cause Court, and a special appeal would not lie. KHOOB CHUND *v.* HAZAREE LALL . . . **1 Agra 275**

62. ——— Suit for money paid as excess of rent. In a suit for recovery of a sum of money less than R500, as money paid in excess of rent due :—*Held*, that, the suit being cognizable by the Court of Small Causes under s. 6, Act XI of 1865, no special appeal lay to the High Court. SIB SAHAYA SUKUL *v.* BIRCHANDRA JUBARAJ
2 B. L. R. A. C. 172

S.C. SHIB SUHAYE SOOKOOL *v.* BEER CHUNDER JOOBRAJ . . . . . **11 W. R. 30**

63. ——— Suit for money illegally levied on land—*Act X of 1876, s. 15—Civil Procedure Code, 1876, s. 586.* The plaintiff sued to recover from the defendant R71-3-3, alleging that the defendant had illegally levied the money on the plaintiff's land on account of enhanced summary settlement and local fund cess. The defendant, being a minor, was represented by the Collector as his

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*n*) MONEY—*concld.*

administrator. The Assistant Judge who tried the suit awarded the plaintiff's claim. The District Judge, on appeal, reduced the amount of the plaintiff's claim to R38-4-9, but upheld the decree of the first Court in other respects. The defendant thereupon filed a second appeal in the High Court. *Held*, that, under the Civil Procedure Code (Act X of 1877), s. 586, no second appeal lay, as the suit was one cognizable by a Small Cause Court. Act X of 1876, s. 15, removes suits to which the Collector is a party from the jurisdiction of the Small Cause Court ; but the nature of the suit remains unaltered. MUSA MIYA SAHEB *v.* GULAM HUSEIN
I. L. R. 7 Bom. 100

64. ——— Suit by lessee for refund of revenue—*Contract to refund excess.* In a suit by a lessee upon a contract for a refund of excess not admissible if the amount claimed be under R500. WHITE *v.* TRIPOORA SUNKUR MOOKERJEE
W. R. 1864, 297

65. ——— Suit to recover money paid in excess of share of profits of land. A suit to recover from the defendant R235, paid to him in excess of his share of the profits of certain lands, is cognizable in the Small Cause Court, and consequently no special appeal will lie in such a case under s. 27, Act XXIII of 1861. JOYNARAIN MANJEE *v.* MUDDOOSOODUN GORAIT
2 W. R. 134

66. ——— Suit for recovery of money stolen from Court—*Suit against Government.* A sum of money was stolen from the Judge's Court of Tippera while *A* was the Nazir. *A* paid the amount to Government, and died leaving *B* his heir. *B* sued Government for recovery of the amount paid by *A* on the ground that, as there was no negligence of *A* and as the amount was under the custody of the guards of Government at the time of the theft, *A* was not responsible for the loss thereof. *Held*, that the suit was cognizable by a Small Cause Court, and therefore, under s. 27, Act XXIII of 1861, no special appeal lay to the High Court. COLLECTOR OF TIPPERA *v.* MAFIZUNNISSA BIBEE
4 B. L. R. Ap. 46

(*o*) MORTGAGE.

67. ——— Suit to recover debt charged on immoveable property—*Act XXIII of 1861, s. 27.* A suit brought to enforce a debt or demand not exceeding R500 which is secured upon, and must in law be primarily satisfied out of immoveable property, is not a suit of a nature cognizable in Courts of Small Causes under s. 27 of Act XXIII of 1861, so as to exclude a right to special appeal. This is so though the plaint on the face of it seeks recovery in the alternative, either from the mortgagor personally, or from the mortgaged property. ATMARAM BALLAL KAGJI *v.* SADASHIV HARI MAHAJANI . **2 Bom. 1**

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*o*) MORTGAGE—*concld.*

68. ——— Suit for enforcement of hypothecation against moveable property—*Act XI of 1865, s. 6.* A suit by the assignee of a registered mortgage-bond hypothecating certain crops to enforce the hypothecation is not a Small Cause Court suit within the meaning of s. 6 of Act XI of 1865, in which a second appeal would be barred by s. 586 of the Civil Procedure Code. *Surajpal Singh* v. *Jairamgir, I. L. R. 7 All. 855,* followed. *Ram Gopal Shah* v. *Ram Gopal Shah, 9 W. R. 136,* and *Appavu Pillai* v. *Subarya Mupuen, 2 Mad. 47,* referred to. KALKA PRASAD *v.* CHANDAN SINGH . . . **I. L. R. 10 All. 20**

(*p*) MOVEABLE PROPERTY.

69. ——— Suit for price of personal property sold—*Suit by co-sharer.* A suit lies in a Small Cause Court by a co-sharer to recover the price of a share of personal property alienated by another co-sharer. RADHANATH SHAHA *v.* KAMEENEE SOONDEREE DOSSEE . . **2 W. R. 37**

70. ——— Suit for materials of hut, or their value—*Act XXIII of 1861, s. 27.* A suit for the materials of a hut, in which the plaintiff sought for a decree to break up and remove them or to obtain their value (R29), was *held* to be a case cognizable by a Small Cause Court under Act XI of 1865, s. 6, and therefore no special appeal would lie. KASHEE CHUNDER DUTT *v.* JUDOONATH CHUCKERBUTTY . . . **10 W. R. 29**

71. ——— Suit to recover possession of share of a boat—*Act XXIII of 1861, s. 27.* A suit to recover possession of a share of a boat by establishment of the plaintiffs' right is a suit for personal property within the meaning of Act XI of 1865, s. 6, and therefore no special appeal lies in such a case under Act XXIII of 1861, s. 27. MAHOMED AZIM BHOOYAH *v.* MAHOMED SOMEE **21 W. R. 413**

72. ——— Suit for the value of trees and fish—*Trees destroyed by defendant.* A suit to recover the value of a tree destroyed by the defendants and for the value of fish taken from the plaintiff's tank (the claim being under R500) is a suit cognizable by a Small Cause Court, and no special appeal lies to the High Court. SUJJAD ALI *v.* BHOLARAM . . . . **5 N. W. 24**

73 ——— Suit for recovery of value of fruit from trees. Where a suit was brought for the recovery of the value of the fruit of certain mango trees alleged to have been misappropriated by the defendants :—*Held,* that, as the suit was of the nature of a suit cognizable by Courts of Small Causes, a special appeal would not lie. SHAMANUND *v.* NUNDKOOMAR **3 Agra 290 : Agra F. B. Ed. 1874, 153**

74. ——— Suit for value of sugar-mill. A stone sugar-mill is moveable property, and a suit for the value of it, if under R500, will lie in the Small Cause Court. No special appeal lies therefore in such a suit. HURMUNGAL SINGH *v.* ATUL SINGH . . . . . **4 N. W. 15**

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*p*) MOVEABLE PROPERTY—*concld.*

75. ——— Suit by widow to recover personal property or its value taken from deceased—*Act XXIII of 1861, s. 27.* The widow and heiress of a deceased person sued the defendants to recover personal property, valued at R200, said to have been taken by them from deceased in his lifetime. *Held,* that a special appeal was barred by s. 27, Act XXIII of 1861. KAPAHI BEWA *v.* KESHRAM KUCH . **2 B. L. R. Ap. 23 : 11 W. R. 93**

(*q*) PROFITS OF LAND.

76. ——— Suit to recover a certain sum on account of a share in property—*Civil Procedure Code, 1882, s. 586—Prayer for account—Question of title.* Plaintiffs sued to recover, on account of their share in produce of certain dhara and khoti properties, R339-14-2, or any other sum which might be found due to them on taking account from the defendant, who was the managing khot. The defendant denied the plaintiffs' right to the produce of some of the properties. The first Court and the Court of appeal found that the amount due to plaintiffs was R72-14-11. On second appeal :—*Held,* that the suit was a Small Cause Court suit, and no second appeal lay. The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes. By merely asking, in the alternative, for an account of the profits, a suit cognizable by a Small Cause Court cannot be converted into one of a different nature. NARAYAN BHASKER *v.* BALAJI BAPUJI **I. L. R. 21 Bom. 248**

77. ——— Suit to recover an ascertained sum as profits of land—*Provincial Small Cause Court Act (IX of 1887), Sch. II, Art. 31—Jurisdiction of Small Cause Court—High Court—Practice.* The plaintiff sued to recover three specific sums of money amounting to R447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant. *Held,* that the suit was one cognizable by a Court of Small Causes ; and that, therefore, no second appeal lay. GIRJABAI *v.* RAGHUNATH(1905) **I. L. R. 30 Bom. 147**

78. ——— *Civil Procedure Code (Act XIV of 1882), s. 586—Provincial Small Cause Courts Act (IX of 1887), Sch. I, Art. 31—Suit to recover profits—Suit of Small Cause Court nature—High Court.* The plaintiff sued to recover from the defendant a specific sum of money (R120) described in the plaint as his income due to him in respect of his share in certain lands. This right was denied by the defendants in their written statement. The lower Courts dismissed the claim. A second appeal was preferred, but it was objected to on the preliminary ground that

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*q*) PROFITS OF LAND—*concld.*

no second appeal lay, as the suit was of a nature cognizable by Courts of Small Causes. *Held*, that no second appeal lay. The question of title did arise incidentally ; but that did not remove the suit from the cognizance of the Court of Small Causes. *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve, I. L. R. 17 Bom. 42*, and *Narayan* v. *Balaji, I. L. R. 21 Bom. 248*, followed. KESRISANG *v.* NARANSANG (1908) . **I. L. R. 32 Bom. 560**

(*r*) RENT.

79. _____ **Suit for arrears of rent**—*Act XXIII of 1861, s. 27.* In suits for arrears of rents of land, when the claim is under R500, a special appeal lies to the High Court, such claims not being generally cognizable by Courts of Small Causes. RAMCHANDRA RAGHUNATH *v.* ABAJI BIN RASTYA . . . . **6 Bom. A. C. 12**

80. _____ *Bom. Reg. XVII of 1827, s. 31, cl. 3—Act XXIII of 1861, s. 27.* The expression " or former year " in Regulation XVII of 1827, s. 31, cl. 3, did not mean the year immediately preceding the current year, but any previous year, and a suit for rent could have been brought before a revenue officer, when Act XI of 1865 was passed, and not before the Small Cause Courts constituted by that Act. A special appeal lay in a suit of this nature. KRISHNARAV RAMCHANDRA *v.* MANAJI BIN SAYAJI. **11 Bom. 106**

81. _____ *Suit by an assignee of arrears of rent after they fall due, whether cognizable by the Small Cause Court—Bengal Tenancy Act (VIII of 1885), s. 3, sub-s. 5—Provincail Small Cause Courts Act, Sch. II, Art. 8. Held*, by the Full Bench (BANERJEE, *J.*, dissenting), that a suit brought by an assignee of arrears of rent, after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes, and a second appeal therefore lies in such a suit. SRISH CHUNDER BOSE *v.* NACHIM KAZI
I. L. R. 27 Calc. 827
4 C. W. N. 357

82. _____ *Suit for arrears of rent brought by assignee of landlord.* A second appeal lies in a suit brought by an assignee of arrears of rent from the landlord. MOHENDRA NATH KALAMAREE *v.* KOILASH CHANDRA DOGRA
4 C. W. N. 605

83. _____ **Suit for zamindari cess**—*Suit for payment for use of land—Act XXIII of 1861, s. 27.* Where the plaintiff claimed a sum of money under the name of a zamindari cess, but in point of fact what was claimed was claimed on account of the use of land :—*Held*, that such a suit was a suit of a nature cognizable by a Small Cause Court under s. 6, Act XI of 1865, and that a special appeal would not lie. BUCHOO CHOWBEY *v.* GHOORIAIT . . . . . **4 N. W. 56**

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*r*) RENT—*contd.*

84. _____ **Suit for Government assessment and local fund cess**—*Suit for arrears rent.* The defendant executed to the plaintiff in 1847 a mulgeni kabuliat (*i. e.*, one kabuliat corresponding to a lease at a fixed rental), agreeing to pay to the plaintiff R150 annually. At the date of the execution of the mulgeni the Government assessment was R56-8-0, but in 1872 it was enhanced to R129-8-0, and a local fund cess of R4-9-0 imposed in addition. The plaintiff sued the defendant to recover from him the enhanced assessment and the cess. On appeal an objection was taken that, the amount claimed by the plaintiff being less than R500, the suit was cognizable by a Court of Small Causes, and that therefore there was no second appeal. *Held*, that the suit might be regarded as one for arrears of rent at an increased rate, and, as such, was not cognizable by a Court of Small Causes. BABSHETTI *v.* VENKATRAMANA . . **I. L. R. 3 Bom. 154**

85. _____ **Suits for rent**—*Civil Procedure Code, 1882, s. 586—Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, Art. 8—"Suits of the nature cognizable in Courts of Small Causes."* A suit for the recovery of rent other than houserent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto under s. 15 and Sch. II, Art. 8, of the Provincial Small Cause Courts Act, 1887. A second appeal will lie in such a suit, though the amount or value of the subject-matter of the original suit does not exceed R500. VEDACHALA MUDALI *v.* RAMASAMI RAJA
I. L. R. 22 Mad. 229

86. _____ *Civil Procedure Code, 1882, s. 586—" Suit of the nature cognizable in Courts of Small Causes "—Suit for rent other than house-rent—Second appeal.* A suit for the recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. So *held* (SUBRAMANIA AYYAR, *J.*, dissenting). *Vedachala Mudali* v. *Ramasami Raja, I. L. R. 22 Mad. 229*, overruled. SOUNDARAM AYYAR *v.* SENNIA NAICKAN . . **I. L. R. 23 Mad. 547**

87. _____ *Civil Procedure Code (Act XIV of 1882), s. 586—Landlord and tenant—Suit by tenant to recover excess payments of rent—Bengal Tenancy Act (VIII of 1885), s. 144.* A suit between landlord and tenant for the recovery by the tenant of excess payments taken by the landlord in respect of the rent of the holding and not exceeding R500 is a suit cognizable by the Small

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*r*) RENT—*concld.*

Cause Court, and under s. 586 of the Civil Procedure Code no second appeal lies. There is nothing in s. 144 of the Bengal Tenancy Act to override the provisions of s. 586 of the Civil Procedure Code, as it determines only the revenue and has no bearing upon the nature of the suit. RANGO ROY *alias* RUNG LAL ROY *v.* HOLLOWAY
I. L. R. 26 Calc. 842
4 C. W. N. 95

88. _____ *Suit by landlord against tenant for a certain sum payable by him out of the rent to a third person by assignment —Civil Procedure Code, 1882, s. 586—Suit for rent or for damages. Held* (by the Full Bench), that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent, and not for damages and a second appeal lies therefore in such a case. *Rutnessur Biswas* v. *Hurish Chunder Bose, I. L. R. 11 Calc. 221,* referred to. *Mohabut Ali* v. *Mahomed Faizullah, 1 C. W. N. 455.* BASANTA KUMARI DEBYA *v.* ASHUTOSH CHUCKERBUTTY . . . . **I. L. R. 27 Calc. 67**
4 C. W. N. 3

89. _____ *Civil Procedure Code (Act XIV of 1882), s. 586—Suit of a small cause nature—Plaint based on muchalka, but containing prayer as for the enforcement of a charge.* In a suit filed in a Munsif's Court, the plaintiff, a zamindar, alleged that first defendant, a tenant on his estate, had executed a *muchalka,* which was registered, in respect of certain lands, and that second defendant was in possession of the lands, and that default had been made in the payment of the *kist* referred to in the *muchalka.* The plaint contained no other allegations, but prayed for a decree for the arrears of *kist,* and concluded with a prayer as for the enforcement of a charge in respect of the *kist : Held,* that the plaint must be read as one for the enforcement of the terms of the *muchalka,* and that the suit was therefore of a small cause nature, and no second appeal lay. *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau, I. L. R. 19 Mad. 329,* followed. HARISCHANDRA DEO *v.* NARAYANA (1901)
I. L. R. 24 Mad. 508

(*s*) SPECIFIC PERFORMANCE.

90. _____ **Suit for specific performance of contract.** A suit (valued at R500) for specific performance of a contract is not cognizable by a Small Cause Court. Consequently no special appeal will lie in such a case. NILKANTH SURMAH *v.* BISHEN BASHEE . . . **6 W. R. 322**

(*t*) SURETY.

91. _____ **Suit to establish surety's liability for rent**—*Necessity to prove non-payment by principal.* A suit to establish a surety's liability on account of arrears of rent due from a patnidar where the non-payment of the rent by the patnidar would have to be established is not cognizable by a Small Cause Court ; and consequently a special appeal was not barred in such a case by s. 27, Act XXIII of 1861. MAHATAB CHUND BAHADOOR *v.* BROJONATH MITTER . . **8 W. R. 111**

92. _____ *Decree—Execution —Stay of execution on furnishing security—Execution against surety—Surety's liability—Civil Procedure Code (Act XIV of 1882), s. 253.* The execution of a decree passed in plaintiff's favour was stayed pending appeal by the defendant on his furnishing security. Afterwards the plaintiff having proceeded in execution against the defendant and the surety, the Court allowed the plaintiff's claim against the surety. In a subsequent execution-proceeding the plaintiff having presented a darkhast for further execution against the surety, the Court passed an order allowing the claim. The order was confirmed in appeal. On second appeal by the surety : *Held,* dismissing the second appeal, that it was not open to the surety to re-open the question as to his liability, he having accepted the finding as to his liability in the prior execution-proceeding and having abandoned the point in the lower Appellate Court in the present proceeding. WAMAN *v.* HARI (1906) . . **I. L. R. 31 Bom. 128**

(*u*) TAX.

93. _____ **Suit for arrears of chowkidari tax payable by patnidar under patni settlement**—*Rent—Bengal Tenancy Act (VIII of 1885), s. 3 (5)—Civil Procedure Code, 1882, s. 586.* In a suit for arrears of chowkidari tax payable by the patnidar under the patni settlement, the Court found that it was not an illegal cess, and could be legally recovered. *Held* (upon the objection of the respondents that, the suit being one of the nature cognizable by a Small Cause Court and valued at less than R500, no second appeal would lie under s. 586 of the Code of Civil Procedure), that, as the consideration for the payment of the chowkidari tax was the occupation or the holding of the patni tenure, and as the payment was to be made periodically to the zamindar by the patnidar, and the amount agreed to be paid was lawfully payable, it came within the definition of "rent" in the Bengal Tenancy Act, and therefore a second appeal would lie. *Dheraj Mahtab Chund Bahadur* v. *Radha Benode Chowdhry, 8 W. R. 517 ; Erskine* v. *Trilochun Chatterjee, 9 W. R. 518 ; Watson & Co.* v. *Sreekristo Bhumic, I. L. R. 21 Calc. 132 ; Rutnesser Biswas* v. *Hurish Chunder Bose, I. L. R. 11 Calc. 221,* referred to. ASSANULLA KHAN BAHADUR *v.* TIRTHABASHINI
I. L. R. 22 Calc. 680

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*v*) TITLE, QUESTION OF.

94. ——— Issues affecting proprietary rights—*Act XXIII of 1861, s. 27.* The decision or order mentioned in s. 27 was confined to those decrees which, if made in a Small Cause Court, would be conclusively binding on the parties, and did not include a decree based upon an issue affecting the proprietary relations between the parties, which, if it had properly arisen incidentally in a suit brought in a Small Cause Court, could not then have been finally concluded between the parties. BHOOPNARAIN SAHOO *v.* MAHOMED HOSSEIN **4 W. R. 60**

See KISTO COOMAR CHOWDHRY *v.* ANUNDMOYEE CHOWDHRAIN . . . **6 W. R. Mis. 128**

95. ——— Question of title incidentally raised. When a suit is of a nature cognizable by a Small Cause Court, there is no right of special appeal, although a question of title is incidentally raised, the finding of the Small Cause Court not being conclusive and only for the purpose of that suit. SUNKUR LALL PATTUCK GYAWAL *v.* RAM KALEE DHAMIN . . . **18 W. R. 104**

96. ——— Question of title raised and tried—*Act XXIII of 1861, s. 27.* No special appeal lies to the High Court in a suit cognizable by the Small Cause Court, although a question of title to immoveable property has been raised and tried in the Court below. MOHESH MAHTO *v.* PIRU **I. L. R. 2 Calc. 470 : 1 C. L. R. 33**

97. ——— Failure of Appellate Court to decide necessary question of title—*Act XXIII of 1861, s. 27.* Where a question of title arises in a suit of a nature triable by a Small Cause Court, which must be determined before plaintiff can get a decree, and the lower Appellate Court fails to determine it, a special appeal is admissible. *Raghu Ram Biswas* v. *Ram Chandra Dobay, B. L. R., Sup. Vol. 34 : W. R., F. B., 127,* and *Nanda Kumar Banerjee* v. *Ishan Chandra Banerjee, 1 B. L. R., A. C. 91 : 10 W. R., 130,* distinguished. PACHOO RAREE *v.* GOOROO CHURN DASS **15 W. R. 556**

98. ——— Where in a suit cognizable by a Court of Small Causes, in order to determine the question at issue between the parties, it was necessary for the Court of appeal in the first instance to determine a question of title to land (which had been raised by the Munsif) :—*Held,* that a special appeal lay to the High Court, though the Court below had omitted to determine such question of title. KISANDRAM VALAD HIRA CHAND *v.* JETHIRAM VALAD MAGNIRAM . **5 Bom. A. C. 57**

99. ——— Question of title decided by Appellate Court. Where a suit appears from the plaint to be one of a nature cognizable in a Court of Small Causes, but a question of title has been gone into and decided by the District Court in appeal, a special appeal will lie. DIKSHIT *v.* DIKSHIT . . . . . **2 Bom. 4**

SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*contd.*

(*v*) TITLE, QUESTION OF—*contd.*

100. ——— Suit for damages involving question of title. A suit for damages for an amount not exceeding R500 is within the competency of a Small Cause Court to decide, notwithstanding that it involves an inquiry into a question of right. No special appeal lies in such a case. LUCKHEE DEBIA CHOWDHRAIN *v.* MALICK **W. R. 1864, 237**

KHANDU VALAD KERU *v.* TATIA VALAD VITHUBA **8 Bom. A. C. 23**

101. ——— Suit which may involve question of title—*Suit for damages for detention of materials of house—Act XXIII of 1861, s. 27.* A suit for damages for detention of materials of a house involves no question of title. Such a suit is cognizable by a Small Cause Court, if under R500 and a special appeal was barred by s. 27, Act XXIII of 1861. KISHUB CHUNDER SHAHA *v.* BROMMO MOYEE DABEA . . **1 W. R. 35**

102. ——— Suit involving question of title—*Suit for damages.* A special appeal was *held* not to lie in a case for damages for value of crops misappropriated under R500 cognizable by a Small Cause Court, notwithstanding that the case involved a question of title. HEDAETOLLAH *v.* KARLOO **7 W. R. 73**

RAM DYAL GANGOOLY *v.* HURO SOONDUREE DOSSIA . . . . . **10 W. R. 272**

103. ——— *Suit for price of trees cut down and removed—Damages—Act XXIII of 1861, s. 27.* A suit for the price of trees cut down and removed is not the less a suit for damages, because the Court, in order to determine whether the plaintiff is entitled as damages to the value of his trees, has to go into evidence as to whether they belong to the plaintiff or not. Such a suit is cognizable by a Court of Small Causes, and no special appeal will lie. SHIB DEEN TEWARY *v.* BUKSHEE RAM PROTAB SINGH **W. R. 1864, Mis. 3**

104. ——— *Act XXIII of 1861, s. 27—Claim by zamindar to wrecked property—Salvage.* A quantity of rice having been recovered from the wreck of a boat, a portion was left on the river bank by the owner for the remuneration of the salvors, including some left as "huk zamindari," which the owners of a neighbouring jote carried away. In a suit brought by the former against the jotedar for the value of the portion last mentioned, the Court of first instance went into the question of the custom entitling to property fo saved. *Held,* that this question was only incidentally raised for the purposes of the suit, which was simply one for the value of moveable or personal property and cognizable by a Court of Small Causes, and, the value being less than R500, a special appeal did not lie. GRANT *v.* MADHOO SOODUN SINGH **10 W. R. 79**

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SPECIAL OR SECOND APPEAL—*contd.*

4. SMALL CAUSE COURT SUITS—*concld.*

(*v*) TITLE, QUESTION OF—*concld.*

105. ——— Suit for arrears of malikana allowance—*Act XI of 1865, s. 6.* *S* sold a share in immoveable property to *M* by a registered deed of sale, which contained the following provision: "The said vendee is at liberty either to retain possession himself or to sell it to some one else; and he is to pay R25 of the Queen's coin to me annually (as malikana), which he had agreed to pay." *M* mortgaged the property to *B*, who obtained possession, and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued *M* and *B* to recover arrears of malikana, the amount sued for being less than R500. *Held*, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mofussil Small Cause Courts Act (XI of 1865), was that suits directly and immediately involving questions of title to immoveable property should not be cognizable by the Small Cause Courts; that in the present suit such a question was directly involved; and that consequently s. 586 of the Code had no application, and a second appeal would lie. *Mahomed Karamutoollah* v. *Abdool Majeed, 1 N. W. 205*, and *Bhawan Singh*, v. *Chattar Kuar, All. Weekly Notes (1882) 114*, referred to. *Pestonji Bezonji* v. *Abdool Rahiman. I. L. R. 5 Bom. 463: Qutub Husain* v. *Abul Husain, I. L. R. 4 All. 134*; and *Kadaressur Mookerjee* v. *Gooroo Churn Mookerjee, 2 C. L. R. 388*, distinguished. CHURAMAN *v.* BALLI

I. L. R. 9 All. 591

106. ——— *Small Cause Court, jurisdiction of—Provincial Small Cause Courts Act (IX of 1887), s. 23—Claim to possession of land when title to land disputed—Civil Procedure Code (Act XIV of 1882), s. 586—Practice.* The plaintiff sued to recover R75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal. *Held*, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court and that, therefore, under s. 586 of the Civil Procedure Code (Act XIV of 1882), no second appeal lay. VINAYAK GANGADHAR BHAT *v.* KRISHNA RAO SAKHARAM ADHIKARI (1901)

I. L. R. 25 Bom. 625

(*w*) TRESPASS.

107. ——— Suit for damages for trespass—*Suit cognizable by Small Cause Court.* In a suit for damages for trespass laid at a sum under R100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Court below. LUKHYNARAIN CHUTTOPADHYA *v.* GORACHAND GOSSAMY

I. L. R. 9 Calc. 116: 12 C. L. R. 89

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL.

(*a*) FORM OF.

1. ——— Requisites for grounds—*Clearness and distinctness.* The grounds of special appeal must not be vague and indistinct, conveying no information to the respondent what the point of law is that he has to meet. NAND KISHOR DAS *v.* RAM KALP ROY **6 B. L. R. Ap. 49: 15 W. R. 8**

2. ——— Grounds of second appeal—*Civil Procedure Code (Act XIV of 1882), ss. 584, 585.* The grounds upon which a second appeal lies to the High Court are those set out in s. 584 of the Civil Procedure Code, and s. 585 enacts that no second appeal shall lie except on the grounds mentioned in s. 584. The provisions of those sections should be strictly adhered to. *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani, I. L. R. 14 Calc. 740: L. R. 14 I. A. 101; Pertap Chunder Ghose* v. *Mohendra Nath Purkait, I. L. R. 17 Calc. 291: L. R. 16 I. A. 233; Durga Chowdhrani* v. *Jewahir Singh Chowdhri, I. L. R. 18 Calc. 23: L. R. 17 I. A. 122*; and *Ram Ratan Sukal* v. *Nandu, I. L. R. 19 Calc. 249: L. R. 19 I. A. 1*, refereed to. KAMESHWAR PERSHAD *v.* AMANUTULLA . **I. L. R. 26 Calc. 53**
2 C. W. N. 649

(*b*) QUESTIONS OF FACT.

3. ——— Grounds of second appeal—*Civil Procedure Code, s. 584.* Under the Code no second appeal will lie, except on the grounds specified in s. 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani, L. R. 14 I. A. 101: I. L. R. 14 Calc. 740*, and *Pertab Chunder Ghose* v. *Mohendra Purkait, L. R. 16 I. A. 233: I. L. R. 17 Calc. 291*, referred to and followed. *Futtehma Begum* v. *Mohamed Ausur, I. L. R. 9 Calc., 309*, and *Nivath Singh* v. *Bhikki Singh, I. L. R. 7 All. 649*, overruled. DURGA CHAWDHRANI *v.* JEWAHIR SINGH CHOWDHRI . . . . **I. L. R. 18 Calc. 23**
L. R. 17 I. A. 122

4. ——— Doubtful findings of fact—*Consideration of evidence.* No Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. RAMRATAN SUKAL *v.* NANDU

I. L. R. 19 Calc. 249
L. R. 19 I. A. 1

5. ——— What are or are not questions of fact—*Question of custom.* A question of

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

custom is a question of fact on which the lower Court alone can pass a decision, and on which the High Court cannot interfere. HUREEHUR MOOKERJEE *v.* JUDOONATH GHOSE . . **10 W. R. 153**

ALI *v.* GOPAL DASS . . . **13 W. R. 420**

6. ——— *Question of damages—Discretion of Judge.* A Judge has a discretion with respect to the amount of the damages which will not ordinarily be interfered with on special appeal. TEEKARAM KYBUTT *v.* RAJKISHEN ROY . . . . . **Marsh. 495**

AHMEDOOLLA *v.* HUR CHURN PANDAH **2 W. R. 236**

7. ——— *Question of amount of damages—Difference of opinion on evidence between lower Courts.* In a suit for damages on account of false charge and consequent arrest, in which the Court of first instance found that there were probable and reasonable grounds for bringing the charge, and the lower Appellate Court took a different view of the evidence, it was *held* that the difference of view was not a subject for special appeal. The amount of damages to be awarded is a question for a jury to decide, and one with which the High Court cannot interfere in special appeal. BANEE MADHUB CHATTERJEE *v.* BHOLANATH BANERJEE. HEERA CHAND BANERJEE *v.* BANEE MADHUB CHATTERJEE . . . **10 W. R. 164**

8. ——— *Question of amount of damages—Award of damages under Act X of 1859, s. 10.* An award of damages by a lower Appellate Court under s. 10, Act X of 1859, though excessive, if it is within the legal limit, cannot be interfered with in special appeal as an error of law. JOHEEROODDEEN MAHOMED *v.* DABEE PERSHAD SINGH . . . . **13 W. R. 22**

Affirmed on review . . . **13 W. R. 391**

9. ——— *Refusal to award damages—Beng. Act VI of 1863, s. 2—Discretion of Court.* The refusal of a Court to award damages under s. 2, Bengal Act VI of 1862, is not a ground for special appeal, it being a matter of discretion to award them or not. DHEERAJ MAHATAB CHAND *v.* DEBENDER NATH THAKOOR **W. R. 1864 Act X, 68**

GOPAL LAL THAKOOR *v.* MAHOMED KADIR. **W. R. 1864 Act X, 73**

10. ——— *Question of law—Sufficiency of evidence.* It is a question of law for the Court to decide on second appeal whether there is evidence before the Court, on which a Court could properly arrive at any given conclusion of fact. BIDHUMUKHI DABEA CHOWDHRAIN *v.* KEFYUTULLAH . . **I. L. R. 12 Calc. 93**

11. ——— *Jurisdiction, question of.* A special appeal will not lie upon a question of jurisdiction depending upon a question

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

of fact, unless the fact has been determined by the lower Court or is admitted by the parties. *Quære:* Whether, if the fact appears, a special appeal will lie unless the error in procedure has affected the merits. LUTEEFOONNISSA BEEBEE *v.* POOLIN BEHARY SEIN **W. R. F. B. 31: 1 Ind. Jur. O. S. 10 1 Hay 242**

S.C. POOLIN BEHARY SEIN *v.* LUTEEFOONRISSA BEEBEE . . . . **Marsh. 107**

COURT OF WARDS *v.* ROOP MOONJUREE KOOER. **25 W. R. 260**

12. ——— *Question of what passes at sale in execution of decree—Mixed question of law and fact.* The question what is actually bargained and paid for at an execution-sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it. GNANAMMAL *v.* MUTHUSAMI **I. L. R. 13 Mad. 47**

13. ——— *Existence of legal necessity.* Where both the lower Courts found that there was no necessity for a widow to borrow money, the High Court refused in special appeal to consider it other than a question of fact, and *held* they could not interfere with the finding in special appeal. INDER CHUNDER BADOO *v.* HURNAUTH CHOWDHRY . . . . **1 Hay 257**

14. ——— *Question of law—Onus probandi.* Where each of the parties has gone into evidence upon the issues raised in the lower Courts, no question as to whether the onus lies on the one or on the other can arise in special appeal. HUREE MOHUN MOJOOMDAR *v.* ASGUR BEHAREE . . . . **23 W. R. 324**

Reversing the decision in ASGUR BEPAREE *v.* HUREE MOHUN MOJOOMDAR . . **23 W. R. 56**

15. ——— *Proceeding to enforce decree—Act XIV of 1859, s. 20.* The question whether the action of the judgment-creditor taken in execution of his decree was a proceeding taken to enforce the decree within the meaning of s. 20, Act XIV of 1859, was a question of fact for the decision of the Courts below, and not one of law on which to bring a special appeal to the High Court. IRSHAD ALI *v.* RADHU SHAH **13 B. L. R. Ap. 1: 21 W. R. 188**

16. ——— *Order finding proceedings to enforce decree not bonâ fide—Act XIV of 1859, s. 20.* The question as to whether proceedings which had been taken to execute a decree had been taken *bonâ fide* to keep alive such decree was a question of fact, and no special appeal lay from an order finding that the proceedings taken were *bonâ fide.* BHUBAN MOHUN CHATTOPADHYA *v.* SAUDAMINI DEBI . **5 B. L. R. Ap. 59**

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

17. _____ *Service of notices.* Where a Judge found no evidence that the notices in certain execution-proceedings were not caused to be properly served, and that those notices were not made in good faith, the finding was *held* to be a finding of fact which could not be disturbed in special appeal. ABDOOL AZEEZ *v.* SHUMSUNNISSA **11 W. R. 263**

18. _____ *Service of notice of enhancement.* A decision that notice of enhancement was duly served cannot be interfered with in special appeal. TARA PROSUNNO MOJOOMDAR *v.* BISHO NATH SIRCAR . . **23 W. R. 144**
Reversing on appeal. BISSONATH SIRCAR *v.* TARA PROSONNO MOZOOMDAR . **22 W. R. 482**

19. _____ *Right of way.* In suits to enforce a right of way, the question whether the plaintiff has a right of way or not is a question of fact to be determined by the evidence he produces of user. Where, on the evidence, the Judge found the plaintiff had not a right of way :—*Held*, that there was no error of law which gave the plaintiff a right to a special appeal. MAHOMED ALI *v.* JUGAL RAM CHANDRA **5 B. L. R. Ap. 84 : 14 W. R. 124**

20. _____ *Finding as to user.* A finding of a lower Appellate Court as to a right of user being proved cannot be interfered with on special appeal, even though not very distinct as to the precise period of enjoyment. WUZEEROODDEEN *v.* SHEOBUND LALL **11 W. R. 285**

21. _____ *Civil Procedure Code, s. 584—Powers of High Court on second appeal.* On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that, "though the tenant admitted the execution of the muchalka, it was not shown that he dispensed with the pottah," no objection was taken in the memorandum of appeal that the muchalka, which contained a statement that no pottah was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding. NARAYANA *v.* MUNI **I. L. R. 10 Mad. 363**

22. _____ **Finding of facts**—*Decision in regular appeal.* When the decision passed in regular appeal turns upon a mere question of fact, if that question of fact is determined after due investigation, there is no ground of special appeal. GOPAL KHUNDEE RAO *v.* DEOKEE NUNDUN **6 N. W. 172**

23. _____ *Consent of parties.* The High Court will not, even with consent of parties, pronounce a decree on the facts in a special appeal. KADAMBINEE DOSSEE *v.* DOORGA CHURN DUTT . . . . . **Marsh. 4**

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

S.C. DOORGA CHUNR DUTT *v.* KADUMBINEE DOSSEE . . . . . **1 Hay 25**

24. _____ *Inference of fact.* It is not essential in special appeal that the High Court should be very careful in not interfering with inferences of fact drawn by a lower Appellate Court. HAMEER MAHOMED CHOWDHRY *v.* FOOL MAHOMED CHOWDHRY . . . **16 W. R. 311**

WOOMA MOYEE BURMONYA *v.* KUNUCK CHUNDER MOOKERJEE . . . . **17 W. R. 418**

Even though it is not an inference, the High Court itself would have drawn, provided the Judge was at liberty to draw it. MAHOMED MANOO BHOOYAH *v.* MAHOMED ASANOOLLAH CHOWDHRY **17 W. R. 349**

KALEE DOSS ACHARJEE *v.* KHETTRO PAL SINGH ROY . . . . . **17 W. R. 472**

25. _____ *Practice—Interference with findings of facts on second appeal.* As a general rule, the High Court will not interfere with the finding of facts by the lower Appellate Court on second appeal, save on some very special ground ; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case has not been satisfactorily arrived at. GOLUCK NATH *alias* RAKHAL DAS CHUTTOPADHYA *v.* KIRTI CHUNDER HALDAR **I. L. R. 16 Calc. 645**

26. _____ *Ground for setting aside decision.* If the reasons in a judgment are such as can be rightly given, and the inferences such as can be legally drawn, it cannot be set aside in special appeal, even if the High Court cannot agree with or support all the reasons given. RUMMEEZOODDEEN BHOOYAN *v.* JOYMALA **15 W. R. 303**

27. _____ *Finding of fact, unsupported by reasons.* The High Court is not bound, in second appeal, by a finding of fact of a lower Appellate Court, when such finding is not supported by any reason. PURSHOTAM SAKHARAM *v.* DURGOJI TUKARAM . **I. L. R. 14 Bom. 452**

28. _____ *Finding of the Court of first instance without reasons given where contrary conclusion has been come to by the District Judge.* The District Judge having expressed an opinion and recorded a finding without discussing the several grounds on which the Subordinate Judge came to a contrary conclusion :—*Held*, that the finding of the District Judge ought not to be accepted. MADHAV SHANBHOG *v.* VENKATASH MANJAYA . **I. L. R. 16 Bom. 540**

29. _____ *Finding of fact unsupported by reasons—Defect in judgment of lower Appellate Court.* Where no reasons are given by a lower Appellate Court for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal. *Kamat* v.

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

Kamat, I. L. R. 8 Bom. 368, 370, and *Roghunath Gopal* v. *Nilu Nathaji, I. L. R. 9 Bom. 452, 454,* referred to. NINGAPPA *v.* SHIVAPPA **I. L. R. 19 Bom. 323**

30. ——— *Decision on fact, though probably erroneous.* In special appeal a lower Appellate Court's findings upon a question of fact were accepted as final, although it seemed to the High Court at least doubtful whether the judgment of the first Court was not the right one and it was not unlikely, if they had the power of going into the matter, that they might have come to a different conclusion from the lower Appellate Court. LOOYEE DHUR ATTOO *v.* PROSUNNO MOYEE DOSSEE . . . **20 W. R. 267**

31. ——— *Error in law.* A finding of fact by a lower Appellate Court may be disturbed in special appeal, if, as in this case, the reasonings and the views upon which that finding is based are erroneous in law, as where evidence is credited or disbelieved on unreasonable grounds. JUGGURNATH DEB *v.* MAHOMED MOKEEM **17 W. R. 161**

SAGE *v.* MACKAY & CO. . . **2 Hay 463**

BEHAREE LALL NAEK *v.* SREERAM ROY. **20 W. R. 259**

See KRISTO GOBIND KUR *v.* GUNGA PERSHAD SURMA . . . . . **23 W. R. 266**

PUTSAHEE KOOER *v.* SHEO PERSHAD RAM OOPADHYA . . . . . **24 W. R. 61**

CHAND MONEE DOSSEE *v.* ABHOY CHURN MAL **24 W. R. 289**

HUNSA KOOER *v.* SHEO GOBIND RAOOT. **24 W. R. 431**

GOBINDO CHUNDER MOULICK *v.* MUDHOOSUDUN MOULICK . . . . . **25 W. R. 550**

DHOONDH BAHADOOR SINGH *v.* PRIAG SINGH. **17 W. R. 314**

KEWAL KANDOO *v.* OMRAO SINGH. **25 W. R. 166**

32. ——— *Error in Law—Partnership.* Where a Subordinate Judge held, from the fact of one person carrying on a business firm and appearing to the world to be the only person carrying it on, that there could be no other person in partnership with him, he was considered to have committed an error which materially affected his decision on the merits, and was a good ground for special appeal. SHOOBUL CHUNDER KULLEAH *v.* KOYLASH CHUNDER MAL . . **14 W. R. 23**

33. ——— *Finding on speculative reasoning.* A finding of fact arrived at upon reasons purely speculative amounts to a mistrial which can be set aside by the High Court in special appeal. MAHOMED AIZADDI SHAHA *v.* SHAFFI MULLA . . . . **8 B. L. R. 26**

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

34. ——— *Improper assumption of, and inference from, facts.* A finding of a fact by the lower Appellate Court was set aside on special appeal, and the case was remanded on the ground that the Judge assumed a state of things in favour of the defendant which the defendant had not urged, and which was contradictory to his case, and because the finding of the Judge was opposed to a proper inference which arose from such facts. SURBESWAR GHOSE *v.* CHOTO ARIZOLLAH MANDAL **8 B. L. R. Ap. 78 : 17 W. R. 213**

35. ——— *Judgment founded on errors of fact.* The High Court reversed on special appeal a judgment which was founded on many errors of fact, and sent it back for a re-trial. POORNO CHUNDER CHATTERJEE *v.* CHUNDER COOMAR ROY . . . . . **24 W. R. 171**

36. ——— *Omission to consider important portions of the evidence—Finding based on statements, not on evidence.* The lower Court, in its judgment, having omitted to make any mention of certain important documents or their bearing on the terms of a tenancy which were in question:—*Held,* that, the lower Court having presumably omitted to consider important portions of the evidence, the findings arrived at by it ought not to be accepted. *Held,* also, that the finding of the lower Court as to the plaintiffs' claim being barred by limitation, being based on statements without referring to any evidence to establish them, could not be accepted. Case sent back for reconsideration and fresh decision. APPA KALGA NAIK *v.* MALLU . . . **I. L. R. 16 Bom. 477**

37. ——— *Decision of Judge not based on evidence given in the case—Finding of fact when binding in second appeal.* In a suit for ejectment for non-payment of enhanced rent the defendants pleaded (i) that they were permanent tenants; (ii) that the plaintiff had no power to enhance; (iii) that the enhancement by the plaintiff was unreasonable. The lower Courts held that the defendants were permanent tenants, but were bound to pay a reasonable rent. Their decision was not based on evidence given in the case, but on what was termed a "well-known distinction between the sheri or private lands of an inamdar and the khata or raiyatwar lands held by recognized tenants." The exercise of certain rights of transfer or inheritance, etc., were regarded as evidence of fixity of tenure at a reasonable rent. On second appeal by the plaintiff to the High Court it was argued that, the District Court having found as a fact, that the defendants were permanent tenants bound to pay a reasonable rent, the High Court in second appeal was bound by that finding. *Held,* that the case should be remanded for proper enquiry. No doubt, if the appeal in the District Court were conducted as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff could not in second appeal question those facts. But it did not appear that it was admitted that the

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

distinction drawn between sheri and khata tenants was correct or that every khata tenant, as such, exercised the rights described by the Subordinate Judge. Under the circumstances, it was clear that the decision of the District Judge was based neither on evidence nor admissions, and was therefore not binding in second appeal. VISHVANATH BHIKAJI *v.* DHONDAPPA . **I. L. R. 17 Bom. 475**

38. ——— *Civil Procedure Code* (*Act XIV of 1882*), *ss. 584, 585—Findings of fact distinguished from inferences or conclusions of law—Inference of law which the facts found were insufficient to justify.* It is well settled that a Court of second appeal, for the purpose of considering the weight of the evidence is not competent according to ss. 584 and 585 of the Civil Procedure Code, to entertain a question as to the soundness of a finding of fact by the Court below. The first Court's decision as to the effect of the evidence must stand final as to the facts. But the soundness of conclusions may involve matter of law, and may be questioned by a Court of second appeal. A conclusion was drawn by an Appellate Court affirming the judgment of the first Court that the defendant had accepted as a binding obligation upon him a mortgage executed by his mother, with whom he was a sharer by inheritance in the property charged. A higher Appellate Court, on a second appeal, decided that these conclusions were not warranted by the facts found, and reversed that judgment. *Held*, that the third Court had not exceeded its powers under the above sections by reversing the decision of the Court below. The expression "specified" used in cl. (*a*) of s. 584, first introduced into the Code by the Act of 1877, means "specified in the memorandum or grounds of appeal." *Durga Chowdhrani* v. *Jewahir Singh Chowdhri, I. L. R. 18 Calc. 23 : L. R. 17 I. A. 122*, followed. RAMGOPAL *v.* SHAMSKHATON **I. L. R. 20 Calc. 93 L. R. 19 I. A. 228**

39. ——— *Inference drawn from finding of fact.* It is open to the Court in second appeal to question the soundness of an inference drawn from a finding of fact. *Ram Gopal* v. *Shamskhaton, I. L. R. 20 Calc. 93*, referred to. KRISHNA KISHORE NEOGI *v.* MAHOMED ALI **3 C. W. N. 255**

40. ——— *Finding of lower Court based on misconception of evidence—Defect in judgment of Appellate Court.* The finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it. GOVIND *v.* VITHAL . **I. L. R. 20 Bom. 753**

41. ——— *Finding on the existence of custom or usage, mainly based on irrelevant matters—Evidence Act* (*I of 1872*), *s. 13—Mis-trial—Remand.* In suits by a landlord for ejectment of purchasers from raiyats having only a right of occupancy on the grounds that the holdings of such raiyats were not transferable without the landlord's consent, the defendants pleaded custom or usage in support of the transfers. Questions arose as to the character of the usage required to be proved in such cases and the nature of the evidence required to prove the usage. In second appeal the High Court, upon an examination of the evidence relied on by the lower Court of appeal, and on reference to s. 13 of the Indian Evidence Act (I of 1872) :—*Held*, that, the finding of that Court on the existence of the usage having been mainly based or irrelevant matters, the appeal was not properly tried and the case must be remanded for re-trial. *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry, I. L. R. 7 Calc. 293*, referred to. PALAKDHARI RAI *v.* MANNERS . . . **I. L. R. 23 Calc. 179**

42. ——— *Proof of custom—Misconception as to mode of proof.* If a decree appealed against is based on wrong views of the law of evidence or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court will interfere in second appeal. DESAI RANCHODDAS VITHALDAS *v.* RAWAL NATHUBHAI KESABHAI **I. L. R. 21 Bom. 110**

In another case the Court on second appeal did not consider it open (where the lower Court had found the existence of a custom) to arrive at an independent finding as to whether the evidence established the existence of such custom. BAI SHRINIBAI *v.* KHARSHEDJI NASARVANJI MASALAVALA . . . . **I. L. R. 22 Bom. 430**

43. ——— *Remand to the Appellate Court—Additional evidence in Appellate Court—Finding of fact upon evidence taken after remand—Procedure in the second Court of appeal—Civil Procedure Code, 1882, ss. 568, 584, 585, and 587.* In a second appeal, the High Court set aside the decrees of the lower Courts on the ground that certain issues raised in the suit were not considered by those Courts, and remanded the case to the lower Appellate Court for a proper decision of the case. The lower Appellate Court took evidence on the issues not tried before and came to findings of fact on that evidence. *Held*, that the lower Appellate Court tried the case, not as an original case, but as an appeal, and acting under the powers given to it took fresh evidence. *Held*, that on second appeal the High Court is precluded by the Code of Civil Procedure from going into facts, and that restriction of power is not confined only to cases where evidence is taken in the first Court. *Gopal Singh* v. *Jhakri Rai, I. L. R. 12 Calc. 37*, followed. *Balkishan* v. *Jasoda Kuar, I. L. R. 7 All. 765*, referred to. *Hinde* v. *Brayan, I. L. R. 7 Mad. 52*, not followed. BENI PERSHAD KUARI *v.* NAND LAL SAHU . **I. L. R. 24 Calc. 98**

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*contd.*

44. _____ *Enhanced rent on irrigated land—Implied contract.* A zamindar tendered to raiyats on his estate pottahs providing (*inter alia*) for the payment of rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut. This had not been sanctioned by the Collector under the Madras Rent Recovery Act, s. 11, but it was found that it had been paid by the raiyats for many years. The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay it. *Held*, that the finding as to the existence of an implied contract to pay the enhanced rent was a finding of fact, and must therefore be accepted on second appeal. SIRIPARAPU RAMANNA *v.* MALLIKARJUNA PRASADA NAYUDU . **I. L. R. 17 Mad. 43**

45. _____ *Civil Procedure Code, 1882, ss. 584 and 585—Inference of law which the facts found are insufficient to justify.* Where the lower Appellate Court arrives at a conclusion which is an inference based upon an erroneous view of law, the judgment is open to question in second appeal. *Lachmeswar Singh* v. *Manwar Hossein, I. L. R. 19 Calc. 253 : L. R. 19 I. A. 48 ; Ram Gopal* v. *Shamskhaton, I. L. R. 20 Calc. 93 : L. R. 19 I. A. 228*, referred to. ISHAN CHUNDER DAS SARKAR *v.* BISHU SIRDAR **I. L. R. 24 Calc. 825 3 C. W. N. 665**

46. _____ *Civil Procedure Code (Act XIV of 1882), ss. 584, 585—Second appeal—Finding of fact by lower Court.* One Ragho died prior to 1856, leaving a widow Anpurnabai, and one son Babaji, who was Anpurnabai's step-son. On Ragho's death, Anpurnabai took possession of the land in question in this suit, and mortgaged it several times. In 1879 she mortgaged it with possession to the father of the defendants. Anpurnabai died in April, 1887, and in 1899, within twelve years after her death, the plaintiffs, who were the sons of Babaji, filed this suit to recover the land. They alleged in the plaint that Anpurnabai had been granted this land by her step-son Babaji by way of maintenance for her life, and they contended that, therefore, their right of suit did not arise until her death. The defendants pleaded adverse possession. They contended that Anpurnabai had held adversely to Babaji and to his sons (the plaintiffs). No evidence was given by the plaintiffs of the alleged grant of the land to Anpurnabai for her life by way of maintenance. The lower Court dismissed the suit. On appeal the District Judge reversed the decision and passed a decree for the plaintiffs. In his judgment he said: "The plaint states that Anpurnabai had this land for maintenance, and, in the complete absence of even the slighest information about Babaji and Ragho, I must take this to be the fact." *Held*, confirming the decree, that this was a finding of fact, with which

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*b*) QUESTIONS OF FACT—*concld.*

the High Court could not interfere in second appeal. BALKRISHNA *v.* GOVIND BABAJI AGASHE (1902) **I. L. R. 26 Bom. 617**

47. _____ *Civil Procedure Code, s. 584—Finding of facts.* In a second appeal the High Court can interfere where there is no evidence to justify the finding of fact arrived at by the lower Appellate Court. PEARY MOHAN MUKERJEE *v.* JOTE KUMAR MUKERJEE (1906). **11 C. W. N. 83**

(*c*) EVIDENCE, MODE OF DEALING WITH.

48. _____ **Evidence generally**—*Error in legal presumptions from facts—Decision without legal evidence.* A Judge in this country is Judge both of law and fact, but if in deciding upon the acts he deals improperly with the presumptions which the law would raise, he commits error in law which the High Court can correct in special appeal. When a Judge decides without legal evidence, he commits an error in law. SURNOMOYE *v.* LUCHMEEPUT DOOGUR . . **9 W. R. 338**

49. _____ *Assumption made without evidence.* Where an assumption is made by the Court without any evidence that is an error of law warranting a special appeal. HIMMUT ALI KHADIM *v.* NYAMUTOOLLAH KHADIM **23 W. R. 250**

Upholding on appeal NIAMUTOOLLAH KHADIM *v.* HIMMUT ALI KHADIM . . . **23 W. R. 519**

50. _____ *Drawing unwarranted conclusions.* Special appeal allowed, and case remanded for re-trial, where the lower Appellate Court had drawn conclusions from the evidence not warranted by law or reason, and had failed to try a material issue in the case. MAHARAM SHEIKH *v.* NAKOWRI DAS MAHALDAR **7 B. L. R. Ap. 17**

51. _____ *Civil Procedure Code, s. 584—Substantial error in a first Appellate Court's finding without any evidence to support it.* The Court of first instance dismissed the suit upon the ground that the right which it was brought to establish had been taken away by a compromise entered into by a guardian on behalf of an infant party to former proceedings. This was reversed by the first Appellate Court, which decreed the claim, holding it unaffected by the compromise, on the ground that the latter was, in fact, contrary to the interests of the infant. The High Court, on a second appeal, set aside this finding, there having been no proof that the compromise was to the infant's detriment, and affirmed the decree of the first Court. *Held*, that the High Court rightly reversed the decree of the first Appellate Court; the above finding, without any evidence to support it, being a substantial error in the proceedings, and good ground of second appeal within the meaning of s. 584, sub-s. (*c*), of the Civil

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*c*) EVIDENCE, MODE OF DEALING WITH—*contd.*

Procedure Code. HEMANTA KUMARI DEBI *v.* BROJENDRO KISHORE ROY CHOWDHRY
I. L. R. 17 Calc. 875
L. R. 17 I. A. 65

52. ——— *Error in legal conclusion or inference from evidence.* In a suit to enforce a right to share in the profits of a ferry, the defendant set up an exclusive title and adverse possession. *Held*, that, the decision that the defendant's possession had been adverse having been an inference from a fact in the Courts below, the correctness of this as a legal conclusion to be drawn or not was a question open to second appeal, and the High Court was not precluded from deciding to the contrary. LACHMESWAR SINGH *v.* MANWAR HOSSEIN . I. L. R. 19 Calc. 253
L. R. 19 I. A. 48

53. ——— *Omission of Appellate Court to consider presumption of facts material to case.* When an Appellate Court appears not to have taken into its consideration a presumption of facts arising out of the circumstances in evidence, and materially affecting the decision of the case, that is such an omission and defect (ss. 354 and 372, Act VIII of 1859) as the High Court will remedy on special appeal by directing an issue. NILATATCHI *v.* VENKATACHALA MUDALI
1 Mad. 131

S.C. ANONYMOUS . 2 Ind. Jur. O. S. 13

5 ——— *Omission to draw inference.* An omission of the Judge to draw an inference from the conduct of parties relied on as evidence is not an error of law with which the High Court will interfere in special appeal. SAVI *v.* PUNCHANUN . . . 25 W. R. 503

55. ——— *Documentary evidence—Construction of document or inference to be drawn from its term—Civil Procedure Code, s. 584—Question of law.* The question of what is the proper inference to be drawn from the terms of a document is a question of law within the meaning of s. 584, Civil Procedure Code, and can be considered in second appeal. CHOCKALINGAM PILLAI *v.* MAYANDI CHETTIAR
I. L. R. 19 Mad. 485

56. ——— *Omission to consider evidence—Error in decision on the merits.* Every Judge of a question of fact is bound to take into consideration all the allegations and proofs upon the record bearing upon that question, as well as the material presumptions arising therefrom, and to overlook them is a defect in law. But before such defect can constitute a good and valid ground of special appeal, it must be of such a character that it may have caused an error in the decision of the case on the merits. GUNEE BISWAS *v.* SREEGOPAL PAUL CHOWDHRY . 8 W. R. 395

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*c*) EVIDENCE, MODE OF DEALING WITH—*contd.*

57. ——— *Decision of lower Courts as to credit to be given to particular proofs.* It is the province of the Court which has to decide issues of fact to determine the amount of credit to which each particular proof offered is entitled; and with the fair exercise of its discretion in this respect by such Court, the High Court, as a Court of special appeal, is not at liberty to interfere. MUTHRA DOSS *v.* MAGH SINGH . 2 N. W. 207

58. ——— *Weight of reasons given for decision.* No special appeal will lie on a ground relating merely to the weight of the reasons given by the lower Appellate Court for the conclusion arrived at. DOORGA CHURN SETT *v.* SHAMANUND GOSSAIN . . . 12 W. R. 376

Or as to the worth of testimony. MACKENZIE *v.* JOWAHIR MAHTOON . . . 25 W. R. 137

59. ——— *Weight of evidence—Discretion of Court under Act XL of 1858.* Weight of evidence is not a point on which the High Court can interfere in special appeal, nor will it interfere with the discretion of the Judge in not allowing a person to represent a minor. DHOONDH BAHADOOR SINGH *v.* PRIAG SINGH . 17 W. R. 314

60. ——— *Giving credit to evidence.* Where the lower Appellate Court has dealt with the evidence on both sides, has weighed it, and come to the conclusion that one side ought to be believed, the giving in the course of his observations a bad reason for believing it is not a ground of special appeal. SHEO GOLAM SAHOY *v.* MOHADEO LALL SAHOO . . 18 W. R. 110

61. ——— *Difference between lower Courts on question of evidence.* Where the first Court and the lower Appellate Court differ as to questions of evidence, it is not a ground of special appeal, nor are the parties entitled to argue in special appeal whether the former or the latter is right. TARA PROSUNNO MOZOOMDAR *v.* BISHONATH SIRCAR . . . 23 W. R. 144

Reversing on appeal BISSONATH SIRCAR *v.* TARA PROSONNO MOZOOMDAR . . 22 W. R. 482

62. ——— *Ground for discrediting evidence found not to exist.* Where it was found, in special appeal, that the main ground on which the lower Appellate Court had suspected the evidence for the plaintiff and given credence to the evidence for the defendants had no existence, the High Court ordered a consideration of the evidence. AMEERUN *v.* CHERAG ALI
24 W. R. 343

MACKENZIE *v.* JOWAHIR MAHTOON.
25 W. R. 137

63. ——— *Erroneous dealing with evidence.* Whether or not a lower Appellate Court commits such an error in dealing with a case on the evidence before him as would

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*c*) EVIDENCE, MODE OF DEALING WITH—*contd.*

make his conclusion on the facts bad in law, if he does not treat the evidence otherwise than reasonably, he gives no room for special appeal. MOHUR MATOON *v.* UMATUM . . . 18 W. R. 499

64. ——— *Improper mode of dealing with evidence—Remand.* On special appeal it appearing that the Judge had dealt with the evidence in the case in an improper manner, it was pointed out, where he had committed errors and the case was remanded, that he might pass a fresh decision upon it. RAM DAS SAHA *v.* MANMAHINI DASI . . . 7 B. L. R. Ap. 4

65. ——— *Judgment showing want of consideration of evidence.* A judgment which shows on the face of it want of due consideration of evidence and the introduction of foreign matters into the case may be brought up before the High Court in special appeal. SOORAJ KANT ACHARJE *v.* KHOODEE NARAIN MANNA 22 W. R. 9

KOOLDEEPNARAIN SINGH *v.* RUMMON SINGH 22 W. R. 278

66. ——— *Civil Procedure Code, 1882, s. 584—Grounds impugning findings of fact. Held,* by the Full Bench (PETHERAM, *C.J.*, dissenting), that under s. 584 (*c*) of the Civil Procedure Code it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Where a lower Appellate Court has drawn strained or unreasonable conclusions from the evidence or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible reasons for arriving at its findings of fact, the High Court may take notice of all such matters in second appeal. *Futtema Begam* v. *Mohamed Ausur, I. L. R. 9 Calc. 309; Assanullah* v. *Hafiz Muhammad Ali, I. L. R. 10 Calc. 931;* and *Lal Mahomed Bepari* v. *Shoila Bewa, 11 C. L. R. 104,* referred to. *Per* PETHERAM, *C. J.*—The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final. By "specified law" in cl. (*a*) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the lower Appellate Courts have either misconstrued a statute or written document,

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*c*) EVIDENCE, MODE OF DEALING WITH—*contd.*

or have come to a wrong conclusion as to what is the customary law of the country or community, with reference to questions at issue between the parties. Cl. (*b*) can only refer to mistakes in law and does not extend the operation of cl. (*a*). The term "procedure" in cl. (*c*) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact. *Per* MAHMOOD, *J.*—That the Legislature by framing s. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal; and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of s. 574 is essentially defective, and may properly be made the subject of complaint in second appeal under s. 584. *Ramnarain* v. *Bhawnidin, All. Weekly Notes (1882) 104,* and *Sheoambar Singh* v. *Lallu Singh, All. Weekly Notes (1882) 158,* referred to. The word "procedure" in cl. (*c*) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Courts. When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand when the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower Appellate Court open to second appeal under cl. (*c*) of s. 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits. NIVATH SINGH *v.* BHIKKI SINGH. BHIKKI SINGH *v.* NIVATH SINGH I. L. R. 7 All. 649

67. ——— *Finding on issue of fact remitted—Civil Procedure Code, 1882, ss. 565, 566, 568. Held,* by the Full Bench (TYRRELL *J.*, dissenting), that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined. *Nivath Singh* v. *Bhikki Singh. I. L. R. 7 All. 649*, referred to. *Per* PETHERAM, *C.J.*, and TYRRELL *J.*—Ss. 565 and 566 of the Civil Procedure Code are, as far as may be, incorporated in Ch. XLII of the Code relating to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is the duty of the High Court, on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. *Per* STRAIGHT, *J.*—S. 587 of the Civil Procedure Code does not mean that the provisions of Ch. XLI relating to first appeals are to be applied indiscriminately or in their entirety to second appeals, and implies no warrant for the decision by the High Court of questions of fact in any shape or at any stage of a second appeal. *Ramnarain* v. *Bhawanidin, All. Weekly Notes (1882) 104*, and *Sheoambar Singh* v. *Lallu Singh, All. Weekly Notes (1882) 158*, referred to. *Per* TYRRELL, *J.*—The jurisdiction of Courts of second appeal in respect of questions of fact is restricted, in so much as the appeal may not be entertained on "grounds" of fact, but under the circumstances of s. 566 of the Code, no less than under the abnormal circumstances contemplated by the ruling of the Full Bench in *Nivath Singh* v. *Bikki Singh, I. L. R. 7 All. 649*, the Court may take cognizance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. In cases where the Court still acting under s. 566, has been obliged in the absence of evidence on the record to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby or by reason only of the circumstance that the evidence is accompanied by a "finding" of the inferior Court,—the term "finding" being used in s. 566 in its restricted sense of an answer to the proposition referred for inquiry, and not for an award of decision of the issue before the Court. BALKISHEN *v.* JASODA KUAR . . **I. L. R. 7 All. 765**

68. ——— *Findings of fact —Procedure of the High Court.* Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of fact which have been arrived at by the lower Appellate Court. FUTTEHMA BEGUM *v.* MAHOMED AUSUR . . . **I. L. R. 9 Calc. 309**

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

69. ——— *Question of fact —Findings on evidence.* The finding of a fact by a lower Appellate Court upon evidence, a portion of which was inadmissible, is not such a finding of fact as cannot be interfered with in special appeal. GURU DAS DEY *v.* SAMBHUNATH CHUCKERBUTTY . . . **3 B. L. R. A. C. 258**

70. ——— *Giving undue weight to inadmissible evidence.* Where the lower Appellate Court gave very great weight to evidence which ought not to have been treated as evidence between the parties, and this error materially affected his judgment throughout, the High Court in special appeal *held* that there had been a mistrial, and remanded the case for re-consideration. ROHEE LALL *v.* DINDYAL LALL . . **21 W. R. 257**

71. ——— *Error in law —Rejection of evidence.* There is a material difference between a case in which a Judge has assigned one bad reason for believing or disbelieving a particular piece of evidence, while he has given one or more good reasons for the same belief or disbelief; or a case in which, putting this particular piece of evidence wholly aside, enough remains to support the judgment, and a case in which the essential question, or one of the essential questions to be decided, rests upon the evidence believed or disbelieved regarded as of great value, or considered worthless, for a reason which is unsound and unsustainable. In the latter case an Appellate Court can interfere on special appeal. HURO PROSAD ROY *v.* WOMATARA DEBEE **I. L. R. 7 Calc. 263 : 8 C. L. R. 449**

72. ——— *Error in procedure—Finding of fact by lower Court not accepted by High Court where the District Judge, in consequence of a mistake as to a date, was biassed in dealing with the defendant's evidence.* Where a Judge, under a mistake, thought that a bond, which was really dated 19th November 1885, was dated 8th November 1886, and consequently treated the deposition of the defendants in which he stated that the bond had been passed by him a fortnight before he signed in the plaintiff's account book the acknowledgment sued on dated the 10th December 1885, as "false :"—*Held*, that, as the Judge must have been biassed by the strong opinion so formed as to the defendant's untruthfulness in dealing with the rest of the defendant's evidence, there was such a substantial error in the procedure as ought to preclude the High Court from accepting the Judge's finding as conclusive upon the point in dispute. Decree reversed, and the case sent back for fresh decision on the merits on the evidence as it stood. *Hemanta Kumari Debi* v. *Brojendro Kishore Roy Chowdhry, I. L. R. 17 Calc. 875 ; L. R. 17 I. A. 69*, referred to. VIRBHADRAPPA *v.* MAHANTAPPA **I. L. R. 15 Bom. 670**

73. ——— *Error in dealing with question of admissibility of evidence and burden*

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

of proof. Per MAHMOOD, *J.*—It is the duty of the Court, when dealing with second appeals and in considering the conclusions at which the lower Appellate Courts have arrived, to consider whether or not those conclusions have been arrived at in due compliance with the rules of law governing the admissibility of evidence, and which involve questions of the burden of proof; especially in cases in which a title is asserted by a plaintiff who seeks to oust a defendant and that defendant denies the title and asserts that the plaintiff has no title at all. WALI AHMAD KHAN *v.* AJUDHIA KANDU
I. L. R. 13 All. 537

74. ——— *Suit for ejectment—Proof of title—Inference of title from acts of ownership—Finding of lower Court on such question—Mixed question of law and fact—Finding of fact.* In an ejectment suit the evidence of the plaintiff's title to the property consisted of evidence of acts of user from which the Court was asked to infer ownership in the absence of proof of a better title by the defendant. Upon review of the evidence the District Judge held that the plaintiff's title was not proved. *Held*, that this finding, which was a mixed one of law and fact, was a finding with which the High Court could not interfere on second appeal. When, from the facts found by the lower Court, the legal inference to be drawn is certain, the High Court in second appeal may correct erroneous conclusions drawn by the lower Appellate Court. Where, however, the legal inference to be deduced from facts is doubtful, it is not open to the High Court in second appeal to interfere with the findings of the lower Court. A test which often presents itself to an English lawyer is this: Would a Judge withdraw the case from a jury on the ground that there was no evidence of the question to be found upon, such as adverse possession or title, to go to them? or would he, on the other hand, on certain facts being established, direct them to find in a particular manner? In either of these cases it would be open to the High Court in second appeal to come to a different conclusion from the lower Appellate Court. But where the question upon the facts and law is one which the Judge would lay before the jury to decide, there it is not open to the High Court to consider the propriety of the finding of the lower Appellate Court. *Lachmeswar Singh* v. *Manowar Hossein, I. L. R. 19 Calc. 253 : L. R. 19 I. A. 48*, and *Ram Gopal* v. *Shamskhaton, I. L. R. 20 Calc. 93 : L. R. 19 I. A. 228*, referred to. RAJARAM *v.* GANESH HARI KARKHANIS
I. L. R. 21 Bom. 91

75. ——— *Misdirection—Ground of special appeal—Error of law.* The fact that the lower Appellate Court has misdirected itself as to the effect of evidence which has been admitted in a suit is an error of law affording a good ground for a second appeal. RAMPROSAD DAS *v.* RAJO KOER . . . . **5 C. L. R. 94**

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

76. ——— *Disregard of evidence.* Where the lower Appellate Court's judgment was not based on the whole evidence on the record (it having left some important evidence out of consideration), the judgment was set aside in special appeal, and the case remanded for retrial. SHUNDHABUN MOHUNT *v.* SHURUT CHUNDER ROY . . . . . **23 W. R. 160**

ABDUL ROHMAN *v.* SOFY MIKHAYESH SAHEBA
24 W. R. 293

MOHUN SINGH *v.* JUGBUTTY KOOER
24 W. R. 297

77. ——— *Disregard of evidence—Error in law.* A complete disregard of evidence which although not conclusive and an estoppel, is of such a nature that a judgment in opposition to it cannot be allowed to stand, amounts to an error in law. HEERA LALL GHOSE *v.* KALEE DASS MOOKERJEE . . . **23 W. R. 65**

ANUND CHUNDER CHUCKERBUTTY *v.* RUTNESSUR DOSS SEN . . . . . **25 W. R. 50**

78. ——— *Irregular dealing with evidence.* Where an Appellate Court ignores the great body of evidence on the record and places reliance on what can be shown either to be no evidence at all or which points almost exclusively the other way, and here it lays down, as positive dicta of law, points which are not law, the High Court would be justified in consideration such proceedings as errors of law, notwithstanding that the Court below has ostensibly based its judgment on the evidence. ROOP NARAINEE KOOER *v.* RESSAL TEWAREE . . . . . **24 W. R. 119**

79. ——— *Improper dealing with evidence.* In this case departing from its general rule in special appeals not to disturb the finding of fact arrived at by the Court below, the High Court, seeing that, on the one hand, the Judge had misrepresented the effect of the evidence in some important particulars, and, on the other hand, omitted to notice facts very much in favour of the defendants, considered itself justified in saying that his mode of dealing with the appeal had led to material defects in the investigation of the case which had produced error in the decision on the merits. It accordingly reversed his judgment and remanded the case for re-trial. SHIBO SOONDUREE DOSSEE *v.* CHUNDER KANT GHOSE **21 W. R. 217**

AMEER BEPAREE *v.* HURREE MOHUN KURMOKAR . . . . . **23 W. R. 87**

80. ——— *Improper and erroneous dealing with evidence—Error in law.* The investigation of a case upon a portion of the evidence, excluding the other portion under a mistaken impression that it was not legal evidence, but conjecture, is an investigation erroneous in law, and is likely to produce an error in the decision of the case on its merits. The mode in which evidence

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

is to be dealt with discussed. MATHURA PANDEY, *v.* RAM RUCHA TEWARI
3 B. L. R. A. C. 108 : 11 W. R. 482

81. ——— *Partial consideration of evidence.* It is a ground for special appeal, if the Appellate Court disregards one side of a case, and turns its attention exclusively to the evidence on the other; but it is no error of law merely to pronounce no objection upon the evidence on the former side. DEO SURUN POORY *v.* MAHOMED ISMAIL . . . . . **24 W. R. 300**

82. ——— *Ground for setting aside decision on facts.* The lower Appellate Court has quite as much authority to decide upon facts as the Court of first instance, and the High Court is not at liberty to interfere with verdicts setting aside judgments of the Court of first instance, simply because such judgments are more detailed or even more satisfactory on the evidence. DOIBO CHUNDER ROY *v.* WOOMA MOYEE DEBIA
19 W. R. 321

83. ——— **Documentary evidence**—*Reasons for rejecting documentary evidence.* The reasons of a Judge for not giving any weight to documents offered as evidence cannot be questioned in special appeal. MUNEE DUTT SINGH *v.* CAMPBELL . . . . . **11 W. R. 278**

But *see* SUROSUTTY DOSSEE *v.* UMBIKA NUND BISWAS . . . . . **24 W. R. 192**

84. ——— *Finding as to sufficiency of documentary evidence. Per* BAYLEY, *J.*—The omission in the first Court to enquire or specify in the judgment as to whether a pottah, which is admittedly 100 years old, and which is supported by the evidence of old witnesses, comes from proper custody or not, is not a sufficient reason to invalidate the finding that the pottah is proved; nor is it a defect in the investigation affecting the merits of the case which would justify the interference of the High Court in special appeal. *Per* GLOVER, *J.*—The question as to proper custody is not in issue, the judge having found the pottah proved by the evidence of witnesses. BUDDIOODDEEN *v.* GOLAM PEER . . . **17 W. R. 279**

85. ——— *Error of Judge in not giving proper effect to evidence.* In order to support a contention that the judgment of the lower Appellate Court is erroneous in law because the Judge has failed to give proper effect to the documentary evidence adduced, it is necessary for the special appellant to show not only that the evidence is calculated to support certain conclusions, but that these conclusions alone flowed from it. SHAM NARAIN *v.* COURT OF WARDS . **20 W. R. 197**

86. ——— *Finding as to genuineness of deed from copy put in evidence.* The finding of a lower Appellate Court pronouncing, on evidence, on the genuineness of a deed on the

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

production of a copy (the original having been lost) is not open to interference in special appeal. BHUGWAN CHUNDER BANERJEE *v.* DUKHINA DEBIA . . . . . **8 W. R. 356**

87. ——— *Finding as to genuineness of document.* A decision that a document was not genuine cannot be interfered with on special appeal. TARA PROSUNNO MOJOOMDAR *v.* BISHO NATH SIRCAR . . . **23 W. R. 144**

Reversing on appeal BISSONATH SIRCAR *v.* TARA PROSONNO MOZOOMDAR . . **22 W. R. 482**

88. ——— *Use of probabilities against direct evidence.* Where the lower Appellate Court merely on the appearence of a document discarded the evidence of witnesses who testified to the making and signing of it, the High Court reversed its decision, on the ground that probabilities which are useful as aids in considering the true value of direct evidence can seldom be safely had recourse to alone for the purpose of entirely invalidating direct evidence. LALLAH JHA *v.* TULLEBMATOOL ZUHRA . . **21 W. R. 436**

89. ——— *Erroneous and unnecessary presumption of fact.* Where the Court concluded against the genuineness of a document on a presumption erroneous or one which did not necessarily arise his decision was set aside on special appeal. AKJOO BIBEE *v.* KOONJO BEHAREE LALL
19 W. R. 288

WISE *v.* RUBAA KHATOON . . **19 W. R. 299**

GOPAL CHUNDER GHOSE *v.* TINCOWREE MUNDUL
19 W. R. 349

MEHER BANOO *v.* KERAMUT ALI **22 W. R. 402**

90. ——— *Comparison of signatures in unusual manner leading to erroneous conclusion.* Where the lower Appellate Court relied on a comparison between the signature in a mortgage-deed and the signature in a vakalatnama and it appeared in special appeal that there were very considerable discrepancies between the signatures, the High Court (departing from the ordinary assumption in such cases that the comparison had taken place in open Court before the parties in the usual way) concluded that the comparison had been conducted in some way which led the lower Court into error. They accordingly reversed its decision and remanded the case for re-trial. PHOODEE BIBEE *v.* GOBIND CHUNDER ROY
22 W. R. 272

91. ——— *Receipts for rent—Comparison of signatures—Credibility of evidence.* In a suit for rent the defendant pleaded payment and put in evidence receipts for the rent claimed. The Court of first instance disbelieved this evidence and gave a decree for the plaintiff. The Judge on appeal compared the signature of the plaintiff on the receipts with his signature to a document not in evidence in the case, and reversed

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

the decree and dismissed the suit. *Held*, that the decision of the Judge, proceeding upon the point as to the credibility and weight of evidence, could not be objected to on special appeal. RAM SOONDER SIRCAR *v.* KISTOBAG BAG
Marsh. 322 : 2 Hay 421

92. ——— *Receipts for rent —Civil Procedure Code, 1859, s. 372—Error in investigation of case.* In a suit for arrears of rent the defendant pleaded payment and filed receipts. The Collector distrusted the receipts, and gave a decree in favour of the plaintiff saying that as to three of the receipts evidence had been given which he did not believe ; and that with respect to the other receipts no evidence had been offered. The Judge, on appeal, reversed the decree, and gave a decree in favour of the defendant, expressing an opinion that the distrust of the evidence in support of the three receipts was without sufficient reason. *Held*, that, with respect to the receipts in support of which no evidence had been offered, the plaintiff was entitled to a decree for the rents to which they applied, and that the finding of the Judge that such rents had been paid without any evidence having then been given of such payments was an "error in the investigation of the case" which had produced error in the decision of the case upon the merits, within s. 372 of Act VIII of 1859, and was therefore ground of special appeal. MOHUN CHUNDER DHUR *v.* KIDGE
Marsh. 381 : 2 Hay 419

93. ——— *Misapprehension of, and irregular dealing with, evidence by Appellate Court—Ground for reversing decision.* Where the lower Appellate Court misapprehended the documentary evidence, mistook the statements of witnesses, and without recording clearly its reasons for doing so sent for documents which had not been put in evidence before the first Court, and also came to the conclusion that certain documents whose authenticity had been sworn to were fabricated merely because their appearance seemed to indicate this, the High Court in special appeal *held* that the case had not been properly tried, and, reversing the decision of the lower Appellate Court, remanded the case for re-trial, excluding from the evidence on the record the evidence which had been received in the appeal stage without any reasons being recorded for its admission. NOWAB KHAN *v.* RUGHOONATH DOSS . . . **20 W. R. 474**

94. ——— *Error in law—Misconstruction of document.* The misconstruction of a document is an error in law sufficient to form a ground of appeal. ODIT NARAIN *v.* MAHESHUR BUX SINGH . **Agra F. B. 52 : Ed. 1874, 39**

95. ——— *Misconstruction of document—Error on facts.* Where the Court in recording the words of a document on which it relies puts one term for another, it is a misconstruction "affording ground for special appeal," but where for reasons given it places a particular boundary mark in a particular spot, its decision, even though wrong on the facts, would not be a misconstruction unless incompatible with the wording of the document. KALEE CHURN PATTUR *v.* CHUNDEE CHURN MUNDUL. . **9 W. R. 366**

96. ——— *Misconstruction of documents. Per* AIKMAN, *J.—Semble :* That a ground of appeal to the effect that the lower Appellate Court has misconstrued a document is not one of the grounds of second appeal contemplated by s. 584 of the Code of Civil Procedure. RUDR PRASAD *v.* BAIJNATH . . **I. L. R. 15 All. 367**

97. ——— *Question of fact —Erroneous use of admission by lower Courts.* The High Court, in special appeal, interferred with the concurrent finding of the first Court and the lower Appellate Court on a finding of fact, where the decision turned entirely on the construction of a written admission which had been wrongly understood. LALLA IMRIT LALL *v.* MAHOMED LALLZAMAH . . . . . **18 W. R. 447**

98. ——— *Mistake as to meaning of evidence—Misconstruction of document.* The misconstruction of a document which is the foundation of the suit, being in the nature of a contract or a document of title, is a ground for special appeal, although not named in Act VIII of 1859, s. 372. But a special appeal does not lie because of a mistake as to the meaning of some portion of the evidence which is in writing, if it is connected with other evidence affecting its construction. NOWBUT SINGH *v.* CHUTTER DHAREE SINGH
19 W. R. 222

99. ——— *Error in construction and dealing with sale certificate.* A Judge is bound to give full effect to the terms of a sale certificate ; and when he proceeds to limit the effect of that c rtificate by certain inferences and conclusions drawn from other documents, he does that which he is not at liberty to do, and commits an error of law which it is in the power of the High Court to remedy on special appeal. MOOKHYA HURUCKRAJ JOSHEE *v.* RAM LALL GOMASHTA
14 W. R. 435

100. ——— *Construction of depositions of witnesses.* The construction of the deposition of witnesses is not a question of law, and therefore not a ground of special appeal. HIMMUT ALI KHADIM *v.* NYAMUTOOLLAH KHADIM
23 W. R. 250

Upholding on appeal, NIAMUTOOLLAH KHADIM *v.* HIMMAT ALI KHADIM . . **22 W. R. 519**

101. ——— *Construction of document—Question of fact.* Where the conclusion of the lower Appellate Court rested, not only upon the contents of a document involving the question

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

of its correct construction, but also upon all the facts of the case and the whole conduct of the parties :—*Held*, that it was not open to special appeal. BUNGSHEE DHUR MAHATA *v.* MUDHOO SOODUN CHOWDHRY . . . . . **23 W. R. 406**

102. ——— *Decision without sufficient evidence.* In a suit on a kabuliat, the Court of first instance found that the kabuliat had not been signed by the defendant, but by a third party, and that there was no evidence that such third party was authorized to sign it. The Judge on appeal reversed the decision. *Held*, that the decision of the Judge holding the defendant responsible for the signature of a person of whose authority there was no evidence was erroneous in point of law, and was a ground of special appeal. SHAM CHAND BYSACK *v.* BUNGO CHUNDER CHATTERJEE . . . **Marsh. 556 : 2 Hay 663**

103. ——— *Finding of fact as to Ameen's report.* Where the lower Appellate Court finds as a fact that the Ameen's report is untrustworthy and his map wrong, the finding cannot be interfered with by the High Court in special appeal. SHEO DYAL SINGH *v.* HODGKINSON **24 W. R. 342**

104. ——— *Omission to record opinion on evidence.* The omission to record an opinion on one of many items of evidence (*e.g.*, an Ameen's report) is not such an error in law as to come within the scope of the provisions for special appeals. BUNDHOO SOOKOOLANY *v.* JOY PROKASH SINGH . . . . . **W. R. 1864, 367**

HIMMUT ALI KHADIM *v.* NYAMUTOOLLAH KHADIM **23 W. R. 250**

Upholding on appeal under the Letters Patent the decision of KEMP, *J.*, in NIAMUTOOLLAH KHADIM *v.* HIMMUT ALI KHADIM . . **22 W. R. 519**

105. ——— *Entry in account book—Error in law.* The improbability of plaintiff having received payment for one bill whilst another and older one remained unpaid was no reason for the Judge refusing to consider the evidence adduced by plaintiff in support of her demand, and his not having done so was *held* to be an error of law. So also the Judges having entirely ignored the evidence with regard to an entry in the plaintiff's day-book on which the first Court decided the case was *held* to be an error of law in the investigation and a proper subject for special appeal. DARIMBO DEBEE *v.* HURREEHUR MOOKERJEE . . . . . **18 W. R. 53**

106. ——— *Document improperly admitted.* Where a Judge is influenced in his estimate of parol testimony by the result of his consideration of documents which he ought not to have dealt with as evidence, there was *held* to have been no proper trial of the case. The High Court on special appeal remanded the case. BOIDONATH PAROOYE *v.* RUSSICK LALL MITTER **9 W. R. 274**

PURAN CHUNDER CHATTERJEE *v.* GRISH CHUNDER CHATTERJEE . . . **9 W. R. 450**

107. ——— *Debutter—Words of dedication—Second appeal—Construction of document—Grounds.* Where a document of title, which was the foundation of the whole of the plaintiff's claim in the suit, was misconstrued by the Lower Appellate Court :—*Held*, that it was open to the High Court in second appeal to interfere with the findings of the Lower Appellate Court arrived at on a misinterpretation of the meaning of the passages of the document. *Nawbut Singh* v. *Chutter Dharee Singh, 19 W. R. 222*, referred to. HARA SUNDAR MAJUMDAR *v.* BASUNTA KUMAR ROY (1905) . . . . . **9 C. W. N. 154**

108. ——— **Oral evidence**—*Difference of opinion between lower Courts as to credibility of witnesses.* Where the Courts differ as to the credibility of witnesses, such difference does not form a ground of special appeal. SREEKANT GHOSE *v.* BHUWAN CHUNDER SEN . . **24 W. R. 13**

109. ——— *Finding as to materiality of evidence or witnesses.* Though a Judge has a right to say that in the absence of a witness he considers material he cannot give the plaintiff a decree, yet where he stated that unless a certain witness (from whom the plaintiff had got a conveyance which it was necessary for him to prove) attended and gave evidence the plaintiff could have no right whatever, his decision was *held* to be wrong in law and was set aside on special appeal. RAM DHUN BANERJEE *v.* RAM NARAIN MOOKERJEE **11 W. R. 311**

110. ——— *Discrediting witnesses for general reasons—Error in law.* For the lower Appellate Court to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law which can be the subject of a special appeal. SHEO PURSHUN PANDEY *v.* BRUN PANDEY **24 W. R. 251**

111. ——— *Disbelief of witness as interested party.* A special appeal will not lie merely on the ground that the lower Appellate Court has disbelieved a witness by reason of his being an interested person or for any other reason within its discretion. DWARKANATH DOSS BISWAS *v.* MUDDUN MOHUN CHUCKERBUTTY **6 W. R. 292**

112. ——— *Omission to give reasons for believing witnesses disbelieved by lower Court.* The omission of a lower Appellate Court to give its resaons for believing witnesses disbelieved by the first Court does not constitute a ground of special appeal. LUCKHEE MONEE DOSSIA *v.* RAJKISHORE PAUL . **4 W. R. 106**

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

Nor the omission to give reasons for confirming the decision of the lower Court. SHAMEE MOHAMED *v.* PRODHAN PALEE . . . **5 W. R. 178**

113. ——— *Omission to give reasons for believing witnesses.* No general rule can be laid down as to when the reasons should be stated by an Appellate Court for believing one set of witnesses rather than another; and the omission of a lower Appellate Court to state such reasons is not a ground for special appeal. SHUMSHUROODDY *v.* JAN MAHOMED SIKDAR **21 W. R. 260**

MUKDOOMUNNISSA *v.* NOKHY SINGH **24 W. R. 296**

114. ——— *Omission to remind witness of former contrary statement—Reference to statement in judgment.* When witnesses under examination make statements which are contrary to statements previously made by them, the Court ought to draw their attention to the contradiction; but an omission to do so does not make the judgment bad in law, because he has remarked on those contrary statements in his judgment. SHAM LALL *alias* SHAMA *v.* ANUNTEE LALL **24 W. R. 312**

115. ——— *Putting onus of proof on wrong party—Irregularity affecting merits—Error in law.* A suit instituted in the Court of the Principal Sudder Ameen was transferred under s. 6 of Act VIII of 1859 to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff. The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sudder Ameen; and the District Judge reversed the Munsif's decree, not on this ground, but on the merits. The plaintiff then appealed to the High Court, objecting that the suit had been illegally decided by the Munsif, upon evidence recorded by the Principal Sudder Ameen; and that the onus of proving the *bonâ fides* of the transaction, which was the subject-matter of the suit, was thrown by the District Judge on the plaintiff, instead of on the defendant, who alleged the want of it. *Held*, (i) that the Munsif's having used the evidence recorded by the Principal Sudder Ameen was only an irregularity which was waived by the plaintiff not requiring the witnesses to be examined again, and proceeding with the suit, and producing other witnesses to be examined in support of his claim; and as this irregularity did not affect the merits of the case, the decree of the Munsif being in the plaintiff's favour, it was not a ground for reversing the decree on special appeal; (ii) that the onus was not thrown by the Judge upon the plaintiff in its proper sense, and so as to be an error in law, as the Judge did not hold that the defendant was entitled to succeed without giving any evidence, unless the plaintiff disproved the allegation of the want of *bonâ fides*. NARANBHAI VRIJBHUKANDAS *v.* NAROSHANKAR CHANDRO SHANKAR **4 Bom. A. C. 98**

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(c) EVIDENCE, MODE OF DEALING WITH—*contd.*

116. ——— **Admission or rejection of evidence**—*Error in admission of document insufficiently stamped.* An error in the admission of an insufficiently stamped promissory note was *held* not to be an error affecting the decision of the case on its merits. MAKBUL AHMAD *v.* IFTIKHARUNNISSA BEGUM . . . . **7 N. W. 124**

117. ——— *Order under s. 20, Stamp Act XVIII of 1869—Discretion—Ground of special appeal.* A District Court refused to allow under Act XVIII of 1869, s. 20, an insufficiently stamped document to be admitted on payment of the full amount of stamp duty, and the penalty, on the ground that it was wilfully executed in fraud of the stamp law. *Held*, that the High Court could not in special appeal question the correctness of the District Court's refusal. *Pendse* v. *Malse, 3 Bom. A. C. 94*, commented on. GAMBHIRMAL *v.* CHEJMAL . . . **10 Bom. 406**

118. ——— *Error in admission of secondary evidence.* Whether secondary evidence is admissible in the place of primary is a question for the determination of the Court which tries the case on its merits, but such determination is open to special appeal, if it is come to without evidence at all, or without evidence legally sufficient. CHUNDERKANT GHOSE *v.* SHOWDAMINEE DEBIA . . . . **9 W. R. 517**

119. ——— *Refusal to admit secondary evidence of lost deed.* All that it would be right for the Court to require for the protection of the revenue in cases where a lost deed was shown not to have had a stamp would be that the same money should be paid, before admitting secondary evidence, as would have to be paid if the deed itself were produced. If the Court does not do that but allows secondary evidence to be given of the contents of the deed, it is not an error which affects the merits of the decision or is a ground for special appeal. HARAN CHUNDER BHOOREE *v.* RUSSICK CHUNDER NEOGY **20 W. R. 63**

120. ——— *Refusal to allow additional evidence—Discretion of Court.* The parties in an appeal are not entitled as of right to put in additional evidence. The Appellate Court allows additional evidence in certain cases, but a special appeal will not lie in the event of the Court refusing to allow it. GOLAM MUCKDOOM *v.* HAFEEZOONISSA . . . . . **7 W. R. 489**

KULPO SINGH *v.* THAKOOR SINGH. **15 W. R. 429**

121. ——— *Refusal to allow additional evidence—Civil Procedure Code, 1859, s. 355.* The High Court on special appeal cannot interfere with the refusal of a lower Court to comply

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SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*contd.*

(*c*) EVIDENCE, MODE OF DEALING WITH—*contd.*

with an application, under s. 355, Act VIII of 1859, to file additional exhibits. MOESH CHUNDER SHAH *v.* SHOSHEE MOOKHEE DEBIA. . **6 W. R. 196**

122. ——— *Taking of additional evidence by Appellate Court—Civil Procedure Code (Act XIV of 1882), s. 568.* Where the lower Appellate Court allows additional evidence to be taken, though it is not satisfied that the evidence is necessary under cl. (*a*) or cl. (*b*) of s. 568 of the Code of Civil Procedure, the High Court will interfere on special appeal; but where this does not appear to be the case, and there is simply an omission on the part of the Appellate Court to record its reasons for allowing additional evidence to be taken, the High Court will not interfere. HAFIZ ABDUL KURRIM *v.* SRI KISSEN RAI . **I. L. R. 11 Calc. 139**

123. ——— *Omission to give reasons for admission of additional evidence.* A sued *B* for rent, making *C* a defendant: the suit was dismissed and *A* appealed. Then *C* sued *B* for rent; *A* intervened and was made a defendant; a decree was passed in favour of *C*, and *A* again appealed. On appeal the Subordinate Judge tried both suits on the same evidence though there was evidence in the second case which was not before the lower Court on the hearing of the first. *Held*, that he should have recorded his reasons for doing so, but that the judgment would not be set aside on that ground, it not appearing that the party taking the objection had been prejudiced or that it had been raised before the Subordinate Judge. PRANNATH SANDYAL *v.* RAM COOMAR SANDYAL **2 C. L. R. 33**

124. ——— *Improper rejection of evidence.* The improper rejection of evidence affecting the decision of the case on the merits is an error in law which may be set aside on special appeal. HURO CHUNDER CHOWDHRY *v.* GOBIND CHUNDER MOITREE . . . **17 W. R. 255**

125. ——— *Rejection of evidence which ought to have been admitted—Ground for interference.* The fact that the Judge may have rejected evidence which ought to have been received and considered does not warrant the High Court in interfering to set aside an order of such Judge. VENKATACHELLA CHETTI *v.* PARVATAMMAL **2 Mad. 418**

126. ——— *Admission or rejection of evidence—Civil Procedure Code, ss. 584, 568—Appeal—Admission of additional evidence in appeal—Discretion of Court.* The refusal by an Appellate Court to exercise the discretion vested in it by s. 568 of the Code of Civil Procedure, with respect to the admission of additional evidence, would be an error or defect in procedure, within the meaning of s. 584 of the Code, because s. 568 distinctly implies that discretion must be exercised. But a refusal, in the exercise of discretion, to admit additional evidence is undoubtedly not such an error or defect. RAM PIARI *v.* KALU (1900) **I. L. R. 23 All. 121**

SPECIAL OR SECOND APPEAL—*contd.*

5. GROUNDS OF APPEAL—*concld.*

(*c*) EVIDENCE, MODE OF DEALING WITH—*concld.*

127. ——— *Leaving out an important portion of evidence—Enhancement of rent—Bhaoli Nakdi—Bengal Tenancy Act (VIII of 1885), s. 29—Evidence.* Enhancement of rent under the Bengal Tenancy Act must mean an enhancement of the same kind of rent. A conversion of *nakdi* into *bhaoli* therefore cannot be regarded as an enhancement within the meaning of s. 29 of that Act. Where the Subordinate Judge left out of account an important portion of the evidence relied upon by the plaintiff:—*Held*, that this was an error of law and a ground of second appeal to the High Court. HASSAN KULI KHAN *v.* NAKCHHEDI NONIA (1905) . . **I. L. R. 33 Calc. 200**

128. ——— *Civil Procedure Code, s. 584—Second appeal—Exclusion of evidence, an error of law—Civil Procedure Code (Act XIV of 1882), s. 584.* Where in a rent suit, the Court of first appeal found as a fact that a certain amount was payable by the tenant as rent:—*Held*, that the High Court on second appeal can set aside the finding when the Court of first appeal wrongly excluded the settlement proceedings from its consideration and disregarded the evidence of road-cess returns filed by the tenants, and thereby committed errors of law. MOHIM CHANDRA ROY *v.* KALI TARA DEBYA (1907) . . . **11 C. W. N. 1028**

129. ——— Where in a second appeal the question was whether certain lands appertained to plaintiff's tenure:—*Held*, that a finding of the lower Appellate Court thereon which amounted merely to an expression of opinion could not be accepted as a finding displacing the finding of the First Court and, further, that the lower Appellate Court had erred in law in disregarding certain evidence without giving sufficient reasons for rejecting it. TRAILOKYA MOHINI DASI *v.* KALI PROSANNA GHOSE (1907) **11 C. W. N. 380**

6. OTHER ERRORS OF LAW OR PROCEDURE.

(*a*) APPEALS.

1. ——— **Appeal wrongly admitted——***Orders and proceedings thereon without jurisdiction.* Where an appeal was allowed from an order rejecting a review, and other acts and proceedings took place based on such illegal order, the High Court set aside all the proceedings in special appeal. JEWUN BIBEE *v.* BUDDUN MUNDUL **9 W. R. 489**

2. ——— *Appeal heard and decided without objection where no appeal lay.* Although Act XXIII of 1861, s. 26, barred an appeal from an order or decision passed in a suit instituted under Act XIV of 1859, s. 15, yet where

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*a*) APPEALS—*concld.*

an appeal was made in such a case, no objection taken, and the appeal decreed, the High Court refused to interfere, the lower Appellate Court's decree having given the plaintiff what the first Court ought to have given. HURDYAL SINGH *v.* KUNHYA LALL . . . **19 W. R. 247**

3. ——— *Appeal heard ex parte without respondent being aware of hearing —Application for rehearing barred before he was aware of decree against him—Civil Procedure Code, ss. 560 and 584(c)—Limitation Act, 1877, Sch. II, Art. 169—Power of High Court to interfere on special appeal.* Where an appeal was heard *ex parte* by a lower Appellate Court and the decree of the Court of first instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served, and who was not aware of the proceedings till after the time for applying for a rehearing under s. 560 of the Civil Procedure Code and Limitation Act, Sch. II, Art. 169, had expired:—*Held*, that the High Court in second appeal had power to interfere under s. 584 (*c*), Civil Procedure Code. BALAJI RAU *v.* SITHABHOY . . . **I. L. R. 19 Mad. 414**

4. ——— *Order rejecting appeal not presented in time without sufficient cause for delay—Discretion of Judge—Exercise of discretion not to be interfered with.* Where an appeal has been dismissed as barred by limitation, the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision. PARVATI *v.* GANPATI ROKDAJI NAIK **I. L. R. 23 Bom. 513**

5. ——— *Civil Procedure Code (Act XIV of 1882), s. 584—Second appeal—Procedure.* Case where in a second appeal the judgment of the lower Appellate Court was set aside on the ground that the procedure adopted by it in the trial of the case was not in accordance with law, which requires that all the facts and circumstances of the case should be taken into consideration. BHUPAT RAI *v.* KALI RAI (1901) **6 C. W. N. 357**

(*b*) COSTS.

6. ——— **Interference with award of costs.** The Court may interfere with the award of costs on appeal. JAFREE BEGUM *v.* AHMED HOSSEIN KHAN . . . . **1 Agra 270**

7. ——— **Question of costs.** There may be circumstances which would justify an appeal upon a mere question of costs. CHITRAYIL *alias* KUNATH AHMED KOYA *v.* IRUMANOM VITTIL KANHAMATH HAJI . . . . **3 Mad. 279**

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*b*) COSTS—*contd.*

8. ——— *Mode of awarding costs.* The question of how costs have been awarded is not a point for special appeal. BEER PERSHAD *v.* DOORGA PERSHAD . **W. R. 1864, 215**

9. ——— *Appeal from portion of decree relating to costs. Held*, in conformity with a Full Bench ruling of the late Sudder Court, that a special appeal lies from the order of the lower Courts in matters relating to costs, and that there is nothing in the law limiting or taking away the right to appeal specially from that part of a decree which relates to costs in any case where any legal ground for special appeal is shown to exist. ASSA RAM *v.* KASHMEEREE DASS **Agra F. B. 90: Ed. 1874, 68**

10. ——— *Discretion in assessing costs—Civil Procedure Code, 1859, s. 187.* Where no appeal is made against the judgment passed on the subject-matter of the suit, the discretionary power of assessing costs given by s. 187 of Act VIII of 1859 should not, unless in a very exceptional case, be interfered with by the Appellate Court. KUPPUSVAMIAYYAN *v.* NANNUVAYYAN **1 Mad. 74**

11. ——— *Improper exercise of discretion in awarding costs.* An improper exercise of discretion in awarding costs against which a regular appeal would lie is no ground for allowing a special appeal, unless the award is contrary to some particular law on the subject. AMIRSAHEB HAFIZULLA *v.* JAMSHEDJI RUSTAMJI **4 Bom. A. C. 41**

DESAJI LAKHMAJI *v.* BHAVANIDAS NAROTAMDAS. **8 Bom. A. C. 100**

12. ——— *Improper exercise of discretion in awarding costs.* There is no foundation for the opinion that an Appellate Court has no authority to interfere with the discretion of the lower Court as to costs. To assess the defendant in a suit with the plaintiff's costs, when plaintiff's suit is dismissed for want of any cause of action, is irregular and unreasonable. DANTULURI NARAYANA GAJAPATI RAZU GARU *v.* SURAPPA RAZU . . . . . **3 Mad. 113**

13. ——— *Erroneous order as to costs.* The Court below gave the plaintiff a decree in a suit for mesne profits for such an amount as should be ascertained to be due, and ordered that the plaintiff should have his costs on the amount claimed. *Held*, that this constituted ground of special appeal, but that the remedy of the defendant was by application to the Court below to amend the order. BHUGGOBAN CHUNDER GHOSE *v.* SHUMBHOO CHUNDER GHOSE **Marsh. 503**

14. ——— *Error in improper exercise of discretion as to costs.* Where the first Court's discretion is improperly exercised in

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*b*) COSTS—*concld.*

the matter of costs, the error may be rectified in regular appeal; but, if this is not done by the lower Appellate Court, the error is not such as would justify the High Court's interference in special appeal. OOMA CHURN *alias* GOPAL CHUNDER ROY MOZOOMDAR *v.* GIRISH CHUNDER BANERJEE
25 W. R. 22

15. ———— *Order in discretion of lower Court.* Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs:—*Held*, that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order: the rule, as laid down in *Gridhari Lal Roy* v. *Sundar Bibi*, *B. L. R. Sup. Vol. 496*, being that an order as to costs cannot be interfered with in special appeal unless it is illegal. FUTEEK PAROOEE *v.* MOHENDER NATH MOZOOMDAR
I. L. R. 1 Calc. 385: 25 W. R. 226

Reversing on appeal under the Letters Patent the decision in MOHENDRO NATH MOJOOMDAR *v.* FUTTICK PAROOEE . . . . **24 W. R. 319**

ACHUMBIT SINGH *v.* KUNHYA LAL MOHAJUN.
7 W. R. 208

(*c*) DISCRETION, EXERCISE OF, IN VARIOUS CASES.

16. ———— **Order for security for costs**—*Appeal struck off in default—Absence of error in law.* When the Civil Procedure Code gives to a Court of regular appeal a discretionary power, and that discretionary power has been fairly exercised, it is no good ground of special appeal that a wiser exercise of the discretion would have led to different results. In a regular appeal the District Judge, at the instance of the respondent, on 26th March, called upon the appellant, who resided out of British territory, to show cause, within two days, why, under s. 342 of Act VIII of 1859, he should not furnish security. The appellant appeared on the 13th of May and filed a written statement that he owned land in Jhansi, and prayed that, if the statement was denied, inquiry might be made. There was nothing to show that this statement was disputed. The Judge on the same day made the following order: "As I cannot say whether or no this is true, and am not aware of the terms under which the land is held in Jhansi, if indeed the appellant holds any land there, the excuse cannot in its present form be accepted, nor can the respondent be exposed to risk while enquiries are pending. The appellant must file security within fourteen days or the appeal will be struck off." On 28th May the appellant produced certificates that he held maafi lands in Jhansi. The Judge, not considering these to be security, after recording that no further order could be passed, struck off the appeal with costs. A special appeal having been admitted

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*c*) DISCRETION, EXERCISE OF, IN VARIOUS CASES—*contd.*

from the Judge's orders, the respondent objected that no special appeal would lie. *Held*, that the High Court ought not to interfere in special appeal merely on the ground that, in the exercise of the discretion given to the lower Appellate Court, another Court might have thought it unnecessary to call upon the appellant to furnish security. *Held*, also, that, unless it could be shown that the investigation of either of the issues of fact touching the appellant's residence and property had been defective, or that there had been error in law, the High Court had no power to interfere in special appeal. *Held*, also, that, if the appellant had, after the order of 26th March, come into Court without delay or even on 13th May applied for an adjournment to enable him to put in proof that he held land in Jhansi, and been refused that permission, the Court would have interfered in special appeal. GOPAL KHUNDEE RAO *v.* DEOKEE NUNDUN
6 N. W. 172

17. ———— **Exercise of discretion not to be interfered with**—*Civil Procedure Code* (*Act XIV of 1882*), *s 584—Limitation Act* (*XV of 1877*), *s. 5—Appeal rejected as not presented in time without sufficient cause for delay—Discretion of Judge.* Where an appeal has been dismissed as barred by limitation, the lower Court holding that there was no sufficient cause for not presenting it within the prescribed time, the High Court can only interfere in second appeal if that decision is contrary to law, that is, if the lower Court has exercised its discretion capriciously or arbitrarily or without proper legal material to support its decision. PARVATI *v.* GANPATI ROKDAJI NAIK
I. L. R. 23 Bom. 513

18. ———— *Limitation Act* (*XV of 1877*), *s. 5*—"*Sufficient cause*" *for not presenting appeal within prescribed period—Interference with exercise of discretion by Appellate Court.* A mere difference in view on the part of the High Court, as to the mode in which the discretion conferred by s. 5 of the Limitation Act ought to have been exercised by the lower Appellate Court in admitting an appeal, is in itself no ground of interference by the High Court. *Per* SIR ARNOLD WHITE, *C.J.* (MOORE, *J.*, concurring).—The test is, has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion, and after the application of the right principle to those facts? If a discretion is exercised under these conditions, and a certain conclusion is arrived at, that conclusion is an exercise of discretion judicially sound, though an appellate tribunal might be disposed to draw a different inference from the facts. The Subordinate Judge had not considered all the facts which were material for the exercise of judicial discretion, and if he did consider them he had

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*c*) DISCRETION, EXERCISE OF, IN VARIOUS CASES—*contd.*

applied a wrong principle. The material question was whether the appellant had been diligent during the period of delay,—not whether he had been misled by the Munsif, or whether his proceedings before the Collector were *bonâ fide*. *Per* BENSON, *J.*—There is a wide distinction between the law of limitation in respects of suits and in respect of appeals. The "sufficient cause," referred to in s. 5 of the Limitation Act, apparently means, not only those circumstances which are expressly recognized as extending time, but also such circumstances as are not expressly recognized, but which may appear to the Court to be reasonable. KICHILAPPA NAICKAR *v.* RAMANUJAM PILLAI (1901)
I. L. R. 25 Mad. 166

19. ——— Execution of decree—*Discretion of Court executing decree—Civil Procedure Code, 1859, s. 207.* It is entirely in the discretion of the Court executing a joint decree to make arrangements under Civil Procedure Code, s. 207, regarding its execution by one of the decree-holders and to take necessary steps for the protection of the interests of the rest; and if it does not choose to do that, it cannot be pronounced wrong in special appeal. HERA ROY *v.* GUJADHUR PARSHAD NARAIN SINGH . . . . **24 W. R. 286**

20. ——— Refusal to grant fresh summons—*Delay.* An exercise of the discretion of the Court in refusing to grant a fresh summons on account of delay in applying for it cannot be interfered with on special appeal. BROJO LALL MOOKERJEE *v.* AUGHOR LALL GHOSAL . **25 W. R. 71**

21. ——— Order for payment of decree by instalments without providing for interest or penalty agreed upon on default—*Discretion, arbitrary exercise of—Civil Procedure Code, 1859, s. 194.* When the lower Courts ordered the decree to be paid by instalments which were hardly sufficient even to cover the interest and did not provide for the interest and penalty conditioned in case of default:—*Held*, that they had exercised the discretion vested in them by s. 194, Act VIII of 1859, arbitrarily and without due caution, and their order could be interfered with and set side on special appeal. HUR GOBIND *v.* HURKHO . . . . **1 Agra 116**

JAFREE BEGUM *v.* AHMED HOSSEIN KHAN.
1 Agra 270

22. ——— Refusal to allow application to amend plaint—*Discretion to allow amendment of plaint.* A lower Court has discretion to permit, or not, the filing of a petition to amend a plaint, and its refusal is no ground for special appeal. WATSON & Co. *v.* NIDHOO DIGWAR **10 W. R. 87**

23. ——— Interest, award of—*Interest on decree, Discretion of Court in allowing.* The Court executing a decree has a discretion in allowing interest. which will not be interfered with in special appeal. PARES NATH MUKHOPADHYA *v.* KISTOMOHAN SAHA
3 B. L. R. Ap. 105: 12 W. R. 50

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*c*) DISCRETION, EXERCISE OF, IN VARIOUS CASES—*concld.*

(*d*) ISSUES, OMISSION TO DECIDE.

24. ——— Omission to consider material facts—*Remand of appeal heard by a Subordinate Judge to District Judge—Act XIV of 1882, s. 566.* If on second appeal it is found that certain material facts, having an important bearing upon a question at issue in the suit, have been omitted to be considered by the lower Appellate Court, the High Court will interfere with the decision of the lower Appellate Court, even though it be on a question of fact. DENA NATH BANERJEE *v.* HARI DASI
I. L. R. 11 Calc. 499

25. ——— *Omission to try question of possession when material.* When the plaintiff sued as owner of property in dispute and in which the defendant admitted the plaintiff's possession, but qualified it by saying that the plaintiff held as zur-i-peshgidar or mortgagee, the omission of the Appellate Court to try the question of possession is an error of law in the investigation which the Court will take notice of on special appeal. GOPAL ROY *v.* TEKAET ROY . **8 W. R. 333**

26. ——— Omission to decide on limitation. An omission by the Judge on appeal to decree according to the law of limitation applicable to the case as stated by the plaintiff, although the objection may not be raised in the grounds of appeal, is an error or defect in the decision of the case on the merits and a ground of special appeal. SALUJI KESRAJI *v.* RAJSANGJI JALMSANGJI
3 Bom. 169: 2nd. Ed. 162

27. ——— Omission to inquire into defendant's plea—*Suit for confirmation of title and possession.* Where a purchaser sues for confirmation of title and possession, and the plea set up by the defence is that the rights and interests in question were previously transferred to another party who had sold it to the defendant's vendor, the omission of the Court to inquire into the alleged transfer and see whether it was genuine, and, if so, whether it was a real or only a colourable transaction, is an error in the decision which is a ground of special appeal. BHUGOBUTTY *v.* BIKRAMAJEET SINGH . . . . . **8 W. R. 477**

28. ——— Omission by Appellate Court to decide on the question of ownership—*Suit before Subordinate Judge depending on issues of ownership as well as on a rent-note.* Where it appeared that an issue was raised as to ownership, and that both parties at the trial before the Subordinate Judge gave evidence on such issue

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*d*) ISSUES, OMISSION TO DECIDE—*concld.*

(although the claim was based, in the main, on a rent note), and the lower Appellate Court omitted to find on such issue :—*Held*, reversing the decrees of the lower Appellate Court, that it ought to have found on the issue as to ownership. RAMKOR GOPALJI *v.* GANGARAM . **I. L. R. 16 Bom. 545**

(*e*) JUDGMENTS.

29. ——— **Reversal of judgment without reasons**—*Difference of opinion as to facts.* A special appeal lies from an Appellate Court's judgment, in which the decree of the lower Court is reversed without any reasons given for differing as to facts. GOBURDHUN *v.* SADHOO **1 W. R. 244**

30. ——— **Omission to state reasons in judgment**—*Civil Procedure Code* (*Act XIV of 1882*), *ss. 574, 584.* The fact that the judgment of an Appellate Court is not drawn up in the manner prescribed by s. 574 of the Civil Procedure Code is no ground for a second appeal under s. 584 unless it can be shown that the judgment has failed to determine any material issue of law. BISVANATH MAITI *v.* BAIDYANATH MANDUL . **I. L. R. 12 Calc. 199**

31. ——— *Finding of fact—Civil Procedure Code, 1882, s. 204.* A finding unaccompanied by the reasons for it as required by s. 204 of the Code is not a conclusive finding of fact binding on a Court of second appeal. KAMAT *v.* KAMAT . . . **I. L. R. 8 Bom. 368**

32. ——— The Judge decided that the plaintiff was barred by limitation, but his judgment did not disclose the grounds on which he held that plaintiff was not entitled to deduct, in calculating the twelve years' limitation, the time occupied by certain suits brought for the same property, in which he was non-suited. *Held*, that it was no ground of special appeal that the judgment was silent on the subject of the claim to deduction, and that, whether the point was urged in the lower Court or not, the plaintiff had no ground of special appeal in respect of omission of all notice of it in the judgment. RAMSOONDER DOSS *v.* MAHOMED ABBED . . . . **1 Ind. Jur. O. S. 102**

33. ——— *Error of procedure—Civil Procedure Code, 1859, s. 359.* A lower Appellate Court's omission to give reasons cannot be considered a ground for special appeal when it has not produced error or defect in the decision upon the merits. Where a lower Appellate Court has omitted to state reasons, and it appears to the High Court that reasons should have been stated, the proper course is to retain the case on special appeal, but to return the proceedings and require the omission to be supplied. DOOLEE CHUND *v.* OOMDA BEGUM . . **18 W. R. 473**

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*e*) JUDGMENTS—*contd.*

34. ——— **Omission to state points for decision and reasons in judgment**—*Omission to follow direction in Civil Procedure Code, 1859, s. 359.* S. 359, Act VII of 1859, requires the points for determination—those in appeal as well as those in the original pleadings—to be stated, and the reasons upon which the decision was arrived at thereon : an omission to do this is ground of special appeal. ROOP CHAND ROY *v.* RAM KANT KOBEERAJ . **W. R. 1864, 98**

35. ——— **Omission to give reasons in judgment until after appeal.** The fact of a Judge not writing a judgment containing the reasons for his decision until after the decree in appeal was passed was *held* not to affect the decision of the case on the merits, and was therefore not a ground of special appeal. BHAGVATSANGJI JALAMSANGJI *v.* PARTABSANGJI AJJABHAI. GANPATRAM LAKHMIRAM *v.* JAICHAND TALAKCHAND **4 Bom. A. C. 105, 109**

36. ——— **Decision on point not contested.** In a suit by a talukhdar, where the dispute was whether certain land which the plaintiff held was what he was entitled to hold as lakhiraj, under a sanad which he produced, and as to the genuineness of which no question was raised, the lower Appellate Court indicated that it considered the sanad not to be genuine. *Held*, that this was an important error, as the genuineness of the sanad was in no way in issue, and that the judgment must be set aside and the case remanded. RAM SOONDUR BANERJEE *v.* KALEE PERSHAD HAJRAH **19 W. R. 267**

37. ——— **Decision for plaintiff on ground not alleged by him**—*Civil Procedure Code, 1859, s. 350—Error not affecting merits.* In a suit for possession of a quantity of land, where the first Court gave plaintiff a decree on the ground that he had proved title by purchase, and the lower Appellate Court, in confirming the decision on the substantial issue raised, went further, and found that one of the defendants was plaintiff's raiyat, contrary to the allegation set up by the plaintiff himself :—*Held*, in special appeal, that the error did not affect the merits of the case or the jurisdiction of the lower Court ; and the High Court could not therefore interfere under s. 350 of the Code of Civil Procedure. RAM CHUNDER CHATTERJEE *v.* RAM JEEBUN DASS . . **14 W. R. 141**

38. ——— **Decision founded on issues not raised in the suit**—*Error of law.* In a suit for the recovery of land upon an alleged lease found to be not genuine, the defendants set up a sale by plaintiff's father. The lower Court found that there had been a sale in fact, but held it to be invalid according to Hindu law, as having been without the concurrence of the plaintiff, the son of the vendor. *Held*, that the validity of the sale not having been

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*e*) JUDGMENTS—*concld.*

questioned by the plaintiff, who had rested his case on entirely different grounds, and no issues having been raised as to the validity of the sale, the Judge had committed an error of law affecting the merits in so deciding, and his decision was reversed on special appeal. PALANI YANDI KAUNDAN *v.* MUTTUSAMI KAUNDAN . . **2 Mad. 441**

(*f*) LOCAL INVESTIGATIONS.

39. _____ **Order directing local investigation**—*Discretion of Court.* Directing a local investigation or not is a mere matter of discretion in which no special appeal will lie of right. GRAHAM *v.* LOPEZ . . . **1 W. R. 141**

BYKUNT NATH SEIN *v.* PEAREE MONEE DASSEE **1 W. R. 196**

POORNO PERSAD ROY *v.* CHUNDER NATH CHATTERJEE . . . . . **1 W. R. 249**

RAJKISHEN MOOKERJEE *v.* HURO MOHUN MOOKERJEE . . . . . **5 W. R. 248**

40. _____ **Order as to local inquiry**—*Discretion of judge.* It is within the discretion of a Judge to order or refuse a local inquiry. When, in the exercise of a reasonable discretion, he refuses such inquiry, his order should not be interfered with unless very strong grounds are shown for the necessity of the enquiry. RASH BEHARI SINGH *v.* SAHEB BOY . . . . . **12 W. R. 76**

41. _____ **Omission to direct local investigation**—*Error in law.* It is not an error in law in the investigation of a case where the Courts below do not direct a local investigation of their own motion when they are not asked by the parties to do so. MACDONALD *v.* MUNAR ROY **B. L. R. Sup. Vol. 358: 3 W. R., Act X, 153**

42. _____ **Local inquiry in suit as to enhancement of rent**—*Discretion of Judge to order local inquiry in suit to contest notice of enhancement—Order of Judge.* In a suit brought to contest a notice of enhancement, a Judge is not bound to order a local inquiry, merely because he incidentally states such an inquiry to be the best source from which to obtain reliable evidence upon the point of rates. Nor will a special appeal lie on the subject of the Judge exercising a discretion as to ordering or not ordering such an inquiry. HERALOLL SEAL *v.* GUNGADHUR SUNNAPUTTY **W. R. F. B. 19: 1 Ind. Jur. O. S. 8: 1 Hay 229**

GUNGADHUR SUNNAPUTTY *v.* HERALOLL SEAL **Marsh. 60**

43. _____ **Irregularity in local inquiry**—*Civil Procedure Code, 1859, s. 180—Appointment of improper officer.* Though s. 180, Act VIII of 1859, makes it imperative on a Court to employ in the first instance the regular officer of

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*f*) LOCAL IDVESTIGATIONS—*concld.*

the Court to hold a local inquiry, non-compliance with this requirement of law is not *per se* a ground of special appeal. RAMDOSS KOONDOO *v.* NILKANTO DHUR . . . . . **8 W. R. 6**

44. _____ *Disregard of report on local investigation—Disputed boundary—Grounds of appeal—Civil Procedure Code (Act XIV of 1882), s. 584.* The Court of first instance accepted as correct a boundary line mapped by an Ameen, dividing the estates of the opposite parties. The lower Appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return, which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and reversed the judgment of the Court below. *Held*, by the Privy Council, that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been in the proceedings below any error or defect, within the meaning of s. 584 of the Civil Procedure Code, which contained the only grounds of second appeal. LUKHI NARAIN JAGADEB *v.* JODU NATH DEO **I. L. R. 21 Calc. 504 L. R. 21 I. A. 39**

45. _____ *Hearing and deciding case after granting commission for local investigation, without awaiting return of such commission—Ground of appeal—Civil Procedure Code, s. 584.* Where a Court on the application of a party or otherwise has issued a commission for a local investigation, it is a substantial error in procedure and therefore a ground of special appeal, under s. 584 of the Code of Civil Procedure, if the Court proceeds to hear and determine the case without having the return of such commission before it. MADHO SINGH *v.* KASHI SINGH **I. L. R. 16 All. 342**

(*g*) MISTAKES.

46. _____ **Mistake in account**—*Review, Application for.* A mistake of account not being an error in law or procedure is not a ground for special appeal. The remedy lies in an application for review. RAM KANTH ROY CHOWDHRY *v.* KALEE MOHUN MOOKERJEE . . **22 W. R. 310**

PROSUNNO COOMAR DUTT *v.* CHYTUNNO CHURN BIDYALUNKAR . . . . **25 W. R. 74**

47. _____ **Error in description of defendant as a minor**—*Appeal by guardian treated as appeal by minor.* The father of a defendant filed an appeal from the judgment of the first Court, describing his son as a minor. It afterwards appeared that the defendant was not a minor; and

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*g*) MISTAKES—*concld.*

the lower Appellate Court refused to pass an order, allowing the appeal by the father to stand as an appeal by the defendant. *Held*, that the lower Appellate Court could, in the exercise of its discretion, allow the appeal to stand as an appeal by the defendant, but the High Court could not interfere with the order in special appeal. SHAMA CHARAN GHOSE *v.* TARAK NALH MUKHOPADHYA
3 B. L. R. Ap. 115

48. ——— Decree proceeding on mistake as to applicability of law—*Mistake of Judge not affecting merits.* The Court will not interfere on special appeal with a decree proceeding on a mistake as to the applicability of a law when such error does not affect the decision of the case. KUREEM KHAN *v.* MUHFOOZ.
W. R. F. B. 16 : 1 Ind. Jur. O. S. 77
1 Hay 226

S.C. JUGOBUNDOO MOZOOMDAR *v.* GOORROO PERSHAD ROY . . . . . **Marsh. 52**

ESSAN CHUNDER DUTT *v.* PRANNAUTH CHOWDHRY . . **Marsh. 270 : 2 Hay 236**

AKBUR ALLY *v.* HOSSAN ALLY
1 Ind. Jur. N. S. 101 : 5 W. R. Mis. 29

(*h*) MULTIFARIOUSNESS.

49. ——— Misjoinder of causes of action. Misjoinder of causes of action is not alone a valid ground of special appeal. SHUNKUR PATUKH *v.* LALA SHEO CHURN LAL
2 N. W. 443 : Agra F. B. Ed. 1874, 238

50. ——— *Absence of material injury.* Misjoinder of claims, without proof of substantial injury sustained thereby, is no ground for special appeal. DURSHUN PANDEY *v.* SAMINAH BEBEE . . . **1 W. R. 114**

51. ——— *Material irregularity.* Where a plaint containing separate causes of action on the part of distinct plaintiffs, though but one prayer—*viz.*, for the delivery up of certain nekasi papers—was filed and tried as a single suit, the Court trying the case was *held* to have committed not a mere technical irregularity, but an incorrect proceeding liable to lead to injustice and a ground for interfering with the judgment on special appeal. RAMCOOMAR SIRKAR *v.* KALEE COOMAR DUTT . . . . **10 W. R. 279**

52. ——— Objection on ground of misjoinder. Where an objection on the score of misjoinder is disallowed by the first Court, but rightly allowed by the lower Appellate Court, the fact that the latter Court holds the objection to be good is no ground of special appeal. MAHOMED HOSSEIN *v.* POTUN . . . . . **20 W. R. 147**

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*i*) PARTIES.

53. ——— Adding parties—*Discretion of Court.* The exercise of the discretion a Court had to add parties under s. 73, Act VIII of 1859, could not be interfered with on special appeal unless it was manifestly unjudicial and wrong. GYARAM SEAL *v.* ISSUR CHUNDER CHUCKERBUTTY
2 W. R. 158

PORAN MUNDUL MOLLAH *v.* SHAM CHAND GHOSE
1 W. R. 228

54. ——— *Error in adding party as plaintiff—Civil Procedure Code, 1877, s. 591.* In a suit for rent where the defendant alleged that a person not on the record had a joint interest with the plaintiff in the property in respect of which the rent was due, and where the plaintiff disputed this and the third person was added by the Court as a co-plaintiff :—*Held*, that this would be an error or defect to which objection could be taken in the memorandum of appeal under s. 591 of Act X of 1877. GOOGLEE SAHOO *v.* PREMLALL SAHOO . . . . . **I. L. R. 7 Calc. 148**

55. ——— *Unappealed order—Civil Procedure Code, 1882, s. 591—Order making person respondent.* S. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. *Goglee Sahoo* v. *Premlall Sahoo, I. L. R. 7 Calc. 148*, referred to. During the pendency of an appeal the plaintiff-respondent died, and on the application of the appellant the name of *H* was entered on the record as respondent in place of the deceased. Subsequently *K* applied to be substituted as respondent alleging that he, and not *H*, was the legal representative of the plaintiff. The Court passed an order making *K* a joint respondent with *H*. To this *H* objected but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents. *Held*, that, on appeal from the decree of the Court below, *H* was entitled to object to the order adding *K* as a respondent, though he had not appealed from the order itself. HAR NARAIN SINGH *v.* KHARAG SINGH
I. L. R. 9 All. 447

56. ——— *Erroneously making intervenor party to suit.* An error in allowing an intervenor to be made a party to the suit is one of procedure only, and is not a ground of special appeal, unless it is shown that the decision of the case was affected by such error. NUNHOO MAHTOON *v.* TEELOCO KOOER . **18 W. R. 313**

57. ——— Refusal to add party—*Discretion of Court in refusing to add party under s. 73, Civil Procedure Code, 1859.* The High Court

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*i*) PARTIES—*concld.*

will not on special appeal interfere with the discretion of a Court in refusing to add a party under s. 73, Act VIII of 1859, unless it is clear the discretion was exercised capriciously, or it appears absolutely necessary to add the party. JAGADAMBA DASI *v.* HARAN CHANDRA DUTT
10 W. R. 108 : 6 B. L. R. 526 note

58. ——— Misjoinder of parties—*Irregularity producing error or defect on the merits.* Where a suit was brought in the Court of the Subordinate Judge by joining as parties defendants who ought not to have been joined, and if they had not been joined the suit would have been cognizable by the Munsif :—*Held*, that the irregularity of the course by which the matter of the suit was brought before another Court than which would otherwise have had cognizance of it was calculated to produce error or defect in the decision on the merits and therefore a ground of special appeal. GUNGA RAI *v.* SAKEENA BEGUM . **5 N. W. 72**

59. ——— Death of party—*Filing plaint in name of dead person—Irregularity.* Where a plaint was filed in the name of a deceased party of whose death the persón filing the plaint was ignorant, and the heir and representative of the deceased was at once put upon the record as plaintiff in his room, the irregularity (if any) was *held* in special appeal to be immaterial and not such as the Court would take notice of. GOLUCK CHUNDER DUTT *v.* COURT OF WARDS . . **10 W. R. 127**

60. ——— Objection of non-joinder of parties—*Error causing wrong decision.* The objection of non-joinder of parties cannot be made a ground of special appeal unless the want of parties has caused a wrong decision to be given. HEERA LALL CHOWDHRY *v.* BISTOO LALL CHOWDHRY
22 W. R. 288

(*j*) REMAND.

61. ——— Order of remand irregularly made—*Error in law—Civil Procedure Code, 1859, s. 351.* It is an error in law for a lower Appellate Court to remand a case except in accordance with s. 351 of the Civil Procedure Code. A special appeal will lie against a decree remanding a suit. NANABHAI NAROTOMDAS *v.* RAMSHET GOVINDSHET . . . **6 Bom. A. C. 156**

62. ——— *Remand of case under s. 351, Civil Procedure Code, 1859—Irregular procedure.* A special appeal does not lie merely because the lower Appellate Court remanded a case under s. 351 of Act VIII of 1859, instead of calling for additional evidence under s. 335, without proof that the special appellant has been prejudiced. NOWCOWREE MUNDUL *v.* MOOKTA BIBEE
2 W. R. 181

Or instead of framing issues on which the case might be tried. JUGOBUNDHOO HALDAR *v.* SREENARAIN MITTER . . . . **20 W. R. 188**

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*j*) REMAND—*contd.*

But *see* RAM KANT PANDEY *v.* GUNESHEE KOONWUR . . . . . **6 W. R. 47**

63. ——— *Improper remand under s. 351, Civil Procedure Code, 1859—Error in procedure.* Where a lower Appellate Court instead of keeping a case on its file and either calling for further evidence or remitting issues under s. 354 of Act VIII of 1859, improperly remanded it under s. 351, but its decision on the merits was not prejudiced by the error in procedure, the High Court refused to interfere in special appeal. BULDEO PERSHAD *v.* GOLAB KHAN . . **6 N. W. 101**
GHASI SINGH *v.* BUDH SINGH . **7 N. W. 193**

64. ——— *Civil Procedure Code, 1859, s. 351.* It does not necessarily follow, when a lower Appellate Court remands a suit under s. 351 of Act VIII of 1859 instead of s. 354, that the order of remand is void and reversable in special appeal. Where, however, a lower Appellate Court directing certain persons to be made parties to the suit, erroneously remanded it under s. 351 for the trial of a particular issue :—*Held*, that, if the case went back under s. 351, inasmuch as the error, by restricting the Court of first instance to that particular issue and thus leaving the finding of the lower Appellate Court on other portions of the case final, might have produced error in the lower Appellate Court's decision on the merits, the decision should be reversed and the lower Appellate Court directed to remand the case under s. 354. GUJRAJ SINGH *v.* BIJAI SINGH . . . . **6 N. W. 114**

65. ——— Irregularity in remanding case—*Civil Procedure Code, 1859, ss. 352, 354.* Where a Judge, instead of remanding a case under s. 352 of Act VIII of 1859, when the Munsif had not disposed of the case upon any preliminary point, ought to have disposed of it under s. 354, keeping the case on his own file, and ordering the Munsif, after taking the necessary evidence and deciding any issue fixed by him, to send up his finding with the evidence to his Court, and then proceeding to try the case as an appeal :—*Held*, that the irregularity was not one which affected the merits of the case or the jurisdiction of the Court, so as to justify interference with the Judge's decision in special appeal. GUNGA MONEE DOSSEE *v.* ISSUR CHUNDER SHAHA
17 W. R. 465

66. ——— *Error in trial of case.* In a suit for a pottah, the Deputy Collector having failed to take the evidence of certain witnesses produced by the plaintiff for examination, the lower Appellate Court remanded the case with a view to the evidence being taken. This was done and the case was re-tried by the Deputy Collector, who again dismissed the plaint. On appeal the decision was reversed. *Held*, that the Judge may have been so far in error, in that, while remanding the case, he did not direct the lower Court to send the case back to him with the additional evidence

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*j*) REMAND—*concld.*

yet, as the error did not interfere with the merits of the case or the jurisdiction of the Court (the evidence having been before the Judge in appeal) it would not warrant interference with his decision in special appeal. NUSSUROODDEEN HOSSEIN CHOWDHRY *v.* LALL MAHOMED PURAMANICK
13 W. R. 234

67. ——— Improper dealing with remanded case—*Re-hearing and decision of case on remand for particular purpose.* The Court of Appeal directed a remand to try the issue on a plea of payment. The lower Court determined the whole case over again. *Held*, that it had no power to do more than try the issue referred, and that, on this ground, its decision might be set aside on special appeal. MOLTAN ALLEE *v.* SHEW BUKSH
Marsh. 603

(*k*) REVIEW.

68. ——— Order granting review—*Order admitting review to correct error or omission.* Where a lower Court with materials before it comes to the conclusion that a review which has been applied for is necessary to correct an evident error or omission or for the ends of justice, and grants the application accordingly, the order admitting the review is not open to be questioned in special appeal. SAHEBJAN BIBEE *v.* SUFDUR ALI
22 W. R. 288

But when a review is admitted on no grounds, the order is open to question. KOLEEMOODDEEN MUNDUL *v.* HEERUN MUNDUL . **24 W. R. 186**

69. ——— *Admission of review on improper grounds.* Where a review has been granted without proper ground, the High Court on special appeal can set aside the order and restore the former judgment. CHUNDER CHURN AUGGRODANY *v.* LOODUNRAM DEB. . **25 W. R. 324**

70. ——— *Grant of review on improper or insufficient grounds.* Where a Court has granted a review, the High Court will not interfere on appeal, though the grounds for granting the review were improper or insufficient. GURUMURTTI NAYUDU *v.* PAPPA NAYUDU
1 Mad. 164

See FUZZUL HOSSEIN *v.* ENAYET ALI KHAN.
2 W. R. 268

71. ——— Reviewing predecessor's judgment and reversing it on insufficient grounds. Where a District Judge, as the lower Appellate Court, reviewed his predecessor's judgment and reversed his decision, and the High Court in special appeal saw no ground on which it could rightly disturb the judgment in question, it set aside the review and restored the judgment. PARBUTTY CHURN DOSS *v.* PROTAP CHUNDER SEN
23 W. R. 275

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*k*) REVIEW—*concld.*

72. ——— Order reviewing judgment of predecessor—*Order on insufficient grounds.* Though a Judge ought not to admit (merely on the facts and without any new evidence being adduced) a review of judgment passed by his predecessor, yet his doing so is not *per se* a ground of special appeal. GHOLAM HOSSEIN *v.* OKHOY COOMAR GHOSE
3 W. R. Act X, 169

73. ——— Omission to correct error in decree on review. When the parties neglect to get an error of law in a decree of the High Court corrected by a review, the High Court will decline to correct it when the case comes up before them again in a subsequent special appeal. SAKHO NARAIN KHANDALKAR *v.* NARAYAN BHIKAJI KHANDALKAR . . . **6 Bom. A. C. 238**

AKBUR ALI *v.* MULLICK MUKHDOOM BUKSH
25 W. R. 63

(*l*) VALUATION OF SUIT.

74. ——— Error in valuation—*Error not affecting decision or jurisdiction of Court.* An error of valuation, which does not affect the jurisdiction of the Courts in which a suit is tried, and does not lead to a defect in the decision on the merits, is not sufficient ground for interference in special appeal. KISTO CHURN MOJOOMDAR *v.* DWARKHA NATH BISWAS . . **10 W. R. 32**

75. ——— *Increase of costs to defendant. Semble:* That an error in the valuation of the plaintiff's claim, on account of which error the defendant is compelled to pay more costs than he would otherwise have to pay, is not in general a ground of special appeal. NANDRAM SUNDARJI NAIK *v.* BALAJI VITHAL . **5 Bom. A. C. 153**

76. ——— *Dismissal of appeal for improper valuation.* The Civil Judge dismissed an appeal on the ground that the appellant fraudulently presented a stamp insufficient to cover the stamp duty properly payable by him on appeal, although the appellant offered to supply additional stamps to make up the proper amount. On special appeal, the proper stamp duty having been paid, the High Court *held* that the course taken by the Civil Judge amounted to such a substantial error in the investigation of the case as called for the interference of the High Court, and remanded the case for investigation on the merits. AMBALA RAMASAWMY IYENGAR *v.* MAHAMADALLY RAVUTAN
5 Mad. 330

77. ——— *Under-valuation of suit—Admissibility of objection on second appeal.* The defendant in a suit raised the objection that its valuation was incorrect, and that if correctly valued it would exceed the jurisdiction of the Munsif's Court. The objection was overruled, both in the Munsif's Court and in that of the District

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*l*) VALUATION OF SUIT—*concld.*

Judge, but was raised again on second appeal. *Held*, that the objection was one that could be raised on second appeal. GOVINDA MENON *v.* KARUNAKARA MENON (1900) **I. L. R 24 Mad. 43**

(*m*) WITNESSES.

78. ——— Refusal to summon plaintiff as witness—*Discretion of Court.* It is within the discretion of a Judge to refuse to summon a plaintiff whom defendant desires to have before the Court as his witness, and that discretion will not be interfered with in special appeal unless shown to have been exercised illegally. INDRO LOCHUN GHOSE *v.* GRISH CHUNDER ROY CHOWDHRY . . . . . **10 W. R. 134**

79. ——— Order as to party refusing to attend—*Civil Procedure Code, 1859, s. 170—Discretion of Court.* Under s. 170, Act VIII of 1859, it is discretionary with a Court to pass such orders as it thinks proper in regard to a party who disobeys its orders to attend, and its directions do not form a ground of special appeal. NARAIN DASS *v.* MAHARAJAH OF BURDWAN. NARAIN DOSS *v.* MAHTAB CHUNDER . . **10 W. R. 174**

80. ——— Dismissal of suit on refusal of plaintiff to answer questions—*Civil Procedure Code, 1859, s. 170.* The High Court will not interfere on appeal with the decree of the lower Court dismissing a plaintiff's suit (under s. 170, Act VIII of 1859), on the ground of his refusing to answer a question material to the case when duly required to do so. *Semble:* It might be otherwise had plaintiff since decree endeavoured to purge his contempt. JESHTA RAMJI SHETT *v.* AWAKER MULLANDEAGATA KUNHI . . **3 Mad. 299**

81. ——— Improper procedure in summoning party as witness—*Civil Procedure Code, 1859, s. 170.* When a plaintiff was summoned as a witness and did not attend, and the first Court, instead of enforcing his attendance or proceeding to pass a decree against him under s. 170, Act VIII of 1859, tried the case on the merits and gave the plaintiff a modified decree:—*Held*, that the lower Appellate Court, instead of reversing the decision and dismissing the plaintiff's claim on the ground of non-attendance, should have again summoned the plaintiff and then acted under s. 170. KISTO COOMAR CHOWDHRY *v.* GOBIND COOMAR . . . **W. R. 1864, 133**

82. ——— Improper interference on appeal with order of lower Court on refusal of party to attend as witness—*Civil Procedure Code, 1859, s. 170.* The first Court having decreed against the special respondent on the ground of his refusal to come forward and give evidence after being summoned by the special appellant, the lower Appellate Court was not authorized by law (with reference to s. 170, Act VIII of 1859) to come to a contrary decision, without insisting on the absentee's evidence being recorded, or giving any reasons for dispensing with it. BUKHSOOR *v.* HARUK CHAND SAHOO **1 W. R. 114**

83. ——— Omission of witness to appear—*Auction-purchaser at sale in execution.* In a case wherein lands were sold in execution, notwithstanding intervention, under s. 246, Code of Civil Procedure, by a plaintiff who claimed under a hibba, which was held by the lower Courts to be false, the High Court refused to interfere merely because the auction-purchaser had not appeared to give evidence. ABDOOL HUQ *v.* AMBUR ALI **8 W. R. 422**

84. ——— Refusal of Munsif to fine recusant witness. The refusal of a Munsif to inflict a fine upon recusant witnesses is no ground for special appeal. PRAN KRISTO DEO *v.* KALEE DOSS DEO . . . . **7 W. R. 460**

85. ——— Refusal to allow witness to be called—*Discretion of Court.* It is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses. There is no right of special appeal upon the point. RAKHAL DOSS MUNDUL *v.* PROTAP CHUNDER HAZRAH . . . **12 W. R. 455**

86. ——— Omission to record evidence of witnesses. To enable an appellant in special appeal to succeed on the ground that the depositions of witnesses were not recorded, he must show that application was duly made that they should not be summoned, or that, being present, application was duly made for their examination. SURM RAE *v.* UBHMAN RAE **2 N. W. 209**

87. ——— Refusal of lower Courts to send back commission after its return unexecuted. Where a commission to examine a witness on behalf of defendant had been returned unexecuted, and the defendant's petition to have it sent a second time was refused both by the first Court and the lower Appellate Court, the High Court in special appeal remanded the case for the issue of the commission, holding that the lower Appellate Court's refusal had been based on insufficient grounds. JHOTEE SINGH *v.* GOPAL SINGH **23 W. R. 457**

88. ——— Adjournment for attendance of witnesses—*Civil Procedure Code (Act XIV of 1882), s. 156—Discretion, exercise of—Witnesses, attendance of—Power of High Court on second appeal.* On the day fixed for the hearing of a suit the defendant applied for process against certain of his witnesses who had been summoned, but who had failed to attend, asking for an adjournment to obtain their attendance. This application was refused, and the case was proceeded with.

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*m*) WITNESSES—*concld.*

The plaintiff's evidence was recorded and that of one of the defendants; the defendants being unable to produce further evidence, the Court recorded that the case was closed, and that judgment would be delivered on the following day, the 31st December. On the day following the defendants produced certain witnesses and asked that they might be examined. This application was rejected, and judgment was subsequently delivered in favour of the plaintiffs. *Held per* PETHERAM, *C.J.*—That the omission to examine the defendant's witnesses on the 31st December was a substantial error in procedure, and that the Munsif had therefore exercised his discretion wrongfully. *Per* GHOSE, *J.*—That although there was some doubt whether the Court on second appeal could interfere in a point of discretion, yet this doubt was not strong enough to justify an expression of opinion contrary to that arrived at by the Chief Justice. MONI LAL BANDOPADHYA *v.* KHIRODA DASI
I. L. R. 20 Calc. 740

See TAYLOR *v.* SARAT CHUNDER ROY CHOWDHRY
I. L. R. 20 Calc. 745 note

(*n*) MISCELLANEOUS CASES.

89. ——— Final order in regular appeal—*Civil Procedure Code, 1859, ss. 342, 372—Question of fact—Exercise of discretion—Error in law.* The term "decisions passed in regular appeal" in s. 372, Act VIII of 1859, might embrace orders rejecting or dismissing an appeal, although such orders were passed before an appeal was heard on the merits, and might not necessitate the preparation of a decree. GOPAL KHUNDEE RAO *v.* DEOKEE NUNDUN . . . **6 N. W. 173**

90. ——— Appeal dismissed on default of appearance—*Refusal of postponement.* Where an appellant is refused postponement and his appeal is dismissed in his absence, the case must be looked upon as one of default, even though the Judge looked into the facts and found the appeal was not to be upheld. The appellant in such a case might apply for a re-hearing or for a review of judgment, but is not entitled to a special appeal. BULDEO MISSER *v.* AHMED HOSSEIN
15 W. R. 143

91. ——— Refusal to give decree on terms—*Discretion of Court.* Though it would have been more satisfactory if the lower Appellate Court, instead of declining to give plaintiffs a decree for possession of certain mortgaged lands on the ground that the sum tendered by them was insufficient to liquidate the mortgage-debt, had made a decree in favour of plaintiffs, contingent upon their paying such sum as should be found due, yet the plaintiffs had no strict right to such a decree, and it cannot be said that the lower Appellate Court had committed an error in law in refusing to make such a decree. BOISTUB DOSS KOONDOO *v.* HUROO NARAIN HALDAR . **17 W. R. 408**

SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*contd.*

(*n*) MISCELLANEOUS CASES—*contd.*

92. ——— Omission to apportion to every part of the land its own rent—*Suit for enhancement of rent.* In a suit for enhancement the omission of the Ameen or Judge to appropriate to every portion of the land which varies in quality its own rent is no ground of special appeal. GOOROODOSS ROY *v.* HURRONATH ROY
W. R. 1864, 61

93. ——— Irregularity in exercise of jurisdiction—*Absence of error in decision.* A Collector's decree, which is right on the merits, cannot be set aside on appeal, merely because of an irregularity in the exercise of the jurisdiction which he had in the case. CHUNDER KANT CHUCKERBUTTY *v.* ELIAS . . **5 W. R., Act X, 29**

94. ——— Giving relief inconsistent with plaint—*Plaint wrongly framed.* A reversioner sued to set aside alienations made by an heiress in possession, but framed her plaint wrongly, asking for immediate possession, to which she was not entitled. The Court declared the alienations good only for the life of the alienor and gave a decree only for such relief as the plaintiff was entitled to. *Held*, that there was no error or defect in the investigation of the case with which the Court would interfere in special appeal. BAMA SOONDUREE DOSSEE *v.* BAMA SOONDUREE DOSSEE
10 W. R. 133

95. ——— Refusal to examine plaintiff's title on erroneous ground—*Civil Procedure Code, 1859, s. 372—Defect in law in procedure.* Where the Courts below have avowedly abstained from examining into a plaintiff's claim of title to land the subject of the suit, on the ground that the plaintiff was a party to the deed under which the defendant claimed, when in fact the deed showed he was no party to it, this constitutes a defect "in the procedure and investigation of the case producing error in the decision of the case upon the merits" within Act VIII of 1859, s. 372, and a special appeal will lie. ABDOOZ SALAM *v.* IMRALOONISSA BEBEE . **Marsh. 6 : 1 Hay 28**

96. ——— Failure to obtain certificate of administration after adjournment of case for that purpose—*Dismissal of case—Debt due to deceased person—Suit by legal representative—Act XXVII of 1860.* The plaintiffs in this suit sued the defendants on a bond, claiming as the heirs of the deceased obligee. The defendants denied that the plaintiffs were the heirs of the deceased obligee, and contended that they should have obtained a certificate under Act XXVII of 1860 before suing. There being good reason to doubt the validity of the title of the plaintiffs, the lower Appellate Court postponed the decision of the case for a certain time in order to give the plaintiffs an opportunity of obtaining such certificate.

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SPECIAL OR SECOND APPEAL—*contd.*

6. OTHER ERRORS OF LAW OR PROCEDURE—*concld.*

(*n*) MISCELLANEOUS CASES—*concld.*

The plaintiffs failing to avail themselves of this opportunity, the lower Appellate Court dismissed the case. The High Court on second appeal refused to disturb the lower Appellate Court's decision. BATASI *v.* MAHESH **I. L. R. 5 All. 555**

97. ——— *Error.* An erroneous view of evidence involves an error of law. ISWAR CHUNDER SANTRA *v.* SATISH CHUNDER GIRI (1902)
I. L. R. 30 Calc. 207 : s.c. 7 C. W. N. 126

98. ——— **"Substantial error or defect of procedure"**—*Grounds of appeal—Reversal by High Court on second appeal of Lower Appellate Court's decision—Civil Procedure Code (Act XIV of 1882), ss. 584, 585—Suit to set aside adoption—Question whether adoption was real and binding.* In a suit in which the plaintiff prayed that it might be declared that the defendant was not her properly and legally adopted son, that the ceremony of adoption did not take place, and that, if it did, it was ineffectual and invalid owing to misrepresentation, coercion and fraud, the first Court found that there was a real adoption binding on the plaintiff. The Lower Appellate Court found that, though an adoption had taken place, it was not, and was not intended to be a real adoption, but was a sham transaction entered into by collusion for the purpose of deceiving the Government, a case which was not set up by the parties, nor warranted by the evidence. *Held* (affirming the decision of the High Court), that such a disposal of the suit was a " substantial error or defect of procedure " within the meaning of s. 584 of the Civil Procedure Code (Act XIV of 1882), and that the High Court therefore had jurisdiction to set aside the finding on second appeal. *Annangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani, L. R. 14 I. A. 101,* and *Durga Chowdhrani* v. *Jewahir Singh Chowdhri, L. R. 17 I. A. 122,* referred to. SHIVABASAVA *v.* SANGAPPA (1905)
I. L. R. 29 Bom. 1
s.c. L. R. 31 I. A. 154

7. PROCEDURE IN SPECIAL APPEAL.

1. ——— **Filing memorandum of appeal**—*Copy of decree—Civil Procedure Code, 1877, ss. 541 and 587.* The Code of Civil Procedure, Act X of 1877, does not require the appellant in second appeal to file a copy of the decree of the Original Court with the memorandum of appeal. PIRATHI SINGH *v.* VENCATRAMANAYYAN
I. L. R. 4 Mad. 419

2. ——— **Extension of time for presentation of appeal**—*Power of High Court.* The High Court has the power of extending the time for the presentation of an application for the admission of a special appeal (TREVOR, *J., dissentiente*). KASHINAUTH ROY *v.* MYNOODDEEN CHOWDHRY
W. R. F. B. 146

SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

On due cause being shown for delay. FLOWEST *v.* KOOTUB HOSSEIN
Agra F. B. 100 : Ed. 1874, 75

3. ——— **Recording findings unnecessary for disposal of case**—*Appellate Court—Judgment—Findings unnecessary for disposal of case—Appeal by successful party—Civil Procedure Code, 1882, s. 203.* When a suit has been dismissed on the merits in the Court of first instance, and that decision is upheld by the District Judge on appeal, merely on the ground of non-joinder, the District Judge should not record any findings in the appellant's favour on the merits of the case ; and, if he does so, such findings will, on second appeal to the High Court, be expunged from the record. NANDA LAL RAI *v.* BONOMALI LAHIRI
I. L. R. 11 Calc. 544

4. ——— **Objections by respondent**—*Civil Procedure Code, 1859, s. 348 (1882, s. 561).* S. 348, Act VIII of 1859, was as applicable to special as to regular appeals. NARAYAN AYYAR *v.* LAKSHMI AMMAL . . . . **3 Mad. 216**

5. ——— *Right of respondent to urge objections under s. 348, Civil Procedure Code, 1859.* In a special appeal, as well as in a regular appeal, it is competent for the respondent to show that points decided against him ought to have been decided in his favour. In an appeal in a suit for enhancement of rent, where the tenant is appellant and seeks to reduce the amount, the respondents may show, on other points of law, that it ought to have been enhanced beyond that which the decree gave him. HILLS *v.* ISHORE GHOSE . . . . . **Marsh. 151**

s.c. ISHORE GHOSE *v.* HILLS . **W. R. F. B. 48**
1 Ind. Jur. O. S. 25 : 1 Hay 350

(*Contra*) MAKUDU RAVULLAN *v.* MASTAN SAHIB
1 Mad. 102

6. ——— **Changing issues on special appeal.** A party was not allowed on special appeal to go behind the issues by which he was content to abide in the lower Court. AHMED MUNDUL *v.* SONAOOLLAH . . . . . **8 W. R. 5**

7. ——— **Direction of trial of issue**—*Right of respondent to take objection—Civil Procedure Code, 1859, s. 372, and Act XXIII of 1861, s. 25.* Where an issue has been directed, and the finding and evidence returned, a special appellant cannot take an objection going to the merits which otherwise would not properly be open upon special appeal. S. 25 of Act XXIII of 1861 gives no rights inconsistent with s. 372 of Act VIII of 1859. NILAYATATCHI *v.* VENKATACHALAM MUDALI
1 Mad. 250

8. ——— **Omission to determine material issue**—*Civil Procedure Code, 1877, s. 565, applicability of.* Where a Court of first appeal omits to determine a material issue of fact, the High Court as a Court of second appeal is not competent, under s. 565 of the Civil Procedure

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SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

Code, to determine such issue itself, but should refer it for determination to the Court of first appeal. SHEO RATAN *v.* LAPPU KUAR . **I. L. R. 5 All. 14**

9. ——— **Payment of stamp duty where not tendered in Court below.** Where an appellant has not tendered the stamp duty and penalty on a document which the Courts below have *held* to be insufficiently stamped, the High Court will not allow him to do so in special appeal. RAM KRISHNA GOPAL *v.* VITHU SHIVAJI **10 Bom. 441**

10. ——— **Ground taken for first time on appeal**—*Ground arising out of facts alleged and admitted.* In special appeal a new ground may be taken if it manifestly arises out of the facts alleged and admitted, whether pressed or not before the lower Appellate Court. KALIMOHAN CHATTERJEE *v.* KALI KRISTO ROY CHOWDHRY **2 B. L. R. Ap. 39 : 11 W. R. 183**

11. ——— **Plea taken for first time on appeal**—*Facts stated in plaint necessary to support it.* A plea may be taken in special appeal though not set out in the plaint, if the plaint did set out all the facts necessary to support the plea, and there was no omission calculated to mislead the Court. JUDOONATH MULLICK *v.* KALEE KRISTO TAGORE . . . . . **22 W. R. 73**

12. ——— **Objection taken for first time in special appeal.** Where in a suit under the Madras Local Boards Act in the Courts of first instance and first appeal no objection was taken to the frame of the suit with reference to the provisions of s. 27 :—*Held*, that the defendants should not be permitted on second appeal to raise such objection to the frame of the suit. PRESIDENT, TALUKH BOARD, SIVAGANGA *v.* NARAYANAN **I. L. R. 16 Mad. 317**

13. ——— **Objection taken for first time on appeal**—*Necessity of notice to quit—Objection as to want of parties—Practice—Suit for specific performance.* An objection as to the necessity of notice to quit is one which may be taken in second appeal. An objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, cannot be taken for the first time in second appeal, as it only involves a question of practice. DODHU *v.* MADHAVRAO NARAYAN GADRE . **I. L. R. 18 Bom. 110**

14. ——— Where an objection was taken in the first Court that a notice to quit ought to have been served through the Court, and on second appeal the objection was based on the ground that it should have been served by proclamation and beat of drum under rule 3 framed by the Local Government under the provisions of the Bengal Tenancy Act, it was *held* that the objection so taken could not be entertained in second appeal. LOKE NATH GOPE *v.* PETAMBAR GHOSE **3 C. W. N. 215**

SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

15. ——— **New point raised in second appeal**—*Question of law.* The High Court will allow, on second appeal, a new point to be raised for the first time, provided it is purely a question of law arising on the findings of the Courts below, and not affected by any facts outside those findings. NAGESH *v.* GURURAO . **I. L. R. 17 Bom. 303**

16. ——— **Point of law raised for first time in second appeal.** In a suit by a mortgagee for possession of the mortgaged land, the mother of the deceased owner claimed to remain in possession of it in virtue of her right to maintenance. At the hearing of the second appeal, a claim was made on her behalf not merely to maintenance, but to a share in the property as mother of the last owner. The point had not been taken in the lower Courts, nor was it one of the grounds of appeal. *Held*, that it could not be taken for the first time in second appeal. It set up a new right differing in kind from that asserted throughout the trial, and not differing merely in degree, as was the case in *Nagesh* v. *Gururao, I. L. R. 17 Bom. 303.* RACHAWA *v.* SHIVAYOGAPA . **I. L. R. 18 Bom. 679**

17. ——— **New point**—*Discretion of Court.* On second appeal the appellant should not be allowed to raise an entirely new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts and capable of being determined without the consideration of any evidence other than that on the record, and even if it falls within the above exception, it is purely discretionary with the Court whether to consider it or not. FAKIR CHAND AUDHIKARI *v.* ANUNDA CHUNDER BHUTTACHARJI . . . **I. L. R. 14 Calc. 586**

18. ——— **Objection that mesne profits ought to have been settled in execution and that no suit lies**—*Suit for recovery of mesne profits from person who has taken possession under a decree which is subsequently reversed on appeal—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 244.* A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount and a declaration that, if the amount were not paid within fifteen days, the tenant should be ejected under s. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed and succeeded in getting the decree set aside, and the amount found due from him for arrears by the first Court was reduced, and a decree made directing that, if the reduced amount were not paid within fifteen days, he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days and recovered possession of his holding. He then brought a suit in the Munsif's Court to recover mesne profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not

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SPECIAL OR SECOND APPEAL—*contd.*

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lie, as the matter might and should have been determined in the execution department under s. 244 of the Civil Procedure Code. *Held*, that, as the suit was instituted in the Munsif's Court, and the Munsif, under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsif, which he did not possess, and that, upon the authority of the decision in *Purmessuree Pershad Narain Singh* v. *Jankee Kooer, 19 W. R. 90*, this could not be made a ground of objection on appeal. *Held*, also, that the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. AZIZUDDIN HOSSEIN *v.* RAMANUGRA ROY . . **I. L. R. 14 Calc. 605**

19. ——— Objection to parties—*Non-joinder of parties. Held*, by MUTHUSAMI AYYAR, and BRANDT, *JJ.* (KERNAN, *J.*, dissenting), that the objection as to non-joinder of parties is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. MOIDIN KUTTI *v.* KRISHNAN **I. L. R. 10 Mad. 322**

20. ——— Question of limitation. Where the question of limitation was raised for the first time in second appeal:—*Held*, that it could not be decided in favour of the plaintiff. SHIBAPA *v.* DOD NAGAYA . . **I. L. R. 11 Bom. 114**

21. ——— *Plea raised at the hearing which was not taken in the memorandum of appeal—Practice.* A plea that the memorandum of appeal in the lower Appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation, is not a plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal. RAM KISHEN UPADHIA *v.* DIPA UPADHIA . **I. L. R. 13 All. 580**

22. ——— *Civil Procedure Code, ss. 541, 542, 584, 585, 587—Plea of limitation as to first Appellate Court taken orally on second appeal.* An appellant in a second appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondents' appeal to the lower Court (where they had been appellants) had been barred by limitation when it was presented. *Held*, that, even though the plea proposed to be raised was one involving a question of limitation, the appellant was not entitled as of right to be heard in support of it without the leave of the Court granted under s. 542 of the Code of Civil Procedure; and that the Court was not itself bound to consider that plea, and under the circumstances did not think it necessary to enter into it. *Ram Kishen Upadhia* v. *Dipa Upadhia, I. L. R. 13 All. 580*, approved. AHMAD ALI *v.* WARIS HUSAIN **I. L. R. 15 All. 123**

SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

23. ——— Argument on point not before raised—*Civil Procedure Code, 1859, s. 374.* The High Court ought not, under s. 374, Act VIII of 1859, to allow a point of law to be argued in special appeal when it was not distinctly raised in the first Court, nor alluded to in the lower Appellate Court. LALLA JOWAHIR LALL PANDEY *v.* COURT OF WARDS . . . . **17 W. R. 214**

24. ——— Objection on appeal not raised before remand—*Question of law.* The High Court is bound to notice an argument on a point of law raised in special appeal, even though it was not raised before the Court on a previous occasion, when it passed an order of remand. DARIMBA DEBIA *v.* NILMONEE SINGH DEO **15 W. R. 180**

25. ——— Setting up new case—*Pleas and objections raised for first time in special appeal.* Parties are not entitled in special appeal to set up a new case, involving an argument entirely different from that raised in the Courts below, and a state of facts entirely inconsistent with their statements there. BUNSEE LALL *v.* AOLADH AHSAN **22 W. R. 553**

26. ——— *Raising new issue—Changing original allegations.* A party cannot be permitted to change in special appeal the allegations on which he went to trial in the Courts below, and to raise altogether a new issue. SHIU DAS NARAYAN SINGH *v.* BHAGWAN DUTT **2 B. L. R. Ap. 15 : 11 W. R. 10**

27. ——— *Changing ground of action.* A plaintiff suing for redemption, on the ground of holding in right of dower, cannot in special appeal claim to redeem on the ground of being heir to the mortgagor. RAHOMAN *v.* FUZULOONISSA . . . . **W. R. 1864, 326**

28. ——— *Changing ground of action.* A claim as heir to a widow cannot be heard on special appeal when the plaintiff did not sue on that ground in the Court below. KRIPANATH MOJOOMDAR *v.* SARODA CHOWDHRAIN **1 W. R. 283**

29. ——— *Changing ground of action.* When a plaintiff has ineffectually sued for a declaration that certain property was his own self-acquired property, he cannot in special appeal ask for a declaration of his title to a moiety of the property as a member of a joint Hindu family. DHUN KRISTO ROY *v.* HURO CHUNDER ROY **5 W. R. 197**

30. ——— *Claim through widow in right of dower—Allegation of right by inheritance.* The defendants in the Court below unsuccessfully claimed to retain possession of some land under a kobala from a Mahomedan widow, who was alleged by them to have been absolutely entitled thereto under her right of dower. *Held*, that the defendants could not, in special appeal, set up for the first time that the widow was entitled

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SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

to a share by inheritance, if not as denmohur, no case of that kind having been made in the Courts below, and no inquiry asked for into the state of the family, or whether any and what share came to the widow. AMBIKA CHARAN DUTT *v.* NADIR HOSSEIN . . . **2 B. L. R. A. C. 258**

S.C. UMBIKA CHURN DUTT *v.* NADIR HOSSEIN **11 W. R. 133**

31. ——— Rules for special appeal— *Sufficiency of evidence on the record, question as to.* A case which is tried in special appeal is subject to all rules provided for regular appeals so far as the same may be applicable. The question whether evidence on the record is legally or reasonably sufficient to support the findings of the lower Appellate Court may be dealt in special appeal without a remand or re-hearing. JOY RAM ROY *v.* OMRAO ROY . . . . . **12 W. R. 431**

32. ——— Omission after favourable finding of law to appeal against adverse finding of fact in lower Court— *Power of High Court reversing judgment on law to decide on fact without remand.* The Court of first instance found against the defendant on a matter of fact, but decreed in his favour on a point of law; and on appeal by the plaintiff the defendant omitted to file a memorandum of objections to the adverse finding of fact of the Court of first instance. The Appellate Court, without going into the question of fact, confirmed the decree of the Court of first instance on the point of law. *Held*, that the High Court, in special appeal, could under these circumstances give judgment in favour of the plaintiff without a remand. WAIGANKAR *v.* WADEKAR **5 Bom. A. C. 194**

33. ——— Power of High Court to draw inference of fact from evidence. The High Court is not at liberty in a special appeal to draw any inference of fact from the evidence in the case. DWARKADAS LALUBHAI *v.* ADAM ALI SULTAN ALI . . . . . **3 Bom. A. C. 1**

34. ——— Mode of obtaining record of facts where ground of appeal is misconduct of Judge in not hearing a pleader. The Court on special appeal is bound to take the facts from the Judge's statement. Where, therefore, a party desires or intends to make the misconduct of a Judge a ground of appeal to the High Court, he ought always to draw the Judge's attention to that matter, either by presenting a petition or otherwise, so that a proper record may be at once made of the facts which he desires to establish in appeal. RAM KOOMAR KYBURTO DASS *v.* SONATUN DASS PORAMANICK . **3 C. L. R. 23**

35. ——— Appeal to Chief Court, Punjab— *Civil Procedure Code, 1882, s. 584—Questions of fact.* An appeal from an Appellate Court to the Chief Court of the Punjab is not limited, as such appeals are under the Civil Procedure Code, 1882, s. 584; but evidence may be dealt

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7. PROCEDURE IN SPECIAL APPEAL—*contd.*

with, and questions of fact are open for decision. BUDHA MAL *v.* BHAGWAN DAS. **I. L. R. 18 Calc. 302**

36. ——— Treatment by High Court of finding of fact— *Suit for wrongful dismissal.* The finding of the lower Courts upon a question of whether there was sufficient ground for the dismissal of a pagoda hereditary servant by the dharmakarta must be treated by the High Court on special appeal as a conclusive finding upon a matter of fact, unless it be supported by no evidence whatever. KRISTNASAMY TATACHARRY *v.* GOMATUM RANGACHARRY . . . . . **4 Mad. 63**

37. ——— Power of High Court as to facts— *Appeal from order of remand—Civil Procedure Code, 1877, s. 562, and s. 588, cl. 28.* On an appeal from an order under s. 562 of the Civil Procedure Code remanding the case, the High Court cannot consider the facts on which the lower Appellate Court passed the order of remand. All that it can do under s. 588, cl. 28, is to consider whether, on the findings of fact by the lower Appellate Court, that Court was right in remanding the case. NOIMOLLAH PRAMANICK *v.* GRISH NARAIN MOONSHEE . **I. L. R. 8 Calc. 674**

38. ——— Effect on special appeal of recording further evidence by Appellate Court— *Right to appeal on facts.* A special appeal is not converted into a regular appeal because the Judge, sitting as a Court of appeal, recorded further evidence under s. 356, Act VIII of 1859, or pronounced a judgment on the evidence recorded, which had not been considered by the first Court as described in s. 353. LALLA HEERA LALL *v.* GOUREE BYJNATH PERSHAD . . . **4 W. R. 43**

39. ——— *Civil Procedure Code, 1882, s. 568—Right to go into facts on appeal.* The provision in s. 568 of Act XIV of 1882 as to an Appellate Court recording its reasons for admitting additional evidence is directory merely, and not imperative. Where the first Court of Appeal has admitted additional evidence, the hearing in the second Court of Appeal will not be treated as a first appeal, so as to allow the pleaders to go into the facts. GOPAL SINGH *v.* JHAKRI RAI **I. L. R. 12 Calc. 37**

40. ——— *Right to examine evidence taken by lower Appellate Court under s. 355, Civil Procedure Code, 1859.* The High Court is not entitled in special appeal to examine the evidence of a witness summoned by the lower Appellate Court under Act VIII of 1859, s. 355, which was not before the first Court, nor treat the appeal as a regular appeal. MAHOMED KAMIL *v.* ABDOOL LUTEEF . . . . . **23 W. R. 51**

Reversing decision in ABDOOL LUTEEF *v.* MAHOMED KAMIL . . . **20 W. R. 369**

41. ——— Right to go behind order of remand— *Omission to apply for review of order.*

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SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

Where a suit was remanded for assessment of mesne profits on the principle laid down in a certain case, if the plaintiff was himself found to have cultivated the lands, and the first Court, finding that to be the fact, assessed the mesne profits on the principle laid down in that case, but the Judge reversed the decision on the ground of a later ruling as to mesne profits, the High Court on special appeal *held* that the special respondent, if dissatisfied with the order of remand, ought to have applied for a review, and, not having done so, he was not entitled to ask the Court to go behind the order and consider whether it was wrong with reference to the latter case. NURSINGH ROY *v.* ANDERSON . . . . . **19 W. R. 125**

See RAMKUVARBAI *v.* DAMODHAR NARBHERAM. **6 Bom. A. C. 146**

42. ——— Objection to previous order in the case to be taken in memorandum of appeal—*Civil Procedure Code, ss. 562, 591.* Unless such objection is taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree to question the validity of an order of remand previously made in the case under s. 562 of the Code of Civil Procedure. TILAK RAJ SINGH *v.* CHAKARDHARI SINGH **I. L. R. 15 All. 119**

43. ——— Order adding defendant—*Civil Procedure Code, 1882, s. 32.* Where an order adding a defendant under s. 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh* v. *Chakardhari Singh, I. L. R. 15 All. 119*, referred to. BANSI LAL *v.* RAMJI LAL . **I. L. R. 20 All. 370**

44. ——— Power of High Court to deal with evidence—*Necessity for remand—Evidence of existence of legal necessity. Held*, by PEACOCK, *C.J.*, that the High Court has the power in special appeal, before remanding a case, to see whether there is any evidence on the record which would warrant a contrary finding to that already come to by the Judge below ; and that it would be worse than useless to remand the present case to the Judge to find whether any necesssity existed for the sale, when the Court sees that there is no evidence on the record to prove the existence of such necessity, and when the Judge has found that there was no necessity ; if he were to come to a contrary finding upon the evidence as it stands, his judgment would be reversed upon special appeal as being a finding without any evidence in support of it. *Held, contra*, by BAYLEY, *J.*, that, under s. 372, Act VIII of 1859, the Court in special appeal cannot try facts on the evidence on the record, or whether the evidence is sufficient to enable the Court to come to a conclusion of fact on the question of legal necessity, and that the case should be remanded to the Judge for a clear finding on that question. RAM PERSHAD SOOKUL *v.* RAJUNDAR SAHOY **6 W. R. 262**

SPECIAL OR SECOND APPEAL—*contd.*

7 PROCEDURE IN SPECIAL APPEAL—*contd.*

45. ——— *Civil Procedure Code, 1882, ss. 565, 566—Determination of case by High Court.* In a suit for pre-emption, based on the wajib-ul-urz of a village, the Court of first instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower Appellate Court, dissenting from this opinion, reversed the first Court's decree, and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, *viz.*, the amount of the consideration for the sale. On appeal from the order of remand, the High Court, on the 3rd January 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code ; that his order must so far be set aside ; and that he should proceed under s. 565 or s. 566 as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of first instance, under s. 566, as to the amount of consideration, and, accepting the first Court's finding upon that issue, decreed the plaintiffs' claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record. *Held per* PETHERAM, *C.J.*, and OLDFIELD and TYRRELL, *JJ.*, that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed in fact in the village, if the evidence for answering this question was already on the record, and that, in such a case, the question need not be referred to the Court of first appeal. *Bal Kishen* v. *Jasoda Kuar, I. L. R. 7 All. 765*, referred to. *Per* STRAIGHT and BRODHURST, *JJ.*, (*contra*). *Bal Kishen* v. *Jasoda Kuar, I. L. R. 7 All. 765*, referred to. DEOKISHEN *v.* BANSI **I. L. R. 8 All. 172**

46. ——— Second appeal from order of remand—*Civil Procedure Code, s. 562—Effect of findings of facts and findings of law.* On an appeal from an order of remand under s. 562 of the Code of Civil Procedure, the High Court is bound to accept the findings of fact of the Court which made the remand, that Court being a Court of first appeal, provided that there is evidence to support them ; but where the High Court has decided a question of law in an appeal from an order under

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s. 562 of the Code, that decision of the question of law will be final for all purposes in the suit and in any appeal which may subsequently be made to the High Court. *Deo Kishen* v. *Bansi, I. L. R. 8 All. 172*, referred to. GAURI SHANKAR *v.* KARIMA BIBI . . . . **I. L. R. 15 All. 413**

47. ——— Appeal from order of an Appellate Court—*Civil Procedure Code, 1882, ss. 562, 588—Findings of fact of the Court below.* In an appeal from an order of an Appellate Court the High Court is bound to accept, as in a second appeal from a decree, the findings of fact arrived at by the lower Appellate Court. *Gauri Shanker* v. *Karima Bibi, I. L. R. 15 All. 413*, approved. TIKA RAM *v.* SHAMA CHARAN . **I. L. R. 20 All. 42**

48. ——— Determination of issues of fact by High Court—*Civil Procedure Code, ss. 565, 566, 587. Held*, by the Full Bench, that s. 587 of the Civil Procedure Code does not make ss. 565 and 566 applicable to second appeals, so as to enable the High Court, in cases where the lower Appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record, but the High Court in such cases must remit issues for trial to the lower Appellate Court. *Balkishen* v. *Jasoda Kuar, I. L. R. 7 All. 765*, and *Deokishen* v. *Bansi, I. L. R. 8 All. 172*, overruled on this point. GIRDHARI LAL *v.* CRAWFORD **I. L. R. 9 All. 147**

49. ——— Power of High Court to look into ground for admitting appeal after time. It is competent to the High Court in special appeal to look into the grounds which a Judge has given for admitting an appeal after the lapse of the prescribed time. On appeal to the High Court against the decree of a subordinate Court, everything which preceded that decree as an act of Court is open to revision. MOWRI BEWA *v.* SURENDRA NATH ROY **2 B. L. R. A. C. 184 : 10 W. R. 178**

50. ——— *Limitation Act (XV of 1877), s. 5, Sch. I.* The High Court, sitting on second appeal, has power to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period allowed by the Limitation Act. *Mowri Bewa* v. *Surendra Nath Roy, 2 B. L. R. A. C. 184*, followed. CHUNDER DOSS *v.* BOSHOON LALL SOOKUL **I. L. R. 8 Calc. 251 : 11 C. L. R. 177**

51. ——— Power of High Court to vary order for execution—*Giving relief not asked for.* The High Court in second appeal should not vary the order for execution which had been passed in such a way as to give the decree-holder relief for which he did not ask. PROTAP CHUNDER DOSS *v.* PEARY CHOWDHRAIN **I. L. R. 8 Calc. 174 : 9 C. L. R. 453**

52. ——— Decrees made without jurisdiction—*Suit cognizable by Small Cause Court—Order sending case on terms to Small Cause Court.* Where the decisions of the lower Courts were found, in special appeal, to have been without jurisdiction, and the suit to be cognizable by the Small Cause Court, the High Court made an order sending the plaint to the Small Cause Court for trial, upon the appellant (plaintiff) paying within three months all the costs of the litigation. DHUN MONEE CHOWDHRAIN *v.* WOOMA CHURN ROY **23 W. R. 445**

53. ——— Objections under s. 567 raised for the first time in second appeal by plaintiffs—*Practice—Remand by lower Appellate Court under Civil Procedure Code, s. 556.* Objections which might have been, but were not, made under s. 567 of the Civil Procedure Code in a lower Appellate Court to the findings on remand of the Court of first instance, cannot be raised for first time as grounds of second appeal from the lower Appellate Court's decree. MUHAMMAD ABDUL HAI *v.* SHEO BISHAL RAI **I. L. R. 10 All. 28**

54. ——— Filing one appeal from four separate decrees—*Amendment of appeal.* In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor *X*. After the date of sale, but before the whole of the purchase-money had been paid into Court, *X* applied to the Court by petition, praying that the amount due to him might be paid to *A*, to whom, he alleged, he had assigned it. Before any order was made on this petition, *B*, *C*, *D*, and *E*, in execution of separate decrees against *X*, attached the sum in Court. The District Munsif ordered that *B*, *C*, *D*, and *E* should be paid before *A*. *A* brought a suit against *B*. *C*, *D*, and *E* in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order and declared the plaintiff to be entitled to the amount. *B*, *C*, *D*, and *E* severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing *A's* suit. *A* presented one second appeal, making *B*, *C*, *D*, and *E* parties thereto, against the four decrees of the District Court. *Held*, that *A* was bound to file a separate appeal against each of the decrees passed by the District Court; he was, however, allowed by the Court to amend his second appeal and file three more second appeals. CHATHU *v.* KUNSHAMED . . **I. L. R. 11 Mad. 280**

55. ——— Change of pleading in appeal—*Practice.* The plaintiff, alleging himself to be joint in estate with *A*, his granduncle, sued to set aside an absolute gift of the house in suit made by *A* in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower Appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant valid and

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SPECIAL OR SECOND APPEAL—*contd.*

7. PROCEDURE IN SPECIAL APPEAL—*contd.*

dismissed the suit. On second appeal the plaintiff contended that he was the heir of the donee, and that under the deed of gift she had no power to alienate. *Held*, that, the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed. KANHIA *v.* MAHIN LAL
I. L. R. 10 All. 495

56. ——— **Omission to examine witnesses**—*Second appeal, objection on, on the ground of such omission.* A Subordinate Judge, after examining some only of the plaintiffs' witnesses, was of opinion that there was no necessity for further evidence, and passed a decree for the plaintiffs. Ten witnesses whom the plaintiffs had summoned were not examined. The defendant appealed to the District Judge. At the hearing of the appeal the plaintiffs did not inform the Judge that some of their witnesses had not been examined, nor did he become otherwise aware of the fact. He reversed the lower Court's decree, being of opinion, on appeal, that the plaintiffs' evidence had not proved their case. The plaintiffs appealed to the High Court, and contended that the decree of the lower Appellate Court should be set aside, in order that the excluded evidence might be taken. *Held*, that there was no sufficient reason, on second appeal, to set aside the decree. The plaintiffs ought to have brought the facts to the notice of the lower Appellate Court, and, not having done so, they could not on second appeal take the objection in order to have a chance of a second trial. GULAM *v.* BADRUDIN . . I. L. R. 18 Bom. 336

57. ——— **Defective judgment of Appellate Court, reversing Munsif's decision on credibility of witnesses**—*Practice—Procedure—Judgment, form of.* Case in which the High Court on special appeal, being of opinion that the judgment of the District Judge reversing that of the Munsif on the credibility of the witnesses did not fulfil the conditions that a judgment reversing such a decision ought to fulfil, brought up the case before itself and heard it as a regular appeal. PURMESHUR CHOWDHRY *v.* BRIJOLALL CHOWDHRY
I. L. R. 17 Calc. 256

58. ——— **Objection to suit on ground of want of certificate**—*Suit under Dekkan Agriculturists' Relief Act.* An objection to a suit under the Dekkan Agriculturists' Relief Act on the ground that a proper certificate had not been obtained could, it was *held*, be taken for the first time in second appeal, as it was an objection affecting the jurisdiction of the Courts below. NYAMTULA *v.* NANA VALAD FARIDSHA
I. L. R. 13 Bom. 424

59. ——— **Change in nature of suit on second appeal**—*Failure of proof of case as first stated in pleadings.* Plaintiffs, being members of a joint Hindu family, alleging division and a sale to them by other members of their share in the family property more than 12 years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it. *Held*, that the plaintiffs, having failed to prove division as alleged, were not entitled in second appeal to have their suit treated as a suit for partition. MUTTUSAMI *v.* RAMAKRISHNA
I. L. R. 12 Mad. 292

60. ——— **Powers of Appellate Court**—*Question of fact—Civil Procedure Code, 1882, ss. 584, 585.* The limitation to the power of the Appellate Court in hearing a second appeal under ss. 584 and 585 of the Code of Civil Procedure, 1882, must be attended to, and the appellant cannot be allowed to question the finding of the first Appellate Court on a question of fact. PERTAP CHUNDER GHOSE *v.* MOHENDRANATH PURKAIT
I. L. R. 17 Calc. 291
L. R. 16 I. A. 233

61. ——— **Objection taken for first time on appeal**—*Misjoinder of causes of action—Civil Procedure Code, s. 44.* Where an objection under s. 44 of the Code of Civil Procedure as to misjoinder of causes of action was raised for the first time on appeal, the High Court on second appeal declined to entertain it. *Dhondiba Krishnaji Patel* v. *Ramchandra Bhagvat, I. L. R. 5 Bom. 554*, followed. MAULA *v.* GULZAR SINGH
I. L. R. 16 All. 130

62. ——— **Objection to jurisdiction on ground of wrong valuation of suit**—*Suits Valuation Act (VIII of 1889), s. 11.* The High Court *held* that it was not at liberty to entertain an objection taken for the first time on second appeal that the suit was not within the pecuniary limits of the District Munsif's jurisdiction, as it appeared on the merits that the appellant had not been prejudiced. MUTHUSAMI MUDALIAR *v.* NALLAKULANTHA MUDALIAR . I. L. R. 18 Mad. 418

63. ——— **Objection taken for first time in second appeal that preliminaries to suit had not been taken**—*Practice.* In a suit for a declaration of the plaintiffs' right to have their names registered as purchasers, an objection having been raised, in second appeal, that the Court had no jurisdiction to entertain the suit, as the plaintiffs had not previously asked the Collector to place them on the register.—*Held*, that this circumstance was not necessary to give jurisdiction, although it might be a reason for treating the suit as premature. That objection, however, being taken for the first time in second appeal, was disallowed. BHIKAJI BAJI *v.* PANDU
I. L. R. 19 Bom. 43

64. ——— **Objection based on point of law.** An objection based upon a point of law may be made in second appeal, provided it does not involve the taking of any additional evidence on matters of disputed facts. DAVDAPPA *v.* GIRIMALLAPPA . . . I. L. R. 19 Bom. 331

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SPECIAL OR SECOND APPEAL—*contd.*

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65. ——— Objection taken on appeal from final decree to order of remand not appealed from. The contention that a map was admissible in evidence was *held* to be open to the appellant, on second appeal, although he had not appealed against an order of remand made by the lower Appellate Court, rejecting the map as not being admissible. *Savitri* v. *Ramji, I. L. R. 14 Bom. 232,* and *Rameshur Singh* v. *Sheodin Singh, I. L. R. 12 All. 510,* followed. KANTO PRASHAD HAZARI *v.* JAGAT CHANDRA DUTTA **I. L. R. 23 Calc. 335**

66. ——— Offer to pay stamp-duty and penalty in second appeal not allowed. An instrument which is not duly stamped will not be admitted on second appeal on payment of stamp and penalty when there is no evidence that the stamp and penalty were tendered and refused on the hearing of the first appeal. *Ramkrishna Gopal* v. *Vithu Shivaji, 10 Bom. 441,* referred to. LAKSHMANDAS RAGHUNATHDAS *v.* RAMBHAU MANSARAM . . . **I. L. R. 20 Bom. 791**

67. ——— Wrong issue framed by lower Court—*Finding in judgment on the point raised by correct issue—Ground for remand.* Where the lower Appellate Court framed a wrong issue for decision, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court in second appeal refused to remand the case for a new finding on that issue. VISHNU RAMCHANDRA *v.* GANESH APPAJI CHAUDHARI . . . **I. L. R. 21 Bom. 325**

68. ——— Amendment of plaint by putting new plaintiff on the record on second appeal. Where plaintiffs had sued as executors by implication under a will which provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, which adoption had been made :—*Held,* under the circumstances of the case, that the plaint should be amended on second appeal by substituting the adopted son as plaintiff with one of the original plaintiffs as his next friend. SESHAMMA *v.* CHENNAPPA . **I. L. R. 20 Mad. 467**

69. ——— Apportionment of mortgage-debt—*Question of apportionment first raised in second appeal—Practice.* A plaintiff, who had purchased part of certain mortgaged property and sued for possession, obtained a decree ordering that he should get possession on payment of the whole mortgage-debt. He did not in the lower Courts ask that the mortgage-debt should be apportioned, but did so in second appeal to the High Court. Under the circumstances, the High Court refused to interfere with the decree. The plaintiff had a remedy by suit for contribution. YADAO BABAJI SURYARAV *v.* AMBO . **I. L. R. 21 Bom. 567**

70. ——— Appeal to lower Appellate Court by respondent in High Court in-

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7. PROCEDURE IN SPECIAL APPEAL—*contd.*

sufficiently stamped—*Court Fees Act (VII of 1870), s. 10.* Where it was discovered in second appeal in the High Court that the respondent, when appellant in the lower Appellate Court, had not paid a sufficient court-fee on his memorandum of appeal in that Court and up to the date of the hearing of the appeal in the High Court, though called upon to do so, had not made good the deficiency, it was *held* that the proper procedure was not to dismiss the respondent's appeal to the lower Appellate Court under s. 10 of the Court Fees Act, but to stay the issuing of the decree, if any, of the High Court in favour of the respondent until such time as the additional court-fee due by him might be paid. NARAIN SINGH *v.* CHATURBHUJ SINGH **I. L. R. 20 All. 362**

71. ——— Objection as to improper admission of document in evidence. An objection that a document which *per se* is not admissible in evidence has been improperly admitted in evidence cannot be entertained for the first time in second appeal. *Miller* v. *Madho Das, I. L. R. 19 All. 76 : L. R. 23 I. A. 106,* distinguished. GIRINDRA CHANDRA GANGULI *v.* RA ENDRA NATH CHATTERJEE . . . . **1 C. W. N. 530**

72. ——— Inferences of fact or of law—*Civil Procedure Code (Act XIV of 1882), s. 584.* Case in which the High Court in second appeal reversed the judgment of the lower Appellate Court, and considered the inferences of facts and also certain facts found by the first Court and not displaced by the lower Appellate Court, which set aside the judgment of the former. In second appeal the High Court has the power of considering whether the procedure adopted by the lower Appellate Court in dealing with the facts is proper or not ; and whether the inferences of fact or law derived by that Court from facts established to the satisfaction are well founded or not. PROTAP NARAIN SINGH DEB *v.* RAGHU RAM HAZRA (1901) **6 C. W. N. 185**

73. ——— Limitation—*Limitation Act (XV of 1877), Sch. II, Art. 179—Where second appeal preferred, time runs from date of order finally disposing of such appeal.* Where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of such order ; and it makes no difference that such second appeal was withdrawn by the appellant. *Patloji* v. *Ganu, I. L. R. 15 Bom. 370,* dissented from. *Abdul Rahiman* v. *Maiden Saiba, I. L. R. 22 Bom. 506,* dissented from. PERIA KOVIL RAMANUJA PERIYA JEEYANGAR *v.* LAKHSHMI DOSS (1906) **I. L. R. 30 Mad. 1**

74. ——— Substitution of parties in second appeal—*Limitation Act (XV of 1877), Sch. II, Art. 175Q.* Where one of the plaintiffs respondents in a second appeal against a decree for rent passed in their favour had died and no

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application was made to bring in his heirs within the period allowed by Art. 155C, Sch. II of the Limitation Act :—*Held*, that the appeal had abated so far as the deceased respondent was concerned, but that the appellants were entitled to go on with the appeal as against the other respondents. *Chandarsang Versabhai* v. *Khimabhai Raghabhai, I. L. R. 22 Bom. 718*, referred to. UPENDRA KUMAR CHAKRAVARTI *v.* SHAM LAL MANDAL (1907) . **I. L. R. 34 Calc. 1020**

75. ——— Evidence not placed before lower Appellate Court not receivable in second appeal. A party cannot, on second appeal let in evidence which was not placed before the lower Appellate Court. *Ramachandra* v. *Krishnaji, I. L. R. 28 Bom. 4*, referred to. *Raru Kutti* v. *Mamad, I. L. R. 18 Mad. 480*, referred to. SECRETARY OF STATE FOR INDIA *v.* MANJESHWAR KRISHNAYA (1904) . . **I. L. R. 31 Mad. 415**

76. ——— Jurisdiction—*Second Appeal.* The Court will allow a question of jurisdiction to be raised for the first time in second appeal, but the contention must be substantiated on the facts already found, or else fail. PURKHIT PANDA *v.* ANANDA GAONTIA (1908) . **12 C. W. N. 1036**

77. ——— Decree against respondent against whom no first appeal—*First appeal.* In a second appeal no decree can be passed against a respondent against whom there was no first appeal. RAM RATAN CHUCKERBUTTY *v.* JOGESH CHANDRA BHATTACHARYA (1907) **12 C. W. N. 625**

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See POLICE ACT (V OF 1861), SS. 17, 19. **I. L. R. 28 Calc. 411**

SPECIAL TRIBUNAL.

——— *Barristers—Vakils—Right of exclusive audience—Special Tribunal—Criminal Law Amendment Act (XIV of 1908), —High Court Charter Act of 1861 (24 & 25 Vict., c. 104), ss. 1, 9, 13 and 14—Letters Patent, 1855, cls. 22, 23 and 24—Ordinary and Extraordinary Original Criminal Jurisdiction—Rules of the High Court, Original Side, 70, 71 and 72.* Barristers have the right of exclusive audience before the Special Tribunal formed to try cases sent up for trial to the High Court under the provisions of the Criminal Procedure Amendment Act, 1908. *Re* BARRISTERS AND VAKILS (1909) **13 C. W. N. 605**

SPECIFIC APPROPRIATION.

See INSOLVENCY—ORDER AND DISPOSITION . **1 B. L. R. O. C. 114, 131**
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——— of agreement to refer to arbitration.

See CONTRACT ACT, s. 28.
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——— of contract, suit for—

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——— of contract of sale—

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——— of contract to give in marriage.

See INJUNCTION—UNDER CIVIL PROCEDURE CODES . I. L. R. 1 Calc. 74

1. GENERAL CASES.

1. ——— Remedies for breach of contract—*Suit for damages.* A party failing to perform his contract may be sued, at pleasure of the other party, either for specific performance or for damages. MUNNEE DUTT SING *v.* CAMPBELL
12 W. R. 149

SPECIFIC PERFORMANCE—*contd.*

1 GENERAL CASES—*contd.*

2. ——— Requisites to entitle party to specific performance—*Ability of plaintiff to perform his part of agreement—Absence or default.* A Court of equity will not decree specific execution of an agreement in favour of a party who is not competent to perform his part of the agreement. To entitle a party to specific performance, he must show that there has been no default on his part, and that he has taken all proper steps towards performance on his own part. BUNGSHEEDHUR MULLICK *v.* CALCUTTA AUCTION COMPANY . 1 Hyde 45

RAM TUNOO KOONDOO *v.* MULLICK DOSSEE
14 W. R. 338

3. ——— *Readiness to carry out agreement.* One who asks the Court for a decree for specific performance of an agreement must show that he is willing and able to carry it out in all its material parts so far as he is concerned, and also that no act of his own in relation to the agreement has in any material degree damnified his opponent. He cannot select one part of the agreement for breach and another for performance. He must be prepared to carry out the entire of his own part of the contract before he can call upon his adversary, through the instrumentality of the Court, to specifically execute the latter part of the agreement. VISHVANATH ATMANARAM *v.* BAPU NARAYAN
1 Bom. 262

4. ——— *Absence of delay in coming before the Court.* Parties seeking specific performance of a contract should come to the Court for relief within a reasonable time. SAM *v.* APPUNDI IBRAHIM SAIB . . . . 6 Mad. 75

5. ——— *Absence of laches—Right to damages.* A suit for specific performance of a contract to sell land will not lie if the plaintiff neglects to enforce his rights for a long time (in this case three years) after his rights under the contract for sale accrued, and if he does not act up to a condition precedent to the sale to him. If he has any claim at all, it would be for damages against the person breaking the contract for loss sustained by the non-fulfilment thereof. PUREEAG SINGH *v.* KHEER SINGH . . . 8 W. R. 280

6. ——— Right to specific performance—*Lapse of time—Agreement to compensate for mesne profits due—Surrender of land charges.* The result of a long-pending litigation was that the defendants were directed to pay wasilat for certain lands which they had possessed under an invalid lakhiraj claim. They subsequently entered into a compromise with the plaintiff, their zamindar, and agreed that, if they defaulted in rent, or if the lands became khas of the zamindar, or were by any means to be alienated, the defendants would point out the lands, or on failure to do this, would pay damages for the loss of the same. *Held*, that lapse of time and surrender of the lands were no impediment to the Court granting relief to the plaintiff in the shape of a decree for specific performance. PROTAP

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SPECIFIC PERFORMANCE—*contd.*

1. GENERAL CASES—*contd.*

CHUNDER SINGH *v.* GOOROO DOSS ROY. PROTAP CHUNDER SINGH *v.* CHUNDER COOMAR ROY.
W. R. 1864, 76

7. ——— *Delay in bringing the suit—Specific Relief Act, s. 22—Joinder of a person not a party to the contract of which specific performance is sought.* A plaintiff sued on the 28th February 1881 for specific performance of a contract entered into on the 1st March 1878 by defendant No. 1, and joined in that suit as a defendant a third person, who alleged that he was the owner of the property, the subject of the contract, seeking to obtain possession and other relief as against such third person, stating that he was a benamidar of defendant No. 1. On second appeal such third person contended that the discretion given to the Court under s. 22 of the Specific Relief Act ought not to be exercised, as the plaintiff had slept on his rights for nearly three years. *Held*, that, although the principle of the objection as to the delay of the plaintiff in bringing his suit was an important one, and one which ought to be considered by the Courts in the exercise of their judicial discretion under s. 22 of the Specific Relief Act, yet the point not having been taken in the Courts below, and there being nothing on the record to lead the Court to presume that the ordinary rule applicable to suits of this nature had been disregarded in the Courts below, the objection ought not under the circumstances to be allowed to prevail in second appeal. MOKUND LAILL *v.* CHOTAY LALL
I. L. R. 10 Calc. 1061

8. ——— *Performance of portion of agreement. Per* PONTIFEX, *J.*—It is of the essence of specific performance that part only of an agreement should not be performed. CUTTS *v.* BROWN . . . **I. L. R. 6 Calc. 328**

s.c. in lower Court. BROWN *v.* CUTTS
5 C. L. R. 487

and on appeal. CUTTS *v.* BROWN . **7 C. L. R. 171**

9. ——— *Specific performance of part of contract and damages—Power of High Court.* The High Court could, under the Charter and Act VIII of 1859, grant specific performance of part of a contract and give damages for the breach of the remainder. In a suit for specific performance of a contract the cause of action is sufficiently shown by a statement of the terms of the contract, followed by the averment of the refusal of the defendant to perform it, with a readiness and willingness of the plaintiff to do his part in it. UNUNTORAM DOSS *v.* RAMLOCHUN AITCH
14 W. R. O. C. 15

10. ——— *Ascertainment of damages—Civil Procedure Code, 1859, s. 192—Specific performance as applied to partnerships.* The ascertainment of the amount of damages was a necessary preliminary to a decree under Act VIII of 1859, s. 192, for specific performance of a contract and payment of damages as an alternative in case

SPECIFIC PERFORMANCE—*contd.*

1. GENERAL CASES—*contd.*

of non-performance. The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases. There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed; first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless it was executed; secondly, where there has been an agreement which has come to an end to carry on a joint adventure, and the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account. VIRDACHALA NATTAN *v.* RAMASAVAMI NAYAKAN . **1 Mad. 341**

11. ——— *Joint contractees—Right of one contractee to specific performance against the wish of the others—Specific Relief Act (I of 1877), s. 16.* Under a single contract to convey land to several persons, it is not open to some of the joint contractees to enforce specific performance of the contract if the other contractees refuse to have specific performances. SAFIUR RAHMAN *v.* MAHARAMUNNESSA BIBI
I. L. R. 24 Calc. 832

12. ——— *Discretion of Court to give relief—Vendor selling land to third parties in breach of his contract.* The fact that, subsequently to, and in breach of, his contract to sell, the vendor has sold the same land to third parties having notice of the contract, and that, if relief is refused to the plaintiff, the land may remain in possession of such third parties, does not affect the question as to the propriety of the exercise by the Court of its discretionary power to enforce the contract. GURUSAMI *v.* GANAPATHIA
I. L. R. 5 Mad. 337

13. ——— *Practice—Liberty to apply—Relief after judgment—Damages—Review—Alternative relief.* On the 27th April 1886, a plaintiff brought a suit praying for specific performance of a contract or in the alternative for damages, and on the 24th November 1886 obtained therein a decree for specific performance with the usual liberty to apply. On the 6th Decmeber 1886 the plaintiff discovered that it was out of the defendant's power to specially perform his contract, and he thereupon, on the 13th April 1887, applied to the Court which had granted the decree for re-hearing of the suit on the question of damages, asking that, in lieu of the decree for specific performance, a decree for damages, when assessed, might be entered up. *Held*, that he was entitled to ask for such relief. PEARISUNDARI DASSEE *v.* HARI CHARAN MOZUMDAR CHOWDHRY
I. L. L. 15 Calc. 211

14. ——— **Right to specific performance**—*Specific Relief Act (I of 1877), s. 23, cl. (b)—Specific performance of contract.* Where the

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SPECIFIC PERFORMANCE—*contd.*

1. GENERAL CASES—*contd.*

personal quality of the party, with whom a contract is made, is a material ingredient in the contract the right to enforce specific performance ceases upon the death of the person with whom the contract is made, and cannot be claimed by his legal representative. If, from the nature of the contract, it is not intended that *A*, the contracting party, should further call upon *B*, with whom the contract is made, to perform his part of the contract, the right to enforce the specific performance of the contract is lost by *B* by reason of delay and laches in performing his part of the contract, although time is not mentioned in the contract as being of the essence of it. MOHENDRA NATH MOOKERJEE *v.* KALI PROSAD JOHURI (1902)

I. L. R. 30 Calc. 265
s. c. 7 C. W. N. 229

15. _____ *Issues—Discretion of Court—Delay—Laches—Specific Relief Act (I of 1877), s. 22—Purchase at Court-sale—Purchase subject to subsisting equities—Right, title and interest of judgment-debtor.* The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 square yards of land forming part of a property consisting of a chawal and vacant land. The agreement was dated the 29th of June 1901, and the suit was filed on the 30th November 1903. The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his estate. He had notice of the plaintiff's claim. *Held*, that even if a purchaser at a Court-sale purchases without notice, he can only buy what the Court could sell, *i.e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as these could have been honestly disposed of by the judgment-debtor himself. *Sobhagchand* v. *Bhaichand, I. L. R. 6 Bom. 193*, followed. *Held*, further, that the purchase by the third defendant was subject to the equity in favour of the plaintiff to compel specific performance, unless that equity had been lost by the plaintiff. The third defendant did not plead delay as a defence or raise a specific issue on the point. *Held*, that the purpose of a general issue is certainly not that pleas should be allowed under it which are not clearly included in the other issues, but only to determine the kind of relief to which a plaintiff is entitled as the result of the findings on the issues preceding it. When, however, a decree for specific performance is sought it is the duty of the Court to see, whether having regard to the judicial discretion vested in it under s. 22 of the Specific Relief Act (I of 1877) it ought to be granted. The proper issue to be raised in such a case is—" Whether the plaintiff's delay has been such as to show that he had lost his right by waiver, abandonment, or acquiescence ? " Laches to bar the plaintiff's right must amount to waiver abandonment, or acquiescence and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. PEER MAHOMED *v.* MAHOMED EBRAHIM (1905)

I. L. R. 29 Bom. 234

16. _____ *Delay in bringing suit—Laches—Limitation.* Delay, which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right is no bar to a suit for specific performance, unless it is shown to have prejudiced the defendant. *Lindsay Petroleum Company* v. *Hurd, L. R. 5 P. C. 221*, and *Jamnadas Shankarlal* v. *Atmaram Harjivan, I. L. R. 2 Bom. 133*, referred to. KISSEN GOPAL SADANEY *v.* KALLY PROSONNO SETT (1905)

I. L. R. 33 Calc. 633

17. _____ *Specific performance, suit for—Pleadings—Practice—Plea in defence—Omission of material term in written contract—Onus—Duty to examine himself—Agreement to take lease on lessor erecting suitable buildings—Time, if essence of contract.* In a suit for specific performance it is important to distinguish between negotiation and contract and to ascertain what the contract is, when and by whom it was made, and who the parties are who are bound by it. Where a party concluded a contract with another party without at any time disclosing that he was acting in the matter as agent for some other person, whether he was really acting as such agent or not, the burden of the contract rested on him, the other party not being concerned with his undisclosed intentions. If the plaintiffs' case is clear and the written statement of the defendant raises no defence, the practice in English Courts allows the plaintiff in a suit for specific performance to move for a decree on the written statement being put in, and to get such a decree at once and as a matter of course. It is incumbent on a party who seeks to make out that by inadvertence or mistake an important term has been omitted from a contract drawn up by himself with his own hand and signed by him, to pledge his oath to the truth of his story specially when the other party comes forward and swears that the suggestion is without foundation. *G. & Co.* agreed to take a lease of certain premises from *H* at a certain rent, upon the latter undertaking to erect new buildings (on a plan which *G. & Co.* approved) to replace existing ones which were to the knowledge of both parties in the occupation of tenants, whom it might take him to eject : *Held*, that time was not made the essence of the contract, though it was clear that in the contemplation of both parties the buildings were to be completed without unreasonable delay. In case of undue delay on the part of *H. G. & Co.* might have made time the essence of the contract by giving notice that they would not hold themselves bound to complete unless the buildings were finished within a specified time, provided the time allowed were such as the Court would hold to be reasonable under the circumstances. It is not incumbent upon a party to give corroborative evidence of

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SPECIFIC PERFORMANCE—*contd.*

1. GENERAL CASES—*concld.*

statements which are not challenged by the other party. MOULVIE MAHOMED IKRAMULL HUQ *v.* WILKIE (1907) . . . **11 C. W. N. 946**

18. _____ *Agreement to lease—Specific performance—Concluded agreement—No time fixed for commencement of lease—Terms reduced into writing—Oral evidence—Indian Evidence Act (I of1872), s. 92.* Oral evidence is admissible to prove some items of an agreement entered into between the parties when some others have been reduced into writing in letters exchanged between the parties. There is no Statute of Frauds in India and there is nothing in s. 92 of the Evidence Act to exclude such evidence. *Semble:* Where there is no agreement as to the date of the commencement of the lease, there is no concluded agreement. *Marshall* v. *Berridge, L. R. 19 Ch. D. 233,* followed. In the circumstances of this case, there was a concluded agreement between the parties which could be enforced, and as the plaintiff had not appealed against the decree of the Court below refusing specific performance, he was certainly entitled to damages. AMBICA PROSAD DASS *v.* J. C. GALSTAUN (1909). **13 C. W. N. 326**

2. SPECIAL CASES.

1. _____ **Agreement to purchase and payment of part of purchase-money**—*Right of purchaser.* When there is an agreement to sell and a part of the consideration-money has been received, the stipulating purchaser is entitled to specific performance on paying down the rest of the said money. SHIB KISHEN DOSS *v.* ABDOOL SOBHAN CHOWDHRY . . **3 W. R. 103**

But *see* RAMTONOO SURMAH SIRCAR *v.* GOUR CHUNDER SURMAH SIRCAR . . **3 W. R. 64**

2. _____ **Contract in respect of adjustment subsequent to decree**—*Act XXIII of 1861, s. 11.* A suit lay for specific performance of a contract in respect of an adjustment subsequent to, and for property beyond, the decree, notwithstanding s. 11 of Act XXIII of 1861, which applied only to subject-matters relating to the decree. RAM LOCHUN BUBRA *v.* MADHUB CHUNDER BUBRA . . . . . **3 W. R. 118**

3. _____ **Re-sale on purchase-money being unpaid**—*Delay in payment where no time is fixed.* When the purchaser of an estate paid earnest-money, and no time was fixed for the payment of the balance, and the vendor re-sold the property within a week:—*Held,* that the vendor was bound to have waited a reasonable period; that the second purchaser took nothing; and that the first purchaser was entitled to a decree for specific performance. MUTHUR ALI *v.* SHEO SAHOY SINGH **W. R. 1864, 281**

4. _____ **Agreement to exchange land**—*Remedy of seller on refusal to give land.* Where a piece of land was sold in consideration of receiving

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

in exchange another piece of land which was not given:—*Held,* that the seller's remedy, having regard to the terms of the contract made, was not by a suit to get back the land sold, but by a suit for damages for breach of contract, or by a suit for the specific performance of the contract or so much of it as was left unperformed. NASIR ALI *v.* GOVERNMENT . . . . . **3 Agra, 394**

5. _____ **Contract for lands for which others were to be exchanged**—*Suit for damages.* Where plaintiff had contracted with defendant to purchase from him a share of certain landed estates, excluding from the contract certain land in those estates situated within a defined boundary, defendant binding himself to make over to plaintiff other lands in exchange:—*Held,* that if defendant failed to make over the lands last mentioned, plaintiff might sue him for specific performance or for damages, but could not sue for the excepted lands. KISHOREE DEBIA *v.* JUGUNNATH ACHARJEE . . . . **9 W. R. 269**

6. _____ **Refusal to act wholly on deed of partition**—*Suit for rights as they existed before deed.* Where a partition deed has been made and partly acted upon, and nothing is asserted against it in the way of undue influence:—*Held,* that the proper course for the plaintiff was to sue to enforce performance, and not for her rights as they may have existed previously. BHOWANEE KOONWAR *v.* THAKOOR DASS . **2 Agra 277**

7. _____ **Agreement to re-unite after partition**—*Absence of money-consideration.* Certain pattidars applied for a butwara under the provisions of Regulation XIX of 1814. At the time of the butwara, it was stipulated between the pattidars of 6 and 7 annas shares that, in the event of a particular village falling by division wholly to either of them, they would re-unite and hold the 13 annas share joint as before. One party having resiled from this agreement, it was held that the other party was entitled to sue for specific performance, and such a suit would lie only in the Civil Court. *Held,* that the absence of mention of any money-consideration in the agreement was no bar to its being enforced, as the parties thereto had waived all objection on the score of the particular village named, or any other, falling wholly or in part to their respective shares. NUKCHAD SINGH *v.* HUNOOMAN DUTT SINGH . **10 W. R. 69**

8. _____ **Contract for appointment of arbitrators under Land Acquisition Act.** In the matter of land acquisition proceedings under Act VI of 1857 a notice was, on the 28th of November, served upon the defendants, signed by the Collector, stating that he had appointed an arbitrator on behalf of Government, and requiring the defendants to appoint a second arbitrator to determine the amount of compensation for the land (describing it) required by the Bombay, Baroda and Central India Railway Company. The defendants' secretary wrote in reply that the defendants had appointed an aribitrator on their behalf to determine

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

the amount of compensation for their land required for the Bombay, Baroda and Central India Railway Company. *Semble:* That a contract was entered into by the last-mentioned notice and letter of reply to it, of which specific performance could be enforced. KHARSHEDJI NASARVANJI CAMA *v.* SECRETARY OF SLALE FOR INDIA **5 Bom. O. C. 97**

9. ——— Agreement for renewal of lease—*Agreement by husband alone—Non-concurrence of mortgagee.* Immoveable property situate in the Island of Bombay was conveyed in 1859 to *N* and his wife (Parsis), their heirs, executors, administrators, and assignees, and was subsequently mortgaged by *N* and his wife, but the mortgagee did not enter into possession. In 1861 *N* alone entered into an agreement with the plaintiff to give them a lease of that property for five years, the plaintiffs being willing to accept that lease with such title as *N* could confer. *Held*, that, notwithstanding the non-concurrence of the mortgagee and of *N's* wife, *N* must specifically perform his contract. The non-concurrence of the mortgagee could not prevent the right of the plaintiff to specific performance by *N* of the agreement, because *N* should either himself redeem the mortgage or permit the plaintiff to do so. NAOROJI BERAMJI *v.* ROGERS **4 Bom. O. C. 1**

10. ——— Contract requiring registration—*Failure to register—Unregistered document.* The plaintiff contracted with the defendant for the purchase of a piece of land, and paid him part of the purchase-money, it being agreed that the balance should be paid after registration of the bill of sale. The defendant kept the document with him, but failed to get it registered. In a suit by the plaintiff to enforce specific performance:—*Held*, that the suit would lie. TRIPURA SUNDARI *v.* RASIK CHANDRA KANUNGUI **6 B. L. R. Ap. 134 : 15 W. R. 189**

See RAHMATULLA *v.* SARIUTULLA KAGCHI. **1 B. L. R. F. B. 58 : 10 W. R. F. B. 51**

TULSI SAHU *v.* MAHADEO DAS. **2 B. L. R. A. C. 105 : 10 W. R. 483**

FATI CHAND SAHU *v.* LILAMBER SINGH DAS. **9 B. L. R. 433 : 14 Moo. I. A. 129 16 W. R. P. C. 26**

PRABHURAM HAZRAH *v.* ROBINSON. **3 B. L. R. Ap. 49 : 11 W. R. 398**

11. ——— Unregistered contract—*Agreement.* The plaintiff lent defendant R20,000, and received a document in the following terms: "On demand we promise to pay *S V M R C* and *C T A C C* the sum of rupees twenty thousand value received. Memo.—For the above promissory note, the grant of the dockyard and offices to be deposited in three days, and a proper agreement drawn out. The time of credit to be one year or eighteen months the interest at R1-10 per cent. per mensem." In a suit to compel specific performance and for damages for breach of the agreement

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

contained in the above memo.:—*Held*, that the memo. contained an agreement of which a Court of equity would grant specific performance, had not defendant rendered specific performance impossible. CURRIE *v.* MUTU RAMEN CHETTY **3 B. L. R. A. C. 126 : 11 W. R. 520**

12. ——— *Registration Act (III of 1877), ss. 48, 49, and 50—Oral agreement, evidence of—Effect of oral agreement as against subsequent registered conveyance.* *A*, by an oral agreement, agreed to grant two mokurari leases of certain properties upon certain terms to *B*, and thereupon executed two mokurari leases in favour of *B* which were not, however, registered. Afterwards *A* granted two mokurari leases of the same mouzahs, upon terms more favourable to himself, to *C* and *D*, who, at the time of such grant, had notice of *A's* previous agreement with *B*. *Held*, in a suit for specific performance brought by *B* against *A* and to which *C* and *D* were added as defendants, that, notwithstanding the provisions of ss. 49 and 50 of Act III of 1877, *B* could obtain a decree for specific relief, and a declaration that the leases to *C* and *D* were void as against him. NEMAI CHARAH DHABAL *v.* KOKIL BAG **I. L. R. 6 Calc. 534 : 7 C. L. R. 487**

13. ——— Bill of sale—*Agreement to transfer share of property in consideration of advances for suit for its recovery—Damages for breach of contract.* Where it was agreed between *A* and *B* that, in consideration of certain proceedings to be instituted jointly by *A* and *B* and payments to be made by *B*, for the recovery of certain property claimed by *A* against *C*, *A* would make over the half of the property recovered to *B*, but *A*, contrary to the terms of the agreement, without the consent of *B*, compromised his claim with *C*, and obtained possession:—*Held*, that the agreement did not operate as a transfer of the property to *B*; she could not sue to eject *A*. *Semble: B's* proper remedy was a suit for specific performance or for damages for breach of the contract, to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by *A*. BHOBOSOONDREE DASSEAH *v.* ISSUR CHUNDER DUTT **11 B. L. R. P. C. 36 : 18 W. R. 140**

14. ——— Agreement for mutual refusals before giving up dwelling-house—*Condition precedent—Limitation Act, 1877, Art. 113,* Two brothers, *V* and *R*, in 1861, agreed together that part of their house should be divided and part enjoyed in common. Each brother was to occupy an assigned division and have the use in common of the rest. If either wished to leave the house, he was bound to offer his share to the other at a fixed price; or if he wished to purchase the share of the other and the other refused to sell, then the party refusing to sell at a fixed price was bound to buy the share of the other brother who wished to purchase. *V* called upon *R* in 1877 either to pay R418 or give up the house. *Held*, that this was an

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agreement enforceable by law ; that until demand no cause of action arose, and limitation only began to run from the demand ; that specific performance should be granted in the alternative. *Venkappa Cheti* v. *Akku, 7 Mad. 219,* distinguished. VIRASAMI MUDALI *v.* RAMASAMI MUDALI
I. L. R. 3 Mad. 87

15. ——— Contract for sale of land by Receiver—*Misdescription—Purchaser having personal knowledge—Title to land between high and low water-mark.* The defendant, who for twelve years had occupied land as tenant, purchased the land at a sale by the Receiver, but refused to complete the purchase on the ground of material misdescription in the advertisement of sale, in that a road and ghât, comprised within the boundaries mentioned in the advertisement, were not the property of the parties whose land the Receiver purported to sell ; and also that, to make up the quantity of land as stated in the advertisement, *viz.*, 20 bighas by estimation, land lying between high and low water mark had been taken into calculation. The owners of the property sold having brought a suit against the defendant for specific performance, the defendant contended that the Receiver was a necessary party to the suit, and that the sale had been rescinded by a statement of the Receiver that he would forfeit the deposit in the event of the defendant not carrying out his contract. In support of his objection to quantity, the defendant relied on a Collectorate chitta as showing that the area of the land sold was only 9 bighas 8 cottahs 10¾ chittaks ; the same chitta, however, in giving the eastern boundary of the property, described it as lying " on the west of the low water of the Ganga." *Held*, that there had been no rescission of the contract, that the plaintiffs, being owners of the land down to low water-mark, were entitled to all subsequent accretions, and were therefore entitled to include in their measurement all land down to low-water mark ; and having regard to the fact that the defendant was personally acquainted with the property sold, it was not open to him to repudiate the contract on the ground of misdescription. The plaintiffs were entitled therefore to a decree for specific performance. GANGADHAR SIRKAR *v.* KASINATH BISWAS . . . **9 B. L. R. 128**

16. ——— Agreement to sell land at a valuation—*Land of peculiar character—Construction of agreement in a pottah—Assignment of pottah—Rights of assignees against original lessors.* The owners of ancestral village lands gave a mokurari pottah of land in a mouzah to the proprietor of a neighbouring colliery " for quarrying coal, for building stores, for garden, for orchard, for road-making, and for other uses." The pottah, besides the above, contained the following, as translated : " You will build a factory according to any plan you choose, and possess the same. Within that aforesaid mouzah we will not give settlement to anybody. If you take possession, according to your requirements, of extra land over and above this pottah, we shall settle such land with you at a proper rate. Thereat we shall make no objection." The lessee, after being in possession for some years under the pottah, assigned it to the plaintiffs, who afterwards took possession of the whole of the extra land, and demanded a pottah therefor from the defendants, and made a contract advantageous to themselves to sell it to third persons. The defendants refused to grant them a pottah. In a suit for specific performance :—*Held*, in the High Court, that where a contract is made to sell land at a fair valuation, and there is no difficulty in ascertaining what a fair valuation would be, the Court will take the usual means of ascertaining it, and decree performance of the contract accordingly. But when, having regard to the peculiar character of the property, as in the case of land supposed to contain coal, or valuable minerals, the value of the land must be to a great extent a matter of guess and speculation, the Court will not decree specific performnace, as it has no means of ascertaining by the ordinary methods what price the plaintiff should pay. *Held*, by the Privy Council, on the construction of the pottah, that if the lessee, or his assigns, had required additional land for the purpose of carrying out the objects for which the pottah was granted, then the lessors would have been bound to settle so much of the adjoining land with them as might have been necessary for such requirements. *Held*, also, that the plaintiffs, the assignees, were not entitled to compel the defendants to grant them a pottah of the extra land, even at a reasonable rate, merely for the purpose of selling it. *Semble :* In a suit for specific performance of an agreement to sell land, the fact that on account of the extraordinary character of the property, as its containing coal or other valuable minerals, there is considerable difficulty in fixing a reasonable rate for it, is not a sufficient reason for refusing a decree. NEW BEERBHOOM COAL COMPANY *v.* BULARAM MAHATA
I. L. R. 5 Calc. 175 ; 932 L. R. 7 I. A. 107

17. ——— Lease savouring of champerty—*Loan of money to carry on litigation.* Specific performance decreed of a lease, though the lease formed part of an arrangement whereby, as a consideration for the lease, the plaintiff was to lend the defendant money to enable him (*inter alia*) to commence legal proceedings against the then tenant of the subject-matter of the intended lease. PITCHAKUTTI CHETTI *v.* KAMALLA NAYAKKAN
1 Mad. 153

18. ——— Compromise made under alleged concealment of fact—*Husband and wife—Armenian Christians.* Specific performance decreed of an agreement in the English form made between husband and wife (Armenian Christians) in the nature of a family compromise respecting the wife's separate property. In the answer of the wife it was alleged that property purchased by the husband had been concealed by him from her when she executed the agreement. *Held*, under the

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

circumstances, that that fact, even if proved, was not sufficient to entitle the wife to treat the agreement as a nullity. *Held*, also, that, if the property said to have been concealed by the husband had been purchased by him out of moneys belonging to the wife's separate estate which was clothed with a trust for the children of the marriage, the wife's remedy was to enforce her own and children's rights by bill to compel a settlement of any property improperly withheld by the husband at the date of the execution of the agreement. GREGORY *v.* COCHRANE . . . **8 Moo. I. A. 275**

ARRATHOON *v.* COCHRANE . **4 W. R. P. C. 66**

19. ——— Contract—*Disability to contract—Temporary disability of zamindar to contract, his estate being subject to the provisions of Act VI of 1876 (Chutia Nagpore Encumbered Estates Act), amended by Act V of 1884—Effect of continuance of transactions after the release of his estate from management under that Act.* It is competent to a person, who has been, but is no longer, in a state of disability, to take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole. He may be bound by a contract, of which the terms are to be ascertained by what passed whilst he was disabled from contracting. The defendant's ancestral zamindari was placed under management by an order made under s. 2 of Act VI of 1876, and he became incapable of contracting in reference to it. He, however, agreed with the plaintiff that the latter should advance money on mortgage, and take a lease of part of the estate. Afterwards by an order, whether well founded or not, at all events effectively made, under s. 12 as amended by Act V of 1884, he was restored to the possession of his estate, again acquiring the right to contract about it. He carried on the transaction with the plaintiff, retaining the benefit of money paid by him, but in the end not completing. *Held*, that he was bound by the contract, though its terms were to be ascertained by what had passed while he was disabled from contracting, and that specific performance could be decreed against him. Whether his entering into the contract was against the policy of the Act, and whether the order under s. 12 had, or had not, been made on good grounds, did not affect the question. GREGSON *v.* UDOY ADITYA DEB **I. L. R. 17 Calc. 223 L. R. 16 I. A. 221**

20. ——— Transfer of Property Act, 1882, s. 83—*Civil Procedure Code, s. 375.* A sum of money having been deposited in Court under the Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgaged premises, which he consented to do. This agreement was not communicated to the Court, and the depositor refused to carry it out when the mortgagee had withdrawn the money as above.

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

Held, that the mortgagee was entitled to a decree for specific performance of the agreement to convey. TATAYYA *v.* PICHAYYA . **I. L. R. 13 Mad. 316**

21. ——— Reversionary interest, sale of—*Purchase-money less than market value of reversion—Stat. 31 Vict., c. 4—Inadequate consideration.* The rule observed in England until the passing of Stat. 31 Vict., c. 4, that specific performance of an agreement to sell a reversionary interest should not be decreed where the purchase-money was less than the market value of the reversion, *held* not to be the rule in India. GITABAI *v.* BALAJI KESHAV SHASTRI NAGARKAR **I. L. R. 17 Bom. 232**

22. ——— Compromise—*Specific Relief Act (I of 1877), s. 22—Specific relief granted in respect of an agreement concerning which both parties had at the time of making it equal means of knowledge, though their relative legal positions were subsequently discovered to be different from what they had supposed at the time.* *N*, a large landed proprietor, died without issue in 1867. His widow *G* held possession of the estates down to her death in 1878. After some disputes as to the succession, one *N K*, claiming as widow of an alleged adopted son of *N*, was put into possession by the Revenue authorities. Against *N K* two suits were brought for the property left by *N*. The first suit was brought in April 1879 by one *C*, claiming as sister's son of *N*. *C*, being a pauper, sold a portion of the property in suit to one *M* for R20,000 and made *M* a co-plaintiff in the suit. The second suit against *N K* was instituted in May 1879 by *S* and others, the defendants, appellants in this present suit, who claimed title as the nearest sapindas of the deceased *N*. In each of these two suits the plaintiff or plaintiffs were successful. In each the defendant appealed. In the case of *C* the defendant was successful, and the plaintiff's suit was dismissed by the High Court on the 7th December 1886; in the other case the parties on the 25th of July 1885 settled their dispute by a compromise. While the two suits above-mentioned were pending, *S* and his co-plaintiffs instituted a suit on the 2nd of July 1883 against *C* and *M* asking for a declaration that they were entitled to succeed to the property of the deceased *N*. In January 1884 the female-defendant having died, the Collector of Bareilly was brought on to the record of this suit as guardian of her minor children, and on the 19th of January 1885 a compromise was entered into between the Collector, on behalf of the minor children of *M* and one adult daughter of *M* on the one hand and the plaintiffs on the other, whereby the representatives of *M* relinquished the suit and consented to a decree being passed in favour of the plaintiffs, and the plaintiffs agreed that, when they got possession of the property, they would make over certain villages and a certain sum of money to the representatives of *M*. On the 6th of January 1888 the Collector of Bareilly instituted a suit for specific performance of the compromise of the 19th January 1885. The Court

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

of first instance decreed the plaintiffs' claim. On appeal by the defendants to the High Court, it was *held* that there was nothing in s. 22 of the Specific Relief Act which would stand in the way of a decree for specific performance of the compromise. The compromise, when entered into in 1883, was not without consideration, and the subsequent course of litigation could not affect the position of the parties as regards the present suit based thereon. SHIB LAL *v.* COLLECTOR OF BAREILLY
I. L. R. 16 All. 423

23. ——— Sale-deed fraudulently suppressed by defendant before registration—*Cause of action.* Where the defendant agreed to sell certain land to the plaintiff and exectued as sale-deed in favour of the plaintiff to that effect, but subsequently obtained possession of it before registration and fraudulently suppressed it :—*Held*, that the plaintiff was entitled to enforce specific performance of the contract by the execution and registration of a fresh document. CHINNA KRISHNA REDDI *v.* DORASAMI REDDI **I. L. R. 20 Mad. 19**

24. ——— Party entitled to damages for breach of contract—*Right to specific performance—Injunction.* A plaintiff who sues for damages, and is entitled to them, cannot likewise be entitled to specific performance, or to an injunction against the further breach of the agreement. ASHRUFOONISSA BEGUM *v.* STEWART **7 W. R. 303**

25. ——— Contract to give in marriage—*Hindu marriage and betrothal—Damages for breach of contract.* The Court will not order the father of a Hindu girl, in a suit to which the girl is not a party, to specifically perform the marriage of his daughter with a person to whom the daughter has been betrothed. It will, however, award damages against the father for breach by him of the contract of betrothal. UMED KIKA *v.* NAGINDAS NAROTAMDAS . . **7 Bom. O. C. 122**

26. ——— *Hindu law—Ceremonies of betrothal. Per* GLOVER, *J.*—A suit for specific performance of a contract to give in marriage will not lie : the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not, by Hindu law, amount to a binding irrevocable contract of which the Court would give specific performance. *In the matter of* GUNPUT NARAIN SINGH . **I. L. R. 1 Calc. 74**

S.C. GUNPUT NARAIN SINGH *v.* RAJUN KOER
24 W. R. 207

27. ——— *Suit to enforce betrothal of marriage—Suit for damages.* The plaintiff, on behalf of her infant son, sued the father and guardian of *M B* to recover possession of *M B*, alleging that *M B* had been betrothed to her son, and that, under the Hindu law, betrothal was the same as marriage, and could not be repudiated, and that the defendant had on demand refused to give up *M B*. The defendant pleaded, *inter alia*, that the betrothal had been repudiated, as the family to which the plaintiff belonged had been guilty of

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

female infanticide, and that it would be illegal, according to Hindu law, to enter into relationship with it. The ceremonies necessary to effect a betrothal had not been performed, though some ceremonies had been gone through. *Held*, that, assuming the ceremonies, which are said to have taken place, to have constituted a contract to marry, and taking into consideration the particular cause assigned for the breach, the relief, if the plaintiff were entitled to any, should be in the shape of damages, and not by the specific performance of the alleged contract. NOWBUT SINGH *v.* LAD KOOER . . . . **5 N. W. 102**

28. ——— Agreement by partners in absence of representative of a deceased partner—*Person in position of trustee.* Surviving partners are treated as trustees of the partnership property for the benefit of the representative of a deceased partner ; and an agreement entered into by such surviving partners, in the absence of the representative of a deceased partner, which agreement is inconsistent with the nature of such trust — to deal with the partnership assets only by way of sale—will not be specifically enforced. RAMLAL THAKURSIDAS *v.* LAKMICHAND MUNIRAM
1 Bom. Ap. 51

29. ——— Stipulation in kabuliat—*Zamindar—Government, liability of.* One of the terms of a kabuliat, equally binding on the Government and a zamindar, the parties concerned, was as follows : "The construction of bheries (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of gungura (large embankments), etc., in connection with the salt and sweet (*i.e.*, not saline) lands of the said pergunnah, shall be made by the Government of the Honourable Company." In a suit brought by the zamindar to obtain an order upon the Government to re-excavate and clear the water-passage of a particular khal situate within the pergunnah, the subject of the kabuliat:—*Held*, that the case was not one in which the Court would decree specific performance. CHUNDER SEKHUR MOOKERJEE *v.* COLLECTOR OF MIDNAPORE
I. L. R. 3 Calc. 464 : 1 C. L. R. 384

30. ——— Agreement to advance money on mortgage. In a suit to compel the defendant to advance R1,800 or thereabouts to the plaintiffs, the unpaid balance of a sum of R3,000 which defendant agreed to advance on mortgage, and for which a mortgage was executed and delivered to the defendant :—*Held*, that the Court ought not to make a decree for specific performance of such agreement. ANAKARAN KASMI *v.* SAIDAMADATH AVULLA . . **I. L. R. 2 Mad. 79**

31. ——— Suit for execution of fresh instrument on retention of first one by defendant—*Specific Relief Act (I of 1877), ss. 12, 21, 22—Suit to restore terms of lost instrument.* The plaintiffs, alleging that the defendants, having executed in their favour and delivered to them a bond the consideration for which was money due to them

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

for rent of land and on a former bond, had received it back for registration, and, refusing to register it had retained it, sued the defendants to have a similar bond executed and registered. *Per* MAHMOOD, *J.*—That it was doubtful whether the suit could be regarded as a suit for specific performance of a contract, and whether the only remedy open to the plaintiffs was not a suit for the money. It was only on the hypothesis that the mere writing of the original bond, in the absence of registration and final delivery, did not amount to a performance of the contract, that the suit was entertainable at all. That, assuming the suit to be one for specific performance of a contract, the plaintiffs were not entitled to the specific relief which they sought, since they could obtain their full remedy by suing for the money in respect of which the fresh bond was sought to be executed; and they had failed to prove the exact terms of the original bond. Observations on the nature of the evidence required to prove a contract of which specific performance is sought. *Per* STUART, *C.J.*—That the suit was bad in form and substance, and there was no ground for the remedy by specific performance of a contract. If the alleged bond were in existence, a suit simply and directly for the recovery of the money claimed by the plaintiffs would have sufficed, for in such a suit, facts relating to the loss or concealment of the bond might have been proved, and under the circumstances secondary evidence at least of the terms of the bond might have been admissible, or the plaintiffs might have found themselves in a position to make out their claim by other evidence; but if the plaintiffs considered it material to their case to have their claim on the bond, the loss or destruction of which could not be doubted, their proper course of proceeding was by a suit to restore the terms of the lost bond, or, as it was said in Courts of equity in England, by suit to obtain the benefit of the lost deed or instrument; and that, if the suit could be taken to be one affording such a remedy, it contained no sufficient materials to warrant it being held that the bond was of the tenor and in the terms alleged by the plaintiffs. MAYA RAM *v.* PRAG DAT . **I. L. R. 5 All. 44**

32. _____ Contract for sale and purchase—*Proposal made in letters—Earnest-money.* The defendant in the name of his wife wrote to the plaintiffs a letter the material portions of which was as follows: "The value of your house, No. 10, Rutton Mistry's Lane, has been fixed through the broker at R13,125; agreeing to that value I write this letter. Please come over to the house of my attorney between 3 and 4 this day with the title-deeds of the house, and receive the earnest. There shall be no doing otherwise." The plaintiffs through their manager wrote in answer to the defendant's wife: "You having agreed to purchase our house for R13,125 have sent a letter through the broker, and were agreeable to it and we will be present between 3 and 4 this day at your attorney's and receive the earnest." The plaintiffs and defendants met at the attorney's office in the absence

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

of the attorney, and no inspection of title-deeds or payment of the earnest-money therefore took place. *Held*, in a suit for specific performance of the above contract, that the first letter contained no absolute proposal or undertaking to purchase, but merely fixed the price to be given for the house, leaving the inspection of title-deed and the payment of earnest-money to be settled at the meeting asked for. That both parties having treated the payment of earnest-money as an element in the contract, the contract could not be completed till the amount of earnest-money had been ascertained. KOYLASH CHUNDER DOSS *v.* TARINY CHURN SINGHEE **I. L. R. 10 Calc. 588**

33. _____ *Agreement to sell land by guardian of minor contingent upon the permission of the Court—Specific Relief Act (I of 1877), s. 26.* A certificated guardian of certain minors entered into the agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase-money was paid by the plaintiff. The Court sanctioned the sale, but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff thereupon sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement. *Held*, that the contract was not one which could be specifically enforced, and that s. 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time, as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties. NARAIN PATTRO *v.* AUKHOY NARAIN MANNA **I. L. R. 12 Calc. 152**

34. _____ Suit for specific performance of a contract against a minor—*Contract entered into by a guardian with the sanction of the Court—Act XL of 1858, s. 18—Guardians and Wards Act (VIII of 1890), s. 31.* In a suit to enforce specific performance of a contract against a minor, entered into by a guardian appointed under Act XL of 1858 with the sanction of the Court, it was not shown that the contract was for the benefit of the minor. *Held*, that a decree for specific performance of a contract should not be made against the defendant while an infant. *Flight* v. *Holland, 4 Russ. 298*, and *Sikher Chand* v. *Dulputty Singh, I. L. R. 5 Calc. 363*, referred to. *Held*, also, that, although the jurisdiction to decree specific performance is discretionary, it must be judicially exercised, and no Court would, even if it could, make a decree for the specific performance of a contract, unless the contract was shown to be for the infant's benefit. JUGUL KISHORI CHOWDHURANI *v.* ANUNDA LAL CHOWDHURI . . **I. L. R. 22 Calc. 545**

35. _____ *Contract Act (IX of 1872), s. 11—Specific Relief Act (I of 1877), s. 28*

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

—*Hindu Law—Guardian.* The mother and guardian of a Hindu minor entered into a contract for the sale of his land. The vendee sued the minor by his mother and guardian *ad litem* for specific performance of the contract and for possession. It was found that the contract was binding on the minor. *Held*, that the suit was maintainable *Fatima Bibi* v. *Debnauth Shah, I. L. R. 20 Calc. 508*, dissented from. KRISHNASAMI *v.* SUNDARAPPAYYAR . . . . **I. L. R. 18 Mad. 415**

36. ——— Contract relating to property of minor—*Decree for specific performance.* A decree for specific performance can be given against a minor when the Court finds that it is for the benefit of the minor that the contract should be performed. *Krishnasami* v. *Sundarappayyar, I. L. R. 18 Mad. 415*, approved. *Fatima Bibi* v. *Debnath Shah, I. L. R. 20 Calc. 509*, dissented from. KHAIRUNISSA BIBI *v.* LOKE NATH PAL **I. L. R. 27 Calc. 276**

37. ——— Contract as to obtaining share of patni lease—*Partial performance.* In a suit against *K*, *H*, and *G* (a minor) to recover possession of an 8-anna share of a patni talukh, and to have a conveyance executed in plaintiff's favour on the allegation that one of the defendants, *K*, had agreed that the patni should be bid for at the sale advertised by the zamindar, and, if purchased, should be taken in the name of *K*, who should convey half to the plaintiff, the cause of action was stated to be that defendants had fraudulently got a patni lease executed in their names and had taken possession, and refused to make over the stipulated share or take the balance of the consideration-money. The defendant *K's* substantial plea was that the mehal had been sold in one lot along with others, and taken by the head member of the family without knowledge of the agreement, and that plaintiff had himself through an agent competed for the patni at the sale: consequently that the event contemplated had not happened, and that plaintiff had himself avoided the agreement. *H* pleaded that he was not privy to the agreement, and the minor that he was not bound. The lower Appellate Court found that both parties had abandoned and avoided the agreement. *Held*, that, even if the agreement were binding on *K*, the Court could not compel a partial performance, which was all that could take place; for as plaintiff claimed half the patni and *K's* share was at most one-fourth plaintiff could be entitled to one-eighth only. A specific performance could not be decreed, for plaintiff could have resisted an action brought by the present defendants for fulfilment of contract, as he could not have been compelled to buy what he had not agreed to. NUFFER CHUNDER CHUNDER *v.* KHOODEERAM PORAMANICK . **24 W. R. 434**

38. ——— Giving lease with possession to another than plaintiff—*Suit for possession where remedy is suit for damages.* *D*, after having given a kutkina pottah of a certain village to *M*, granted another kutkina pottah of the same land to *R*, who obtained possession under his pottah. *M* then sued *D* and *R* for ejectment and to recover possession. *Held*, that *M's* remedy lay in an action for damages, and that he could not claim specific performance unless *R* raised no objection to giving up possession. BUJRUNGEE DUTT PATTUCK *v.* MOORAD ALI . . . . . **22 W. R. 7**

39. ———Conveyance to other parties after previous conveyance to one unregistered—*Remedy of prior vendee.* Where the executants of a deed of conveyance (kobala) omit to have it registered, and the property is sold to a third party who takes it *bonâ fide* for valuable consideration, the party in whose favour the conveyance was executed should seek his remedy against the executants, not in a suit for specific performance, but in an action for damages. NUND KISHORE LALL *v.* MOHUN LALL . **22 W. R. 164**

40. ——— Refusal of specific performance where suit for damages is proper remedy. *Held*, under the circumstances of the case, that there was not such a contract on consideration received as to make this a case where a suit for specific performance rather than a suit for damages should be held to be the correct form of action. BAL GOBIND MUHTOON *v.* LUTAFUT HOSSEIN **7 W. R. 142**

41. ——— Agreement extending lease on conditions—*Right to possession under former lease expired—Agreement extending lease on conditions—Right to compensation for being kept out of possession.* The defendant's father was engaged in litigation for the purpose of obtaining possession of a zamindari under a lease for ten years, given by the zamindar, commencing in 1857. While the suit was pending, the defendant's father sold five-eighths of his interest under the lease to the plaintiff and agreed to give plaintiff possession, in consideration of certain sums of money paid and certain liabilities undertaken by the plaintiff. The defendant's father obtained possession in 1865, but refused to put the plaintiff's agents in possession, on the ground that the plaintiff had not complied with the terms of the agreement. In giving a decree for the defendant's father against the lessor, the Privy Council reserved to the zamindar leave to institute a suit for redemption upon payment to the defendant of all sums advanced to him. In a suit instituted by the zamindar for redemption in 1866, a razinamah was signed by the plaintiff and defendant in the suit, by which the term of the original lease was extended to the year 1875 for the considerations therein contained. In 1867 the plaintiff brought a suit for possession, and claimed the benefit of the stipulations contained in the razinamah, or for damages. *Held*, that the plaintiff was not entitled to possession, on the ground that defendant was not in possession under the old lease, inasmuch as the effect of the razinamah of 1866 was not to extend the former old lease, but plaintiff was entitled to recover damages for loss of profits during the defendant's father's possession

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

under the old lease. FONDCLAIR *v.* VINAITHEETHAN CHETTY . . . . **5 Mad. 251**

42. ——— **Vendor and purchaser**—*Suit by purchaser against vendor for specific performance of contract of sale—Covenant by purchaser to build a temple—Specific Relief Act (I of 1877), s. 21.* On the 16th November 1893 the first defendant agreed to sell a house to the plaintiff. The contract contained a covenant on the part of the plaintiff to build a temple and to secure an annuity to the vendor and his wife. On the 21st of the same month the first defendant sold and conveyed the same house to the second defendant and put him in possession. In a suit brought by plaintiff against defendants Nos. 1 and 2 for specific performance of the contract of the 16th November :—*Held*, that specific performance could not be granted, the covenants contained in the agreement being such as the Court could not enforce. RAMCHANDRA GANESH PURANDHAREE *v.* RAMCHANDRA KONDAJI **I. L. R. 22 Bom. 46**

43. ——— *Specific Relief Act (Act I of 1877).* Upon a contract for the sale of the proprietary right in lands the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase-money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the Appellate Court was about to be given against him on the ground that he was not entitled to what he claimed. *Held*, that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this ; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account. BINDESHRI PRASAD *v.* JAIRAM GIR . **I. L. R. 9 All. 705 L. R. 14 I. A. 173**

44. ——— *Suit by vendee against vendor—Delay of vendee in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice.* On the 26th February 1886 the defendant purchased a house from *C* for R4,500 and paid *C* a considerable portion of the purchase-money. Before the transaction was completed, and the conveyance executed, the defendant, on the 23rd June 1886, by an agreement in writing, of that date, agreed to sell the house to the plaintiff at an advanced price of R4,800. The defendant was anxious that the sale should be completed in a short time, as the draft of the conveyance by *C* to himself had been prepared, though not finally approved, and the house was in bad repair and in a somewhat dangerous condition. He had applied to the Municipality for leave to repair the house,

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

and the monsoon season had begun. Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase within twelve days from the date of the agreement (22nd June 1886), and this was duly inserted in the agreement. During the twelve days the plaintiff took no steps to have his conveyance prepared, but asked the defendant for a month's time to complete, saying that he had not the money with him. After some hesitation the defendant extended the time to the 10th August. On the 21st July at latest the drafts of the conveyance from *C* to the defendant were formally and finally approved, and the defendant was anxious to complete the sale to the plaintiff. On the 23rd July he wrote to the plaintiff reminding him that the time to complete would expire on the 9th or 10th of August, and requesting him to be prepared then to complete the purchase ; otherwise he would consider the agreement of the 23rd June to be null and void, and would himself begin to repair the house. The plaintiff sent no reply to this letter, but at an interview with the defendant told him that he was considering the matter. He, however, took no steps in the matter beyond getting a draft conveyance prepared. The deed of conveyance by *C* to the defandant was ready for execution on the 23rd August. Matters remained in this state until September. On the 7th September the defendant through his solicitors served a notice on the plaintiff, requiring him to carry out the agreement of the 23rd June, and giving him notice that, in default of compliance within four days, he would consider the agreement at an end. The four days having expired without the plaintiff sending a reply or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th September he completed his purchase from *C* without reference to the plaintiff. If the plaintiff had been ready to complete the purchase, the conveyance to him by the defendant and the conveyance by *C* to the defendant would have been executed simultaneously. Immediately after taking the conveyance from *C*, the defendant began to repair the house. When the repairs were almost complete, the plaintiff, on the 5th October 1886, sent a notice to the defendant requiring him to specifically perform the agreement of the 23rd June 1886. The defendant refused, and the plaintiff filed this suit for specific performance. *Held*, on the evidence, that the delay in completing the purchase was the delay of the plaintiff, and not of the defendant. *Held*, also, that, having regard to the circumstances under which the contract with the plaintiff was made and to the nature of the property, the time stipulated for the completion of the purchase was of the essence of the contract, and that the extension of time granted at the plaintiff's request to the 10th August operated only as a waiver to the extent of substituting the extended time for the original time, and did not destroy the essentiality of the time. *Barclay* v. *Messenger, 43 L. J. Ch. 449.* The defendant's letter of the 23rd

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

July was but a timely warning to the plaintiff that the contract would not be kept in suspense after the extended time had expired. The plaintiff, though thus warned, took no steps to complete, and was not therefore in a position to enforce performance from the defendant after the 10th August had gone by. It was contended for the plaintiff that the letter of the 7th September, written by the defendant's solicitors, treated the contract as then still subsisting and purported to put an end to it if not completed within four days ; that the time so allowed was unreasonable ; that the defendant, in fact, by that letter waived the plaintiff's previous default and gave the plaintiff a fresh starting-point. *Held*, that such was not the effect of the letter. The letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver could not be relied on. *Barclay* v. *Messenger, 43 L. J. Ch. 449*, and *Stewart* v. *Smith, 6 Hare 222. Quære :* Whether under all the circumstances of the case, and assuming time not to have been originally of the essence of the contract, the four days' time limited by that letter was unreasonable. FAKIR MAHOMED *v.* ABDULLA **I. L. R. 12 Bom. 658**

45. ——— Failure to give possession under agreement—*Suit for specific possession.* A purchaser of property of which possession was contracted to be given, but which contract the vendor is unable to fulfil, is at liberty to rescind the contract and sue for repayment of the purchase-money, and is not obliged to sue for specific performance. MOHUN LAL *v.* BEHAREE LAL . **3 N. W. 336**

46. ——— Agreement to pay money or in default to execute bond—*Suit to recover money.* By an agreement it was contracted that the defendant should pay to the plaintiff R4,000 within six months, and that, in default of payment within such period, he should execute a bond to secure payment with interest within a further period of six months. The money not having been paid and no bond having been executed, more than twelve months after the date of agreement, the plaintiff sued to recover the amount due under the agreement with interest. *Held*, that the suit was rightly brought, and that the plaintiff was not bound to have sued for specific performance of the agreement to execute a bond. ROHIMUNISSA BEGUM *v.* MAHOMED MIRZA . **10 C. L. R. 103**

47. ——— Agreement for assignment of rents—*Suit for consideration-money—Damages.* The plaintiff, having agreed to assign certain arrears of rent due to him to the defendant for a consideration, brought this suit in which he tendered the kobala of assignment and claimed the consideration-money with interest. *Held*, that the plaintiff had misconceived the shape in which his suit was brought, and, as his claim was purely for money, he should have sued for damages for breach of contract, especially as it was found as a fact that the subject

SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

assigned was now worthless. *Held*, also, that, as in a former suit brought by the present defendant for specific performance of the same contract the present plaintiff (as then defendant) had resisted successfully and without qualification, he could not now treat the contract as subsisting. SHEO PERGAH ROY *v.* INJORE TEWAREE . **21 W. R. 433**

48. ——— Agreement by Government to pay moneys in lieu of tora garas hak—*Jurisdiction of Civil Courts—Pensions Act (XXIII of 1871), s. 4.* A suit against Government, upon an alleged agreement by Government to pay moneys from its treasury in lieu of tora garas haks, falls within the prohibition, in s. 4 of Act XXIII of 1871, to Civil Courts to entertain any suit relating to any grant of money made by the British Government, whatever may have been the consideration for such grant, and whatever may have been the nature of the payment, claim, or right for which such grant may have been substituted. Observations on the cessation of the collection of tora garas by Government. *Quære :* Whether Government bound itself to act perpetually as agent of the garasias in the collection of tora garas. *Quære :* Whether the Civil Courts would compel the specific performance of such an agreement. MAHARVAL MOHANSANGJI *v.* GOVERNMENT OF BOMBAY **I. L. R. 4 Bom. 437**

49. ——— Agreement to lease—*Subsequent lease to third party taking in good faith without notice of agreement—Specific Relief Act (I of 1877), s. 18.* *S* agreed to lease certain immoveable property to *W* for a term of fifteen years, and to execute and register the lease on a certain specified day. Before the day fixed for executing the lease arrived, *S* executed a lease of the same property for two years in favour of *N* and others, who had no knowledge of the agreement to lease to *W*. *W* thereupon sued *S* and his lessees, claiming cancellation of the two years' lease to *N* and his co-lessees and specific performance of the agreement to lease to him for fifteen years. *Held*, that *S* was, having regard to s. 18 of the Specific Relief Act, in the position of a person who had agreed to lease, "having an imperfect title," and who had subsequently acquired such an interest in the property as enabled him to carry out his agreement, and that, although the lease to *N* and others could not, under the circumstances, be set aside, the plaintiff was entitled to a decree for "specific performance," of the agreement to lease to him, to take effect after the determination of the lease which had been granted to *N* and others. SARJU PRASAD SINGH *v.* WAZIR ALI (1900) . . . **I. L. R. 23 All. 116**

50. ——— Agreement to sell—*Contract Act (IX of 1872), s. 65—Limitation Act (XV of 1877), Sch. II, Art. 97—Suit for specific performance—Agreement declared unenforceable—Alternative claim for refund of consideration paid thereunder—Limitation.* The defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immoveable property

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SPECIFIC PERFORMANCE—*contd.*

2. SPECIAL CASES—*contd.*

to the plaintiff, and the plaintiff paid into Court, as part of the consideration, the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell, nor did they return to the plaintiff the money which he had paid on their behalf. The plaintiff thereupon sued the defendants, claiming in the alternative either a decree for specific performance of the agreement to sell or a refund of the money paid by him as part of the consideration for the sale agreed upon. The Court of first instance gave the plaintiff a decree for specific performance. On appeal by the defendants, it was *held* by the High Court (i) that, the terms of the agreement, to sell not being satisfactorily proved, no decree for specific performance could be made ; (ii) that the plaintiff was therefore entitled to get back the money which he had paid under the agreement ; and (iii) that the plaintiff's alternative claim for a refund on failure of consideration was governed, as to limitation, by Art. 97 of the second Schedule to the Indian Limitation Act, 1877, and was not barred by limitation, inasmuch as limitation only began to run from the date of the High Court's decree declaring the agreement to sell to be unenforceable. *Dassu Kuar* v. *Dhum Singh, I. L. R. 11 All. 47*, followed. UDIT NARAIN MISR *v.* MUHAMMAD MINNAT-ULLA (1903) **I. L. R. 25 All. 618**

51. ———— Attempt by party to rescind agreement of which his heirs afterwards seek specific performance—*Suit—Ekrar—Consideration, failure of.* Where parties had made a compromise comprising an agreement, the chief consideration for which was the execution of an ekrar by one party acknowledging the title (as adopted son) of the other party to the agreement, and the former had subsequently by his conduct (in bringing a suit to set aside the adoption and alleging that the ekrar had been obtained from him by fraud) attempted and in a great measure succeeded in depriving the latter of the benefit of the agreement :—*Held*, in a suit by the heirs of the party, who had so tried to rescind the agreement, that there had been a failure of consideration and the conduct referred to was at variance with and amounted to a subversion of the relation intended to be established by the compromise, and that specific performance of the agreement could not be enforced. SRISH CHANDRA ROY *v.* BANOMALI ROY (1904) . **I. L. R. 31 Calc. 584 s.c. L. R. 31 I. A. 107**

52. ———— Construction of lease—*Covenant for renewal.—Time whether or not of the essence of the contract.* The plaintiff sued for specific performance of a covenant for renewal contained in a lease, the material clause of which was as follows :—" After the expiration of the said term, if the lessees shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment

SPECIFIC PERFORMANCE—*concld.*

2. SPECIAL CASES—*concld.*

of the rent mentioned in the lease." There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration. *Held*, on a construction of the lease, that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the defendants of his intention to take advantage of the covenant for renewal. JAGGI LAL *v.* SIR W. E. COOPER (1905) . . **I. L. R. 27 All. 696**

53. ———— Contract to re-convey land—*Civil Procedure Code (Act XIV of 1882), s. 43—Cause of action—Whether same for a suit for specific performance of a contract to reconvey land and for the mesne profits of the property—Specific Relief Act (I of 1877), s. 19.* A suit for specific performance of a contract to reconvey a certain plot of land after its breach and the claim for mesne profits of the property to which the plaintiff is entitled in consequence of the delay on the defendant's part to execute the reconveyance, are based on the same cause of action. A plaintiff instituted a suit for the specific performance of a contract to reconvey a plot of land, in which he did not claim mesne profits to which he was entitled in consequence of the defendant's delay in performing the contract ; subsequently to the decree for specific performance he brought another suit for the mesne profits : *Held*, that the plaintiff's suit for mesne profits that accrued due before the institution of the suit for specific performance was barred under s. 43, Civil Procedure Code. GANESH RAM PAL *v.* MOHESH RAM PAL (1909) . . . . **13 C. W. N. 669**

SPECIFIC RELIEF ACT (I OF 1877).

See INJUNCTION—SPECIAL CASES—EXECUTION OF DECREE. **I. L. R. 4 Calc. 380**

See INJUNCTION—SPECIAL CASES—PUBLIC OFFICERS WITH STATUTORY POWERS. **I. L. R. 21 All. 348**

See LEASE . **I. L. R. 33 Calc. 203**

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR . **I. L. R. 18 Bom. 474**

See VENDOR AND PURCHASER—INVALID SALES . **I. L. R. 26 Bom. 159**

———— **Mandamus**—*Bank of Bombay—Right of a shareholder to inspect the register of shareholders of the Bank —Object of such inspection —Common law right of a member of a corporation to inspect books of the corporation—Presidency Banks Act (XI of 1876), s. 50. Held*, that the plaintiff's proper remedy was by way of suit and not *mandamus* dnder the Specific Relief Act. SULLEMAN SOMJI *v.* THE BANK OF BOMBAY (1907) **I. L. R. 31 Bom. 319**

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 9.

See APPEAL—EXECUTION OF DECREES—QUESTIONS IN EXECUTION. I. L. R. 26 Mad. 428

See APPEAL—ORDERS. I. L. R. 22 Calc. 830

See COSTS—SPECIAL CASES—SUMMARY SUIT FOR POSSESSION . 15 W. R. 268

See LIMITATION ACT, 1877, SCH. II, ART. 3 7 C. W. N. 218

See LIMITATION ACT, SCH. II, 1877, ART. 142 . . . 9 C. W. N. 1061, 10 C. W. N. 1081

See PARTIES—PARTIES TO SUITS—PRINCIPAL AND AGENT. I. L. R. 5 Bom. 208

See POSSESSION—NATURE OF POSSESSION. I. L. R. 15 Bom. 238

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—NATURE AND EFFECT OF DECISION . . 20 W. R. 12

See POSSESSION—SUITS FOR POSSESSION. I. L. R. 26 Mad. 514

See RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS. I. L. R. 6 Bom. 477

See RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE. I. L. R. 27 Bom. 302

See SPECIFIC PERFORMANCE.

See STATUTES, CONSTRUCTION OF. I. L. R. 19 Calc. 544

See SUIT . I. L. R. 31 Calc. 647

See TITLE—EVIDENCE AND PROOF OF TITLE . . . 5 C. L. R. 278

See TITLE—MISCELLANEOUS CASES. I. L. R. 25 Mad. 448

This section corresponds with s. 15 of the Limitation Act of 1859. The following are cases decided on that section :—

1. ——— *Criminal Procedure Code, 1861, ss. 318, 319—Dispossession.* The object and effect of s. 15 of Act XIV of 1859 considered, and the bearing of ss. 318 and 319 of the Code of Criminal Procedure with regard to cases of dispossession and the jurisdiction of the Civil Courts, illustrated. ENAETOOLLAH CHOWDHRY *v.* KISHUN SOONDUR SURMA . . 8 W. R. 386

2. ——— *Object of section—Wrongful dispossession—Onus of proof.* S. 15 did not affect the general law on the matters to which it related, but provided a special remedy for a particular kind of grievance, *e.g.*, to replace in possession a person who had been evicted by a wrongful act from landed property of which he had been in undisturbed possession, and to prevent a powerful person from thus shifting the evidence of proof from himself to another less able to support it. KALEE CHUNDER SEIN *v.* ADOO SHAIKH . 9 W. R. 602

3. ——— *Possessory actions by persons wrongfully dispossessed—Civil Procedure Code, 1859, s. 230.* S. 230 of the Civil Procedure Code of 1859, which related to possessory actions by persons wrongfully dispossessed in execution of decrees, did not apply to a case determined under s. 15 of Act XIV of 1859. GOBIND CHUNDER BAGDEE *v.* GOBIND GHOSE MUNDUL 7 W. R. 171

4. ——— *Previous possession—Dispossession.* Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under s. 9 of the Specific Relief Act, 1877, which must be brought within six months from the date of dispossession. *Khajah Enaetollah Chowdhry* v. *Kishen Soondur Surma, 8 W. R. 389 ; Ertaza Hossein* v. *Bany Mistry I. L. R. 9 Calc. 130 ; Debi Churn Boido* v. *Issur Chunder Manjee, I. L. R. 9 Calc. 39 ; Kawa Manjee* v. *Khowaz Nussio, 5 C. L. R. 278 ; Wise* v. *Ameerunnissa Khatoon, L. R. 7 I. A. 73 ; Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar, I. L. R. 8 Bom. 371 ; Pemraj Bhavaniram* v. *Narayan Shivaram Khisti, I. L. R. 6 Bom. 215 ; Mohabeer Pershad* v. *Mohabeer Singh, I. L. R. 7 Calc. 591 : 9 C. L. R. 164,* referred to and explained. PURMESHUR CHOWDHRY *v.* BRIJOLALL CHOWDHRY I. L. R. 17 Calc. 256

SHAMA CHURN ROY *v.* ABDUL KABEER 3 C. W. N. 158

NISA CHAND GAILA *v.* KANCHARAM BAGANI I. L. R. 26 Calc. 579, 3 C. W. N. 568

5. ——— *Suit to enforce right of way.* S. 15 of Act XIV of 1859 was not applicable to a suit to enforce a mere right of way. HARO DYAL BOSE *v.* KRISTO GOBIND SEIN 17 W. N. 70

6. ——— *Nature of possession necessary for suit—Possession as trespasser. Semble :* Mere possession as a trespasser was not sufficient to entitle a plaintiff to recover in a suit brought under s. 15 of Act XIV of 1859. There must be in the plaintiff juridical as opposed to mere physical possession. DADABHAI NARSIDA *v.* SUB-COLLECTOR OF BROACH . . 7 Bom. A. C. 82

7. ——— *Warrant of execution—Seizure of immoveable property not described in decree—Illegal possession.* Where a warrant was issued to the Sheriff to seize certain specific immoveable property not coming within the description in the decree, it was *held* that possession under such warrant would not be an illegal possession under the meaning of s. 15. JADUBCHUNDER CHECHKY *v.* HEERALOLL SAHA 1 Ind. Jur. N. S. 21 : Bourke O. C. 384

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SPECIFIC RELIEF ACT I (OF 1877) —*contd.*

——— s. 9—*contd.*

8. ——— *Right of way—Immoveable property.* A right of way is not "immoveable property" within the meaning of s. 9 of the Specific Relief Act. MANGALDAS *v.* JEWANRAM . . . **I. L. R. 23 Bom. 673**

9. ——— *Tenants illegally ejected.* A tenant in possession after expiry of his lease can only be ejected by due course of law; and if illegally dispossessed, he was entitled, under s. 15, Act XIV of 1859, to sue and recover possession, notwithstanding a pottah set up by defendant. SOFAOLL KHAN *v.* WOOPEAN KHAN . **9 W. R. 123**

10. ——— *Time within which suit must be brought.* The suit must be brought within six months of the alleged ouster, otherwise anterior possession would be of not avail to the plaintiff. AMEER BIBEE *v.* TUKROONISSA BEGUM **7 W. R. 332**

Upheld on review in TUKROONISSA BEGUM *v.* MOGUL JAN BIBEE . . . **8 W. R. 370**

AMEEROONISSA KHATOON *v.* WISE. **24 W. R. 435**

The plaintiff is entitled to recover notwithstanding any other title. DOE D. KULLAMMAL *v.* KUPPU PILLAI . . . . . **1 Mad. 85**

11. ——— *Trial of question of dispossession.* Plaintiff having sued under s. 15. Act XIV of 1859, for possession of a parcel of land of which he alleged himself to have been dispossessed by defendants building a hut upon it, the Court of first instance determined that, as the land was part of a village and plaintiff had not sued for possession of the village, it could neither declare his possession of the entire village nor of the particular parcel. *Held*, that there was no reason why the Court should not try whether the plaintiff was dispossessed as alleged, and whether he should not have possession. OMARCHAND MAHATA *v.* NAWAB NAZIM OF BENGAL **11 W. R. 229**

12. ——— *Right under decree for possession.* A party recovering possession of land in virtue of a decree under s. 15, Act XIV of 1859, recovered the land with the crop growing upon it, and was fully entitled to cut the same. SHIRAJDEE PRAMANICK *v.* EMAM BUKSH BISWAS **13 W. R. 104**

13. ——— *Suit to set aside award under section.* The defendant having had an award under s. 15, Act XIV of 1859, the plaintiff's allegation of possession and dispossession by the defendant required him specifically to prove the facts before the defendant could be called upon to prove his case. JUGGURNATH DEB *v.* MAHOMED MOKEEM . . . . **17 W. R. 161**

14. ——— *Suit to set aside award under section.* Although in a suit to set aside an award made under s. 15, Act XIV of 1859, plaintiff had to establish his own title before the party in possession could be required to make good his case, a Judge should look into the summary case itself, and ascertain if there had been a proper inquiry and trial in that case. SURBO MOHUN ROY *v.* SURUT CHUNDER ROY . . **16 W. R. 34**

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 9—*contd.*

15. ——— *Decree for possession—Evidence.* A decree for possession in a suit under s. 15 of Act XIV of 1859 was *primâ facie* evidence that the plaintiff in that suit was entitled to recover, from the defendant therein, mesne profits for the period of dispossession. RADHA CHARAN GHATAK *v.* ZAMIRUNISSA KHANUM **2 B. L. R. A. C. 67 : 11 W. R. 83**

Reversing S.C. ZUMURUDOONISSA *v.* RADHA CHURN GHUTTUCK . . **9 W. R. 590**

See JIAULLAH SHEIKH *v.* INU KHAN. **I. L. R. 23 Calc. 693**

and cases there cited.

16. ——— *Mortgagee in possession—Dispossession by mortgagor—Suit for possession—Fraud.* It is no answer to a suit for possession under s. 9 of the Specific Relief Act, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy is by way of a suit to set aside the mortgage and recover possession. SAYAJI BIN NIMBAJI *v.* RAMJI BIN LANGAPA **I. L. R. 5 Bom. 446**

17. ——— *Partial dispossession—Suit for possession.* A possessory suit lies under s. 9 of the Specific Relief Act, when plaintiff's possession has been partially, as well as when it has been wholly, disturbed. SABAPATHI CHETTI *v.* SUBRAYA CHETTI . . **I. L. R. 3 Mad. 250**

18. ——— *Possessory suit—Constructive possession by receipt of rents.* The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of s. 9 of the Specific Relief Act. The object of that section is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent. *In the matter of the petition of* TARINI MOHUN MOZUMDAR. TARINI MOHUN MOZUMDAR *v.* GUNGA PROSAD CHUCKERBUTTY **I. L. R. 14 Calc. 649**

19. ——— *Immoveable property—Right of fishery—Possession—Dispossession.* The plaintiffs were fishermen belonging to the village of N. They claimed in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nagothna Creek between high and low-water marks, within certain limits set forth in the plaint, and under s. 9 of the Specific Relief Act (I of 1877) they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 9—*contd.*

before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendant then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section. *Held*, that the first Court did not act without jurisdiction, the right claimed coming within the denomination of immoveable property. BHUNDAL PANDA *v.* PANDOL POS PATIL
I. L. R. 12 Bom. 221.

20. ——— *Right of fishery —Suit for possession of right to fish in a khal.* A suit for the possession of a right to fish in a khal, the soil of which belongs to another, does not come within the provisions of s. 9 of the Specific Relief Act, 1877. NATABAR PARUE *v.* KUBIR PARUE
I. L. R. 18 Calc. 80

21. ——— *Immoveable property—Right of fishery—Possession, suit for. Held*, by the Full Bench (PRINSEP and PIGOT, *JJ.*, dissenting) that a suit for the possession of a right to fish in a khal, the soil of which does not belong to the plaintiff, does not come within the provisions of s. 9 of the Specific Relief Act. FADU JHALA *v.* GOUR MOHUN JHALA . **I. L. R. 19 Calc. 544**

22. ——— *Immoveable property—Right of ferry.* A right of ferry is immoveable property or an interest therein within the meaning of the Specific Relief Acts, s. 9. KRISHNA *v.* AKILANDA . . **I. L. R. 13 Mad. 54**

23. ——— *Mamlutdars, Courts Act (Bom. Act III of 1876)—Suit by a trespasser to recover possession.* A trespasser, who has been dispossessed, is not entitled to bring a suit under s. 9 of the Specific Relief Act (I of 1877) or under Bombay Act III of 1876 to recover possession. *Dadabhai Narsidas* v. *Sub-Collector of Broach, 7 Bom H C Refi A. C. J. 82 ; Krishnarav Yashvant* v *Vasudev Apaji Ghotikar, I. L. R. 8 Bom. 371 ;* and *Virjivandas Madhavdas* v. *Mahomed Alikhan Ibrahimkhan I. L. R. 5 Bom. 208*, referred to. AMIRUDIN *v.* MAHAMAD JAMAL
I. L. R. 15 Bom. 685

24. ——— *Possession, suit or—Suit in ejectment on a possessory title. Per* EDGE, *C.J.*, STRAIGHT and TYRRELL, *JJ.* (MAHMOOD *J., dissentiente*).—S. 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being whatever his title, in possession of immoveable property, is ousted therefrom. That section does not debar a person who has been ousted by a trespasser from the possession of immoveable property to which he has merely a possessory title from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. *Davison* v. *Gent, 26 L. J. Exch. 122 ; Asher* v. *Whitlock, L. R. 1 Q. B. 1 ; Wise* v. *Ameer-un-nissa Khatoon, L. R. 7 I. A. 73 ; Pemraj Bhabaniram* v. *Narayan Shivaram Khisti, I. L. R. 6 Bom. 215 ; Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar, I. L. R. 8 Bom. 371 ;* and *Muhammad Yusuf* v. *Sukh Nath, All. Weekly Notes (1887) 55*, referred to. *Per* MAHMOOD, *J.*—A person who is suing upon a merely possessory title to recover possession of immoveable property against a person who has ousted him must bring his suit, if at all, under s. 9 of Act I of 1877, and therefore within six months from the date of his dispossession. WALI AHMAD KHAN *v.* AJUDHIA KANDU . . . **I. L. R. 13 All. 537**

25. ——— *Nature of possession giving right of suit—Juridical possession.* Where the plaintiff alleged that he was in possession of a certain room as representing his father and uncle who were alive, but who were not parties to the suit, and that he had been dispossessed from such room within six months of the institution of the present suit :—*Held*, that his possession, not being juridical possession, did not entitle him to maintain a suit under s. 9 of the Specific Relief Act. Permission to be allowed to amend the plaint by alleging that the possession of the plaintiff was exclusive possession on his own account was not allowed, such allegation being inconsistent with the case on which he came into Court. NRITTO LALL MITTER *v.* RAJENDRO NARAIN DEB **I. L. R. 22 Calc. 562.**

26. ——— *Suit for possession by person evicted brought more than six months from date of dispossession against one having better title than himself.* Certain land belonging to two brothers was mortgaged by one of them and leased to plaintiffs by the mortgagee. The heirs of the other brother, declining to accept the mortgage or the lease which had been granted under it as binding on them, evicted plaintiffs from the land. Plaintiffs now brought this suit against the defendants to recover the possession of which the defendants had deprived them by such eviction. The defendants' title was found to be good. *Held*, that s. 9 of the Specific Relief Act was not applicable, and that plaintiffs could not succeed. *Per* SUBRAHMANIA AYYAR, *J.*—That it is an undoubted rule of law that a person who has been ousted by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster, even though that possession was without any title. *Asher* v. *Whitlock, L. R. 1 Q. B. 1 ; Sundar* v. *Parbati, L. R. 16 I. A. 186 : I. L. R. 12 All. 51 ; Ismail Ariff* v. *Mahomed Ghouse, L. R. 20 I. A. 99 : I. L. R. 20 Calc. 834*, referred to. *Nisa Chand Gaita* v. *Kanchiram Bagani, I. L. R. 26 Calc. 579*, distinguished. *Held*, also, that s. 9 of the Specific Relief Act cannot be held to take away any remedy available with reference to the well recognized doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title.

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 9—*contd.*

But that the above propositions were inapplicable to the facts of the present case where the defendants were found to have good title. *Per* O'FARRELL, *J.*—The rule is that where plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title he can only do so under the provisions of s. 9 of the Specific Relief Act, and not otherwise. Here the defendants held under a lease granted by a person who was found to have title, and a suit to recover possession would only lie under the provisions of s. 9 of the Specific Relief Act, and this was clearly not such a suit. MUSTAPHA SAHEB *v.* SANTHA PILLAI . . . **I. L. R. 27 Calc. 179**

27. ——— *Civil Procedure Code, 1877, s. 103—Re-hearing—Review.* S. 9 of the Specific Relief Act does not prohibit a re-hearing under s. 103 of the Code of Civil Procedure. A re-hearing differs widely from a review. ANTHONY *v.* DUPONT . . **I. L. R. 4 Mad. 217**

28. ——— *Suit for possession of land by person wrongfully ejected—Joinder of other claims.* A Court should in all cases in which it applied give effect to the provisions of the first paragraph of s. 9 of the Specific Relief Act, 1877, whether that section is expressly pleaded or not. There is nothing to prevent a claim for damages and a claim for establishment of title being joined with a claim for the relief provided for by the abovementioned section. RAM HARAKH RAI *v.* SHEODIHAL JOTI . . **I. L. R. 15 All. 384**

29. ——— *Decree for possession—Form of decree.* Where a decree was passed under s. 9 of the Specific Relief Act (I of 1877) giving the plaintiff possession, and also directed that the costs of removing huts and filling up excavations should be paid by the defendant under this decree :—*Held*, that the latter portion of the decree was beyond the scope of a possessory decree under s. 9 of the Specific Relief Act, and must be set aside. TILAK CHANDRA DASS *v.* FATIK CHANDRA DASS . . . **I. L. R. 25 Calc. 803**

30. ——— *Hât—Suit to recover possession of a hât—Delivery of possession—Incorporeal right—Illegal dispossession.* A *hât*, the possession of which is held by collecting tools or rents, is not "immoveable property," within the meaning of s. 9 of the Specific Relief Act ; and a suit to recover its possession is therefore not maintainable under that section. *Fadu Jhala* v. *Gour Mohun Jhala, I. L. R. 19 Calc. 544*, relied upon. FUZLUR RAHMAN *v.* KRISHNA PRASAD (1902) **I. L. R. 29 Calc. 614**

31. ——— *Constructive possession—Collusion by tenant with the trespasser—Refusal by the tenant to bring a suit—Right of suit.* S. 9 of the Specific Relief Act contemplates the case of a person who, being in physical possession of property, is dispossessed. So, where plaintiff was in constructive possession of a plot of land through his tenant, and the latter was dispossessed : *Held*, that the plaintiff had no right to maintain a suit under s. 9 of the Specific Relief Act. *Held*, further, that plaintiff was not entitled to bring a suit, even where, subsequent to such dispossession, the tenant, in collusion with the person who dispossessed, refused to bring a suit. SONATON SHOME *v.* HELIM (1902) . . **6 C. W. N. 616**

32. ——— *Civil Procedure Code, s. 43—Summary suit for possession—Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits—Burden of proof.* One Lachmi Narain died possessed of certain immoveable property. He left him surviving a widow, Mukhta Kunwar. Narain Das obtained possession of some portion of the said immoveable property, as he alleged, under a lease from Mukhta Kunwar, and held possession, at any rate, for some months, down to the 27th of November 1897. After the death of Mukhta Kunwar, one Sheo Kumar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process, dispossessed Narain Das. Narain Das thereupon instituted a suit under s. 9 of the Specific Relief Act, and, having obtained a decree in the suit, was restored to possession. He then instituted a suit against Sheo Kumar to recover mesne profits for the time during which he was out of possession. As to this suit, it was *held* (i) that the suit was not liable to be defeated by reason of s. 43 of the Code of Civil Procedure ; and (ii) that, as to the other issues arising in the suit, the first was, whether the defendant was the true owner of the property, the burden of proving which was on him ; and, secondly, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant. SHEO KUMAR *v.* NARAIN DAS, (1902) **I. L. R. 24 All. 501**

33. ——— *Civil Procedure Code (Act XIV of 1882), s. 622—Tenant holding over—Dispossession by landlord—Suit by tenant to recover possession—Extraordinary jurisdiction.* A tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by the landlord. The tenant then brought a suit for possession against the landlord under s. 9 of the Specific Relief Act (I of 1877). The Subordinate Judge dismissed the suit. The plaintiff (tenant) thereupon applied under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882). *Held*, reversing the decree, that the plaintiff (tenant) was not liable to be evicted by the defendant landlord *proprio motu* and that he was entitled to a decree for possession. *Per* BATCHELOR, *J.*—"To read the words 'due course of law' in s. 9 of the Specific Relief Act as merely equivalent to the word 'legally' is, we think, to deprive them of a force and a significance, which they carry on their very face.

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 9—*contd.*

For a thing, which is perfectly legal, may still be by no means a thing done 'in due course of law;' to enable this phrase to be predicated of it, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law and the 'due course of law' means, we take it, the regular normal process and effect of the law operating on a matter which has been laid before it for adjudication. That, in our opinion, is the primary and natural meaning of the phrase, though it may be applied in a derived or secondary sense to other proceedings held under the direct authority of the law; in this sense it may be said, for instance, that revenue or taxes are collected in due course of law." The only issue tried by the Subordinate Judge was—"Whether the plaintiff was wrongly dispossessed within six months before the suit." *Held*, that the plaintiff's remedy lay in an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882), inasmuch as that issue was not one upon which the dispute between the parties could be properly adjudicated upon. RUDRAPPA *v.* NARSINGRAO (1905)

I. L. R. 29 Bom. 213

34. ——— *Immoveable property—Actual and constructive possession—Landlord and tenant—Dispossession by third party—Suit by Landlord—Maintainability.* A landlord holding possession through a tenant can bring a suit under s. 9, Act I of 1877, to recover possession of property of which he has been dispossessed by the act of a third party. *Innasi Pillai* v. *Sivagnana Desikar, C. R. No. 348 of 1893, unreported*, followed. JAGANNATHA CHARRY *v.* RAMA RAYER (1905)

I. L. R. 28 Mad. 238

35. ——— *Criminal Procedure Code (Act V of 1898), s. 145—Possessory suit—Effect of order of a Criminal Court—Revision. Held*, that the existence of an order passed under s. 145 of the Code of Criminal Procedure is no bar to the institution of a suit under s. 9 of the Specific Relief Act, 1877, for recovery of possession of the same land. *Held*, also, that when a suit under s. 9 of the Specific Relief Act is decreed the remedy of the defendant lies not in revision, but in the institution of a suit for a declaration of the defendants title and for possession. *Sheo Prasad Singh*, v. *Kastura Kuar, I. L. R. 10 All. 119*, referred to. JWALA *v.* GANGA PRASAD (1908)

I. L. R. 30 All. 331

36. ——— *Dispossession in due course of law—Suit by tenant of judgment-debtor against auction-purchaser—Delivery of possession—Civil Procedure Code (Act XIV of 1882), ss. 318, 319.* When on obtaining delivery of possession of immoveable property under s. 318 of the Code of Civil Procedure the auction-purchaser dispossessed a tenant of the judgment-debtor:—*Held*, that the auction-purchaser not having proceeded under s. 319 of the Code, the dispossession was not in due course of law and a suit under s. 9 of the Specific Relief Act was maintainable. MULUK PATOONI *v.* BHARAT CHANDRA DAS (1908)

12 C. W. N. 694

37. ——— *Criminal Procedure Code (Act V of 1898), s. 145—Dispossession due to order of Criminal Court—Possessory suit—Maintainability.* It is not open to an unsuccessful party in a proceeding under s. 145 of the Criminal Procedure Code to institute a suit under s. 9 of the Specific Relief Act for recovery of possession upon the allegation that he has been dispossessed as a result of the order of the Criminal Court. *Nagappa* v. *Sayad Badrudin, I. L. R. 26 Bom. 353*, and *In the matter of Chytun Chunder Roy, 20 W. R. 12*, distinguished. MOORE *v.* MONORANJAN GUHA, (1908)

12 C. W. N. 696

38. ——— *Possessory suit—Possession of plaintiff if must have been physical possession—Possession through tenants—Ouster of tenants—Tenants not made parties—Jurisdiction.* S. 9 of the Specific Relief Act is not confined in its application to cases in which the plaintiff has been deprived of actual bodily possession. *Held*, that in this case the complete ouster of the tenant in actual occupation of the land amounted to the ouster of his immediate landlord to whom rent used to be paid. In a suit under the section instituted by the immediate landlord of the dispossessed tenants, who were not made parties to the suit, the Court made a decree in the plaintiff's favour:—*Held*, that the non-joinder of the tenants did not affect the jurisdiction of the Court and the High Court would not interfere. BINDUBASHINI CHOUDHURANI *v.* JAHNAVI CHAUDHURANI (1897)

13 C. W. N. 303

39. ——— *Specific Relief Act (I of 1877), s. 9—Possession through tenant—Dispossession—Possessory suit if lies at the landlord's instance—Total diluviation of land during suit if ousts Court's jurisdiction. Quœre:* Whether a person who holds possession of land through tenants and is dispossessed is precluded from instituting a suit under s. 9 of the Specific Relief Act. *Sonaton Shome* v. *Sheikh Helim, 6 C. W. N. 616, Bindubashini Chaudhurani*, v. *Srimati Jahnavi Chaudhurani, 13 C. W. N. 303*, referred to. *Quœre:* Whether the total diluviation of the land in the course of a suit under s. 9, Specific Relief Act, oust the jurisdiction of the Court. JANAKI NATH ROY CHOUDHURY *v.* DINA MANI CHAUDHURANI (1909) . . . **13 C. W. N. 305**

40. ——— *Specific Relief Act (I of 1877), s. 9—Dispossession of tenant—Landlord if may sue—Adhiars of Bhutan Duars, if tenants—High Court's power to revise—Civil Procedure Code (Act V of 1908), s. 115.* The decision in *Bindubashini* v. *Jahnavi, 13 C. W. N. 303*, is in direct conflict with that in *Sonaton Shome* v. *Sheikh Helim, 6 C. W. N. 616. Semble* (approving of the former decision):

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— **s. 9**—*concld.*

When a landlord is deprived of the possession of the benefits arising out of the land demised by reason of the dispossession of the tenant, he should be entitled to obtain recovery under s. 9 of the Specific Relief Act. *Adhiars* of Bhutan Duars are tenants. When a Munsif refused to make a decree under s. 9, Specific Relief Act, in favour of a landlord because he thought that the land was not in his possession but in that of his tenants, and so he was not dispossessed within the meaning of s. 9, Specific Relief Act: *Held*, that he merely committed an error of law, and the High Court in revision could not interfere with his decision. *Amir Hassan* v. *Sheo Baksh*, *I. L. R. 11 Calc. 6*, *Raghu Nath* v. *Rai Chatraput*, *1 C. W. N. 633*, *Fadu Jhala* v. *Gour Mohan Jhala*, *I. L. R. 19 Calc. 544*, and *Bindubashini* v. *Jahnavi*, *13 C. W. N. 303*, referred to. SHYAMA CHURN GHOSH *v.* MAHOMED ALI (1909) . . . **13 C. W. N. 835**

——— **ss. 9 and 39**—*Suit on basis of former possession apart from title—Concurrent suit for cancellation of deed of gift under which defendant claimed—Cause of action.* Where a plaintiff filed a suit for recovery of possession of immoveable property under s. 9 of the Specific Relief Act, 1877, and, while such suit was pending, filed a second suit asking for cancellation of a deed of gift under which the defendant claimed title, it was *held* that this was not a splitting up of a cause of action and that the second suit was unobjectionable in point of law. JAI GOPAL MUKERJI *v.* LALIT MOHAN (1904) **I. L. R. 26 All. 236**

——— **ss. 15, 17**—*S. 15 does not apply where undivided father, without concurrence of his sons, agrees to sell—Decree in such cases in suit for specific performance against the father and son.* An undivided father has an interest in and under certain circumstances a power of disposal over every portion of the undivided property. S. 15 of the Specific Relief Act will not apply where an undivided father contracts to sell undivided property without the concurrence of his undivided son. Where such an agreement is sought to be enforced in a suit which the father and son are joined as defendants, the proper decree to be passed is one directing the sale by the father of the entire property on payment of the whole consideration, without determining whether the sale will be binding on the son and not one directing the father to sell his one half share on payment of one half of the purchase money. *Kosuri Ramaraju* v. *Ivalury Ramalingam*, *I. L. R. 26 Mad. 74*, followed. SRINIVASA REDDI *v.* SIVARAMA REDDI (1908) **I. L. R. 32 Mad. 320**

——— **s. 18.**

See SALE . . **9 C. W. N. 1019**

See SPECIFIC PERFORMANCE—SPECIAL CASES . . **I. L. R. 23 All. 119**

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— **s. 18**—*concld.*

See VENDOR AND PURCHASER—MISCELLANEOUS CASES . . **2 C. L. R. 382**
I. L. R. 14 Mad. 459

——— **s. 18**—*Contract relating to property of minor—Guardian, liability of.* Where a contract to sell immoveable property was entered into, without any legal necessity, by the defendant, not in her personal capacity and not on the representation that the property was her own, but as the next friend of her minor son, and the parties contemplated that, unless the sanction of the District Judge were obtained, the bargain was to come to an end, and before such sanction was obtained the minor died, leaving the defendant as his heir: *Held*, that the agreement could not be specifically enforced against the defendant. S. 18 of the Specific Relief Act has no application, where the defendant never contracted to sell property, as if it were her own. RASHMONI DASI *v.* SURJA KANTA ROY CHOWDHRY (1905) . . . **I. L. R. 32 Calc. 832**

——— **s. 19.**

See SPECIFIC PERFORMANCE. **13 C. W. N. 669**

——— *Suit for declaration under a mokurari pottah—Alternative relief—Civil Procedure Code (Act X of 1877), s. 28.* A suit to have a mokurari pottah enforced as against one co-sharer granting it, and other co-sharers who repudiate it, and in the alternative to have the salami paid for the mokurari pottah returned, is in substance a suit to enforce a contract to place the plaintiff in possession of the land under the pottah, and to declare his rights to it as against all the defendants; and under s. 19 of the Specific Relief Act the plaintiff is entitled to ask for compensation as against the defendant granting the pottah. Under s. 28 of the Civil Procedure Code, such an alternative claim may be allowed against one or more of the defendants. RAJDHUR CHOWDHRY *v.* KALIKRISTNA BHATTACHARJYA **I. L. R. 8 Calc. 963: 11 C. L. R. 330**

——— **ss. 20, 21.**

See INJUNCTION—SPECIAL CASES—BREACH OF AGREEMENT. **I. L. R. 14 Mad. 18**

1. ——— **s. 21**—*Agreement to refer to arbitration—Refusal to refer—Pleading.* A contract to sell goods contained the following clause: "That any dispute arising hereafter shall be settled by the selling broker, whose decision shall be final." In a suit to recover damages for breach of the contract, the defendant pleaded that the dispute should have been referred to the decision of the selling broker, and that the suit was therefore barred under s. 21 of the Specific Relief Act, the latter clause of which provides that, "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person, who has made such a contract, and has refused to perform it, sues in respect of any subject

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 21—*contd.*

which he has contracted to refer, the existence of such contract shall bar the suit." *Held*, that, before that section could be relied upon, it must be shown that the plaintiff had refused to refer to arbitration; and that the filing of the plaint was not such a refusal. KOOMUD CHUNDER DASS *v.* CHUNDER KANT MOOKERJEE
I. L. R. 5 Calc. 498: 5 C. L. R. 264

2. ——— *Agreement to refer to arbitration—Award—Suit in respect of matter referred barred.* The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made thereon disallowing the plaintiff's claim. *Held*, that, under these circumstances, the further hearing of such suit was barred. SALIG RAM *v.* JHUNNA KUAR
I. L. R. 4 All. 546

3. ——— *Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings.* One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract. *Held*, that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act. The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract and not a contract broken up by the conduct of all the parties to it. TAHAL *v.* BISHESHAR
I. L. R. 8 All. 57

4. ——— *Contract to refer dispute to arbitration—Refusal to perform such contract—Right of suit.* To bar a suit under s. 21 of the Specific Relief Act, a refusal to arbitrate must be before the action is brought. CRISP *v.* ADLARD
I. L. R. 23 Calc. 956

5. ——— *Agreement to refer to arbitration—Refusal to perform agreement.* In a suit against a brother-in-law for maintenance the defendant alleged that, after the plaintiff had left his house, an agreement had been made between them to refer their dispute to arbitration, that the agreement of reference had been actually signed, but that, on the day fixed by the arbitrators for making their award, the plaintiff had given notice to them not to make an award, and accordingly they had not done so. The defendant contended that, by reason of this agreement, the plaintiff's suit was barred by s. 21 of the Specific Relief Act, I of 1877. The alleged agreement to refer was in the following terms: "To *D M* and *D D*. We, the undersigned two persons, give in writing to you as follows: We used to reside and act in the house together in peace and harmony. Lately, a few days ago, in consequence of a disagreement amongst the women, *V* resided separately. Upon persuasion having been used towards her, *V* again resides in the house together with the rest: so now all are residing in the house in peace and harmony. If any occasion should arise, and if any disagreement should take place amongst the women, in order to find a remedy for that, we, the undersigned two persons, give in writing to you as follows: As to whatever award or settlement you two persons together will make, in accordance therewith, we agree to receive or pay. As to that, we are truly to act on our true religious faith; and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs and representatives, all; the 11th Jyesth Vadya Samvat 1939, the day of the event, Friday, the 1st June 1883. And as to this, you are truly to make and deliver a settlement within fifteen days' time." *Held*, that the plaintiff's suit was not barred. The agreement did not indicate what was the subject-matter to be referred, and there was no evidence to show that the plaintiff's claim to maintenance had been laid before the arbitrator or that the plaintiff had refused to perform her agreement to refer in reference to that claim. Nor was there any evidence to show the time at which the plaintiff withdrew from the arbitration—whether before or after the time allowed to the arbitrators to make and publish their award, *viz.*, fifteen days. If the latter, her withdrawal could not, in any view of the section, be held to be a refusal on her part to perform her agreement to refer. Even if the plaintiff's withdrawal was unjustifiable, it appeared that the defendant had taken no steps, under s. 523 of the Civil Procedure Code (Act XIV of 1882), to have the agreement filed in Court, and thus render her withdrawal of no effect. There was nothing to show that the defendant did not acquiesce in it. *Quære:* Whether the above agreement was not void by reason of uncertainty. *Quære:* Whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission to withdraw from or to prevent an award being made upon the submission falls within the concluding paragraph of s. 21 of the Specific Relief Act, I of 1877. ADHIBAI *v.* CURSANDAS NATHU . . **I. L. R. 11 Bom. 199**

6. ——— *Arbitration—Agreement to refer—Order under s. 506, Civil Procedure Code, to refer matters in dispute in action then pending—Order under s. 373, pending the reference granting plaintiff permission to withdraw with liberty to bring fresh suit.* The wording of s. 21 of the Specific Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court. The parties to a suit, while it was pending, agreed to refer the matters

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 21—*concld.*

in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877). *Held*, that the Court in the former proceedings had no power no revoke the order of reference prior to award except as provided by s. 510 of the Code ; that consequently the Court's order under s. 373 was *ultra vires* if involving such revocation, or, if not involving it, left the order of reference still in force ; that in either alternative the suit was barred by s. 21 of the Specific Relief Act ; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. *Per* TYRRELL, *J.*, that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision. SHEOAMBER *v.* DEODAT . . **I. L. R. 9 All. 168**

7. ——— *Civil Procedure Code, s. 523—Arbitration—Agreement to refer made pending a suit—Such agreement a bar to the continuance of the suit.* Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of s. 523 of the Code of Civil Procedure or not. *Salig Ram* v. *Jhunna Kuar, I. L. R. 4 All. 546 ; Sheoambar* v. *Deodat, I. L. R. 9 All. 168*, and *Shib Lal* v. *Hira Lal, All. Weekly Notes (1888) 133*, followed. SHEO DAT *v.* SHEO SHANKAR SINGH, (1905) . . . . **I. L. R. 27 All. 534**

8. ——— **ss. 21 and 30**—*Suit to recover money due on an award—Specific performance—Damages.* In a suit for the recovery of a certain sum of money with interest due on an award and on the failure of the defendant to pay for the recovery of the same from the defendant's property, it was contended that the plaintiff was not entitled to the relief sought having regard to ss. 21 and 30 of the Specific Relief Act (I of 1877). *Held*, disallowing the contention, that the suit was not for specific performanee. It was a suit for the recovery of money and for relief incidental thereto. FARDUNJI *v.* JAMSETJI EDULJI (1904) **I. L. R. 28 Bom. 1**

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 22.

See INJUNCTION—SPECIAL CASES—BREACH OF AGREEMENT.
I. L. R. 18 Bom. 702
I. L. R. 19 Bom. 764

See SPECIFIC PERFORMANCE.
I. L. R. 29 Bom. 234

1. ——— *Specific performance of contract—Discretion of Court—Delay in applying to Court for relief.* Great delay on the part of the plaintiff in applying to the Court for specific performance of a contraet, of which he claims the benefit, is of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. *Milward* v. *The Earl of Thanet, 5 Ves. 720n.*, referred to. NAWAB BEGAM *v.* CREET (1905) **I. L. R. 27 All. 678**

2. ——— *Specific performance—Issues—Discretion of Court—Delay—Laches—Purchase subject to subsisting equities—Right, title and interest of judgment-debtor.* The plaintiff sued for specific performance of an agreement whereby the father of the first defendant and the husband of the second defendant agreed to sell to the plaintiff 500 square yards of land forming part of a property consisting of a chawl and vacant land. The agreement was dated the 29th of June 1901, and the suit was filed on the 30th November 1903. The third defendant purchased the entire property at a Court-sale in execution of a money-decree obtained by the creditors of the original vendor against his estate. He had notice of the plaintiff's claim. *Held*, that even if a purchaser at Court-sale purchases without notice, he can only buy what the Court could sell, *i.e.*, the right, title and interest of the judgment-debtor, as these existed at the date of the sale, and as these could have been honestly disposed of by the judgment-debtor himself. *Sobhagchand* v. *Bhaichand, I. L. R. 6 Bom. 193*, followed. PEER MAHOMED *v.* MAHOMED EBRAHIM, (1905) **I. L. R. 29 Bom. 234**

——— s. 23, cl. (*b*)—

See SPECIFIC PERFORMANCE—GENERALLY.
I. L. R. 30 Calc. 265

——— cl. (*c*)—

See COMPROMISE—REMEDY ON NON-PERFORMANCE OF COMPROMISE.
5 C. W. N. 386

See HINDU LAW . **I. L. R. 29 All. 37**

——— s. 23 and s. 27, cl. (e)—*Contract to take shares.* S. 23, cl. (*h*), and s. 27, cl. (*e*), of the Specific Relief Act (I of 1877) do not apply to contracts to take shares ; and only embody the English law as to cases where a company has taken the benefit of a contract, but refuses to carry it into effect. IMPERIAL ICE MANUFACTURING COMPANY *v.* MUNCHERSHAW BARJORJI WADIA **I. L. R. 13 Bom. 415**

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 25.

See VENDOR AND PURCHASER—TITLE. I. L. R. 15 Bom. 657

——— s. 26.

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . I. L. R. 4 Bom. 594

See SPECIFIC PERFORMANCE—SPECIAL CASES . I. L. R. 12 Calc. 152

——— s. 27.

See MORTGAGE—REDEMPTION—RIGHT TO REDEEM . I. L. R. 24 Mad. 449

See RIGHT OF SUIT—POSSESSION, SUITS FOR—CO-DEFENDANTS. 6 C. W. N. 314

See VENDOR AND PURCHASER—INVALID SALES . . I. L. R. 18 Mad. 43

See VENDOR AND PURCHASER—NOTICE. I. L. R. 10 Calc. 710 I. L. R. 27 Calc. 358

1. ——— cl. (*b*)—*Misjoinder—Joinder of causes of action—Multifariousness.* The plaintiffs sued to enforce an agreement for the execution of a conveyance of certain immoveable property, and for the possession of such property, making the party to such agreement and the persons who had, subsequently to the date of the same, purchased such property in execution of decree, defendants in the suit, on the allegation that such persons had purchased in bad faith and with notice of the agreement. *Held*, with reference to s. 27 of Act I of 1877, that, under such circumstances, there was not necessarily a misjoinder of causes of action. GUMANI *v.* RAM CHARAN . . I. L. R. 1 All. 555

2. ——— *Agreement to convey the mortgaged property in case of default—Suit for specific performance of contract—Mortgage—First and second mortgagees.* On the 7th February 1873 *F* mortgaged the equity of redemption of a certain estate to *B* and *G*. On the 7th August 1877, he mortgaged such estate to *P*, agreeing that, if he failed to pay the mortgage-money within the time fixed, he would convey such estate to *P*, and that, if he failed to execute such conveyance, *P* should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed." On the 6th October 1877 *F* mortgaged such estate to *B* and *D*. By this mortgage the lien created by the mortgage of the 7th February 1873 was extinguished. In December 1877, *B* and *D* obtained a decree against *F* on the mortgage of the 6th October 1877, and in June 1878, in execution of that decree, such estate was put up for sale and was purchased by *D*. In February 1880 *P* sued *F* and *D* for the execution of a conveyance of such estate to him in accordance with *F*'s agreement of the 7th August 1877. *Held*, that the mortgage of the 7th August 1877 was not in the nature of a mortgage by conditional sale, and there was no necessity for *P* to take proceedings to foreclose the mortgage, and the suit was maintainable. Also that, assuming that *D* had no notice of the agreement of the 7th August 1877, it was very doubtful whether under s. 27 (*b*) of Act I of 1877 *D* could claim that specific performance of that agreement should not be granted, inasmuch as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien. BADRI PRASAD *v.* DAULAT RAM . I. L. R. 3 All. 700

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 27—*concld.*

——— s. 28.

See SPECIFIC PERFORMANCE—SPECIAL CASES . I. L. R. 18 Mad. 415

——— s. 30.

See LIMITATION ACT, 1877, SCH. II. ART. 113 . . I. L. R. 5 All. 263 I. L. R. 16 All. 3 I. L. R. 23 Mad. 593

——— s. 31.

See DEED—RECTIFICATION. I. L. R. 14 Calc. 308 L. R. 14 I. A. 18

1. ——— *Landlord and tenant—Rectification or alteration of contract of tenancy—Specific Relief Act (I of 1877), s. 31.* Where a party to a contract of tenancy desires to have it rectified or altered, the suit should be brought under s. 31 of the Specific Relief Act. ANARULLAH SHAIKH *v.* KOYLASH CHUNDER BOSE I. L. R. 8 Calc. 118

S.C. KOYLASH CHUNDER BOSE *v.* ANARULLAH SHEIKH . . . . 9 C. L. R. 467

2. ——— *Sale—Suit for specific performance—Rectification—Mutual mistake—Clear proof.* To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of s. 31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake. "A person, who seeks to rectify a deed upon the ground of mistake, must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought." *Fowler v. Fowler, 4 D. & J. 250. 254*, followed and applied. MADHABJI *v.* RAMNATH (1906) I. L. R. 30 Bom. 457

——— ss. 31, 34.

See CONTRACT—BOUGHT AND SOLD NOTES. I. L. R. 20 Calc. 854

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 35.

See CONTRACT ACT, S. 23—ILLEGAL CONTRACTS—AGAINST PUBLIC POLICY.
I. L. R. 3 Mad. 215

——— *Rescission of contract, suit for—Evidence necessary to set aside contract.* In order that a contract should be set aside under s. 35 (*b*) of the Specific Relief Act (I of 1877), the plaintiff should be shown to have been less to blame in the transaction than the defendant. HARI BALKRISHNA *v.* NARO MORESHVAR
I. L. R. 18 Bom. 342

——— ss. 38, 41.

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 26 Calc. 381

——— s. 39.

See ARBITRATION—AWARDS—VALIDITY OF AWARDS, AND GROUND FOR SETTING THEM ASIDE . I. L. R. 25 Bom. 10

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS.
L. R. 29 I. A. 203
I. L. R. 27 Bom. 607
I. L. R. 7 Calc. 736
I. L. R. 23 Bom. 375

See LIMITATION ACT, 1877, SCH. I, ART. 91.
I. L. R. 27 Bom. 560
I. L. R. 5 All. 322

See ONUS OF PROOF—DECREES AND DEEDS, SUITS TO ENFORCE OR SET ASIDE.
I. L. R. 12 All. 523

See RIGHT OF SUIT—INTEREST TO SUPPORT RIGHT . I. L. R. 9 All. 439
I. L. R. 23 Bom. 375

1. ——— *Suit for declaration—Cancellation of document—Consequential relief.* The plaintiff having sued for the cancellation of a sale deed framed the prayer in the plaint so as to seek a declaration that the sale-deed was fraudulent and for an order to have it cancelled and a copy was sent to the Sub-Registrar as provided by s. 39 of the Specific Relief Act (I of 1877). *Held*, that the suit was one for a declaration with a distinct prayer for consequential relief. *Karam Khan* v. *Daryai Singh, I. L. R. 5 All. 331*, dissented from. PARVATIBAI *v.* VISHVANATH (1905)
I. L. R. 29 Bom. 207

2. ——— *Limitation Act (XV of 1887), Art. 91—Suit to set aside an instrument—Collusive sale-deed not intended to be acted upon.* A suit to cancel or set aside an instrument must, under Art. 91 of the Limitation Act, be brought within three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The plaintiff on 1st June 1895 executed a sham sale-deed in favour of the defendants, neither party intending that it should be acted upon. The defendants in February 1899 began to set up a claim to ownership on the strength of the deed. On 3rd August 1900, plaintiff brought this suit On its being contended that the suit was barred by limitation :—*Held*, that the suit was not barred having been brought within three years from the date when the plaintiff apprehended that the defendants had set up a title under the instrument. The facts which would entitle a person to bring such a suit are stated in s. 39 of the Specific Relief Act (I of 1877). SINGARAPPA *v.* TALARI SANJIVAPPA (1905)
I. L. R. 28 Mad. 349

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 39—*concld.*

——— s. 40 and Ch. IV, ss. 35-38—*Impossibility arising after execution of contract to perform a portion—Suit to cancel such portion.* A contract was entered into between the plaintiff and the defendant by which the plaintiff agreed to cultivate indigo for the defendant for a specified number of years in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a sub-tenant only. During the continuance of the contract the plaintiff lost possession of those lands through his immediate landlord having failed to pay the rent, and having been in consequence ejected therefrom by the owner. In a suit to have so much of the contract as related to those lands cancelled on the ground that it had become impossible of performance through no neglect on his part,—*Held*, that Ch. IV (ss. 35—38) of Act I of 1877 (Specific Relief Act) did not apply to such a case, but that the plaintiff was entitled to the relief he sought under s. 40 of that Act, inasmuch as the contract was evidence of different obligations, *viz.*, to cultivate indigo in different villages. INDER PERSHAD SINGH *v.* CAMPBELL
I. L. R. 7 Calc. 474 : 8 C. L. R. 501

——— s. 41.—*Refund of money.* The decision in *Mohori Bibee* v. *Dharmodas Ghose, I. L. R. 30 Calc. 539*, is also an authority for the proposition that the circumstances of a particular case may be such that having regard to s. 41 of the Specific Relief Act (I of 1877), the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other, which justice may require. DATTARAM *v.* VINAYAK (1904)
I. L. R. 28 Bom. 18

——— s. 42.

See APPELLATE COURT—ERRORS AFFECTING OR NOT MERITS OF CASE.
I. L. R. 9 All. 622

See BOMBAY REVENUE JURISDICTION ACT.
I. L. R. 29 Bom. 19

See CLAIM TO ATTACHED PROPERTY.
I. L. R. 24 Mad. 20

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS ;
I. L. 29 I. A. 203
ENDOWMENT I. L. R. 26 Mad. 450
MISCELLANEOUS SUITS.
I. L. R. 24 Mad. 275
I. L. R. 24 All. 170
I. L. R. 25 Mad. 504

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 42—*contd.*

See HINDU LAW—ALIENATION—ALIENATION BY WIDOW—SETTING ASIDE ALIENATIONS, AND WASTE.
5 C. W. N. 445
I. L. R. 32 Calc. 62
9 C. W. N. 25

See HINDU LAW—REVERSIONERS—ARRANGEMENTS BETWEEN WIDOW AND REVERSIONERS . I. L. R. 22 Calc. 354

See HINDU LAW—REVERSIONERS—POWER OF REVERSIONERS TO RESTRAIN WASTE AND SET ASIDE ALIENATIONS.
I. L. R. 18 Mad. 53

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
I. L. R. 11 All. 224

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11 C. L. R. 533

See MADRAS LAND REVENUE ASSESSMENT ACT, s. 2 . I. L. R. 19 Mad. 292
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I. L. R. 16 Calc. 117

See PARTIES—SUIT BY SOME OF A CLASS AS REPRESENTATIVES OF CLASS.
I. L. R. 15 Bom. 309

See PARTITION—MISCELLANEOUS CASES.
I. L. R. 16 Calc. 117
I. L. R. 36 Calc. 726

See RIGHT OF SUIT—CHARITIES AND TRUSTS . . I. L. R. 8 All. 31

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE . I. L. R. 7 All. 583

See TIPPERAH RAJ
I. L. R. 35 Calc. 777

1. ——— *Declaratoy decree—Judicial discretion, decree made in the exercise of—Interference on appeal—Hindu widow—Widow's estate—Will executed by widow, if entitles reversioner to declaratory decree—Cause of action.* The execution of a Will by a limited owner such as a Hindu widow does not as a general rule afford a sufficient reason for granting a (declaratory) decree in favour of a reversioner declaring that the Will is invalid for the purpose of transferring the estate to the devisee. But where the Courts below in the deliberate exercise of the discretion entrusted to them by s. 42 of the Specific Relief Act made such a decree, the Judicial Committee refused to interfere with it, although their Lordships thought that, had they been sitting as a Court of first instance they would have felt great hesitation before making the decree. Their Lordships found special reasons for not interfering in the present case, in the fact that in their pleadings the widow and her devisees had set up a Will alleged to have been executed in her favour by her deceased husband under which she claimed to be absolute owner—a title which was inconsistent with any present or future rights of the reversioners. JAIPAL KUNWAR *v.* BHAIYA INDAR BAHADUR SINGH (1904)
I. L. R. 26 All. 238
8 C. W. N. 465
s.c. L. R. 31 I. A. 67

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 42—*contd.*

2. ——— *Declaratory suit—Declaration—Further relief—Court—Jurisdiction.* S. 42 of the Specific Relief Act enacts that no Court shall make a declaration in a suit in which the plaintiff being able to seek further relief omits to do so. The section does not empower the Court to dismiss such a suit. An injunction is a "further relief" within the meaning of s. 42 of the Specific Relief Act. *Farasram* v. *Bhimbhai, 5 Bom. L. R. 195*, followed. KUNJ BEHARI *v.* KESHAVLAL HIRALAL (1904) . . I. L. R. 28 Bom. 567

3. ——— *Failure to claim consequent relief—Property in custodia legis, plaintiff being the custodian.* Plaintiff sought for a declaration of his right to property without asking that the property should be delivered to him. The property had belonged to *S*, deceased. Prior to the death of *S*, who was a minor, proceedings had been taken for the appointment of a guardian for him under the Guardian and Wards Act. Pending those proceedings the District Court appointed plaintiff Receiver and placed him in possession of the property, removing the minor's mother, the present defendant, from the charge thereof. The High Court reversed that order and directed that possession of the property should be handed back to the defendant. This order had not been carried out to any extent at the date of suit. On the objection being raised that the suit was not maintainable by reason of s. 42 of the Specific Relief Act :—*Held*, that the suit was maintainable. The possession of the property was, at the time, neither with the defendant nor with the plaintiff, it being in *custodia legis* and in the hands of an officer of the Court and it being a mere accident that that officer was the plaintiff. Inasmuch as the defendant was not in possession, plaintiff could not, as against her, have consequential relief, and nothing more was required to be done to secure to the plaintiff all his rights than to obtain an order of the Court enabling him to retain possession in his own right. VEDANAYAGA MUDALIAR *v.* VEDAMMAL (1904)
I. L. R. 27 Mad. 591

4. ——— *Suit for declaration of title—Omission to seek further relief—Revenue Jurisdiction Act (X of 1876), s. 11—Suit against Government on account of any act or omission of any Revenue officer—All such appeals allowed by the law—Appeals in respect of the act or omission.* The effect of the proviso to s. 42 of the Specific Relief Act (I of 1877) is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall not grant the relief that is prayed. The expression "all such

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 42—*contd.*

appeals " in s. 11 of the Revenue Jurisdiction Act (Bombay Act X of 1876) means appeals in respect of the act or omission. Therefore the bar of s. 11 would not apply to a suit wherein the cause of action is not an order or decision in respect of which there was a right of appeal under the Land Revenue Code (Bombay Act V of 1879). SAKHARAM *v.* THE SECRETARY OF SLALE FOR INDIA (1904) . . . . **I. L. R. 28 Bom. 332**

5. ——— *Suit to set aside an auction sale—Plaint not asking for possession—Defendant subsequently put into possession of property sold.* A plaintiff instituted a suit to set aside an auction sale. The plaintiff, not having at the time of filing the suit been dispossessed of the property sold, claimed only the setting aside of the auction sale and cost and paid a proper Court-fee on the suit so framed. About a month after the institution of the suit the auction-purchaser was put into possession of the property, which he had purchased. Then the suit came on for hearing, the plaintiff was directed to amend his plaint by adding a claim for possession of the property and to pay the proper Court-fee upon a suit for possession, and on his declining to do so his suit was dismissed with costs. On appeal by the plaintiff it was *held*, that the suit when instituted being in every respect regular and properly stamped, no action on the part of the defendants subsequent to the institution of the suit could affect or prejudice the right of the plaintiff and the suit was remanded under s. 562 of the Code of Civil Procedure to the lower Court foi determination according to law. *Surjan Singh v. Buldev Prasad, All. Weekly Notes (1900) 172,* followed. RAM ADHAR *v.* RAM SHANKAR (1904) **I. L. R. 26 All. 215**

6. ——— *Suit for declaratory decree—Further relief—Cancellation of document.* The plaintiff came into Court alleging that he was the owner and in possession of a certain house, of which one of the defendants had executed a mortgage in favour of the other defendant; that the defendant mortgagee had filed a suit and having obtained a decree for sale had caused the property to be proclaimed for sale. The plaintiff asked for a declaration that the house was not liable to sale in execution of the decree obtained by the first defendant. *Held*, that s. 42 of the Specific Relief Act was no bar to the suit, the plaintiff not being obliged to seek any other relief (as, for example, cancellation of the deed of mortgage) than that which he had claimed. GANGA GHULAM *v.* TAPESHRI PRASAD (1904) . . . . **I. L. R. 26 All. 606**

7. ——— *Declaratory decree—Discretion of Court—Joint Hindu family—Non-joinder of parties.* Where some of the descendants of a judgment-debtor under two Rent Court decrees filed a suit in a Civil Court, asking for a declaration that the joint ancestral family property was not liable, after the decease of the judgment-debtor, to be taken in execution of such decrees and did not make parties to the suit the two sons of the judgment debtor, it was *held* that the Court exercised a right discretion under s. 42 of the Specific Relief Act, 1877, in refusing to grant a declaratory decree. MAHARAJA OF BENARES *v.* RAMJI KHAN (1905) **I. L. R. 27 All. 138**

8. ——— *Suit by heir presumptive against life tenant to restrain waste by life tenant—Injunction.* There is nothing in law to prevent the heir presumptive, that is, the person who would be entitled to possession, if the life tenant were to die at the moment of suit, from suing for a declaration that as against the life tenant he is entitled as next reversioner, and for injunction restraining the life tenant from wasting the property in suit. *Rani Anand Koer* v. *The Court of Wards, L. R. 8 I. A. 14,* followed. *Gangayya* v. *Mahalakshmi, I. L. R. 10 Mad. 90,* referred to. *Greeman Singh* v. *Wahari Lall Singh, I. L. R. 8 Calc. 12,* dissented from. MANMATHA NATH BISWAS *v.* ROHINI MONI DASI (1905) . **I. L. R. 27 All. 406**

9. ——— *Discretion of Court to make declaratory decree—Limitation Act (XV of 1877), s. 7—Suit by minor for declaration of invalidity of widow's alienation—Omission by father of minor to sue—Father's right to sue barred—Hindu Law—Suit for declaration of invalidity of widow's alienation—Plaintiff not nearest reversioner—Maintainability.* Plaintiff, a minor, sued for a declaration that an alienation by a Hindu widow was invalid as against him after the death of the widow. Plaintiff was not the nearest reversioner, there being certainly one and apparently two sets of reversioners, who would be entitled to take in succession before him. Plaintiff's father had not brought any suit, though he could have done so, and the father's right to bring such a suit had become barred. The nearest reversioner had concurred in the improper alienation and all the reversioners nearer than plaintiff had omitted to sue and were barred from doing so by limitation. They were all parties to the suit :—*Held*, that the suit was not barred by limitation. Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through or derive his title from another reversioner, even if that other happens to be his father, but each derives his title from the last full owner. Plaintiff was therefore entitled to the benefit of s. 7 of the Limitation Act. There is no privity of estate between one reversioner and another as such, and, consequently, an act or omission by one reversioner cannot bind another reversioner, who does not claim through him. *Bhagwanta* v. *Sukhi, I. L. R. 22 All. 33,* approved. *Chhaganram Astikram* v. *Bai Motigavri, I. L. R. 14 Bom. 512,* discussed. *Held*, also, that plaintiff was entitled to maintain the suit. A more distant reversioner may maintain such a suit, when the reversioners nearer in succession are in collusion with the widow or have precluded themselves from suing. The right given by s. 42 of the Specifie

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 42—*contd.*

Relief Act to bring a declaratory suit is not limited by illustration (*E*) of that section or by Art. 125 of the Limitation Act to suits by a person presumptively entitled to possession. The general words of a section should not be limited to the illustations given in the Act or by reference to the suits specially enumerated in the Limitation Act. Though it was doubtful whether the lower Court should, in the exercise of its discretion, have allowed the suit to proceed, having regard to the remoteness of plaintiff's interest, the High Court made the declaration prayed for, as the finding of fact was that the alienation had been made without necessity and was improper, and it might be that, when the widow should die the plaintiff would be the presumptive reversioner, and the declaration now made would save him from having to prove the impropriety of the alienation again. *Per* DAVIES, *J.*—The declaration made in the present suit would serve the purpose of perpetuating testimony for whomsoever might happen to be the next reversion on the death of the widow. GOVINDA PILLAI *v.* THAYAMMAL (1905) . . . **I. L. R. 28 Mad. 57**

10. ——— *Discretionary power of Court in granting declaration—Declaration in respect of a void instrument—Courts, inherent powers of, to stay or dismiss vexatious suits—Court Fees Act—Ad valorem stamp not necessary in suits for declaration, where no consequential relief asked.* Every Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof actions which it holds to be vexatious. *Haggard* v. *Pelicier Freres,* [*1892*] *A. C. 61 67, 68,* referred to. Where the facts alleged in a plaint are totally inconsistent with decisions pronounced on the amplest materials, in litigation extending over three quarters of a century such a plaint ought to be dismissed summarily in the exercise of such inherent power. The discretionary power to grant declaratory decrees under the Specific Relief Act ought not to be exercised when the plaintiff seeks to have declared as invalid and void a transaction which, on his own allegations, would be but a *brutum fulmen* so far as his rights are concerned. *Thakurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh, L. R. 31 I. A. 67, 69.* It will be no ground for the grant of such discretionary relief, that the transaction in question may furnish a piece of evidence against the plaintiff. Where a plaint merely prays that a will in regard to a property may be declared void as against the plaintiff, the stamp duty payable is that for a declaratory suit, and not an *ad valorem* fee on the value of such property. VIJIASWAMI TEVAR *v.* SASIVARMA TEVAR (1905) . **I. L. R. 28 Mad. 560**

11. ——— *Civil Procedure Code (Act XIV of 1882), s. 283—Suit brought under s. 283 not liable to dismissal because no further relief asked.* The special right conferred by s. 283 of the Code of Civil Procedure on a claimant, whose claim is rejected, to sue for a declaration of his title in so far as it is affected by the order passed against him is

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 42—*concld.*

not controlled by the proviso to s. 42 of the Specific Relief Act, and the plaintiff in such a suit is not bound to ask for any further relief, to which he may be entitled. *Kunhiamma* v. *Kunhunni, I. L. R. 16 Mad. 140,* overruled. *Ambu* v. *Ketlilama I. L. R. 14 Mad. 23,* followed. KRISTNAM SOORAYA *v.* PATHMA BEE (1905) . **I. L. R. 29 Mad. 151**

12. ——— *Declaratory decree—Suit to declare that a person was not adopted by the plaintiff.* The setting up of an adoption alleged to have been made by the plaintiff is such an infringement of his right as sole owner as to entitle him to sue for a declaratory decree under s. 42 of the Specific Relief Act declaring that the person alleged to have been adopted is not his adopted son. It is not necessary for the maintainability of such a suit that a claim must be set up by the party alleged to have been adopted. CHINNASAMI MUDALIAR *v.* AMBALAVANA MUDALIAR (1905) **I. L. R. 29 Mad. 48**

13. ——— *Presumptive reversioner, entitled after widow's death may sue to set aside will of last male holder.* The right of the presumptive reversioner to sue for a declaratory decree under s. 42 of the Specific Relief Act is not restricted to the class of transactions referred to in illustrations (*e*) and (*f*) to that section, *i.e.*, to transactions by the widow herself. Where on the death of the last male owner leaving a widow, the properties belonging to him are claimed by devisees under a will alleged to have been left by him, the nearest reversioner in existence is entitled to sue for a declaration that the alleged will was invalid and did not bind his reversionary interest. PUTTANNA *v.* RAMAKRISHNA SASTRI (1906) **I. L. R. 30 Mad. 195**

14. ——— *Suit for possession before expiry of lease—Declaratory decree—No alteration in the nature of the suit.* During the subsistence of a tenancy a third party dispossessed the plaintiff's tenants. The plaintiff sued the third party for posseession. *Held,* that the suit for immediate possession was not maintainable in consequence of the existence of the outstanding lease. *Held,* also, that the plaintiff in such a case was entitled to a declaration of title and this does not alter the nature of the suit. *Sita Ram* v. *Ram Lal, I. L. R. 16 All. 440,* followed. GHULAM HUSAIN *v.* MUHAMMAD HUSAIN (1909) **I. L. R. 31 All. 271**

——— s. 45.

See CALCUTTA CORPORATION. **I. L. R. 36 Calc. 671**

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, s. 31 . **I. L. R. 22 Calc. 717**

See COMPANY—TRANSFER OF SHARES AND RIGHTS OF TRANSFEREES. **I. L. R. 16 Bom. 398**

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SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 45—*concld.*

See HACKNEY-CARRIAGE ACT (BOM. ACT VI OF 1863), s. 6.
I. L. R. 27 Bom. 307

See LEASE . I. L. R. 36 Calc. 271

See LICENSE . I. L. R. 28 Bom. 253

See POLICE ACT (XLVIII OF 1860), ss. 11, 12 . . I. L. R. 26 Bom. 396

1. ——— **Chairman of Calcutta Municipality, discretion of, as to list of candidates and votes at elections.** Instances of applications under s. 45 of the Specific Relief Act for rules against the Chairman of the Calcutta Municipality with regard to the list of candidates for and the votes given at municipal elections. *In the matter of* MUTTY LALL GHOSE
I. L. R. 19 Calc. 192

In the matter of RAJENDRA LALL MITTRA
I. L. R. 19 Calc. 195 note

In the matter of the ELECTION OF MUNICIPAL COMMISSIONERS FOR WARD NO. 10, CALCUTTA.
I. L. R. 19 Calc. 198

2. ——— **Practice.** *Per* RUSSELL, *J.*—Under rule 577 of the High Court Rules, all applications under s. 45 of the Specific Relief Act (I of 1877) should be made by motion, and not by petition. GELL *v.* TAJA NOORA (1903)
I. L. R. 27 Bom. 307

——— s. 52.

See MAINTENANCE . 9 C. W. N. 1073

——— s. 53.

See INJUNCTION—SPECIAL CASES—EXECUTION OF DECREE.
I. L. R. 23 Calc. 351

See INJUNCTION—UNDER CIVIL PROCEDURE CODE . I. L. R. 27 Bom. 357

——— ss. 53, 54, 55.

See INJUNCTION . I. L. R. 34 Calc. 97

——— s. 54.

See CO-SHARERS—ENJOYMENT OF JOINT PROPERTY—ERECTION OF BUILDINGS.
I. L. R. 12 All. 436

See INJUNCTION—
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I. L. L. 27 Bom. 357

SPECIAL CASES—
BREACH OF AGREEMENT;
I. L. R. 26 Mad. 168
I. L. R. 18 Bom. 702
I. L. R. 19 Bom. 764

EXECUTION OF DECREE.
I. L. R. 22 Mad. 189

INTRUSION IN OFFICE.
I. L. R. 21 Bom. 821

SPECIFIC RELIEF ACT (I OF 1877) —*contd.*

——— s. 54—*concld.*

See INJUNCTION—*contd.*

OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY.
I. L. R. 13 Bom. 252; 674
I. L. R. 19 All. 259
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I. L. R. 26 Bom. 735
I. L. R. 24 Calc. 260
I. L. R. 22 Mad. 251

POSSESSION OF JOINT PROPERTY.
I. L. R. 29 Calc. 500

See LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY—ERECTION OF BUILDINGS.
I. L. R. 16 Mad. 407

See PARTIES—SUITS BY SOME OF A CLASS AS REPRESENTATIVES OF CLASS.
I. L. R. 15 Bom. 309

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR . I. L. R. 13 Bom. 674
I. L. R. 18 Bom. 474
I. L. R. 20 Bom. 704

See VENDOR AND PURCHASER—INVALID SALES . . I. L. R. 18 Mad. 61

——— **Building of indigo factory**—*Bengal Tenancy Act (VIII of 1885), s. 23—Agricultural purpose—Specific Relief Act (I of 1877), s. 54, Ill. (k)—Injunction restraining tenant from rendering land unfit for tenancy—Suit, if maintainable.* The cultivation of indigo is an agricultural purpose, but the manufacture of indigo cakes out of indigo plants cannot be said to be an agricultural purpose. Where land is let out for agricultural purposes *generally*, the erection of an indigo factory on a part of such land must render it unfit for the purposes of the tenancy; and the landlord would be entitled to sue for an injunction restraining the tenant from building such factory on the land. SURENDRA NARAYAN SINGH *v.* HARI MOHAN MISSER (1905) . . . . . 9 C. W. N. 87

——— s. 55.

See INDIGO . I. L. R. 31 Calc. 174

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY . I. L. R. 14 Calc. 236
I. L. R. 31 Calc. 944

——— *Mandatory injunction—Perpetual injunction—Trees overhanging neighbour's land—Continuing nuisance—Threatened damage.* As every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation, it is open to the Court to grant a mandatory injunction for the removal of the nuisance under s. 55 of the Specific Relief Act. *Lemmon* v. *Webb*, [*1895*] *A. C. I.; Hari Krishna Joshi* v. *Sankar Vithal*

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SPECIFIC RELIEF ACT (I OF 1877)—*concld.*

——— s. 54—*concld.*

I. L. R. 19 Bom. 420; Norris v. *Baker, 1 Roll. 393; Baten's Case, 9 Rep. 53; Shelfer* v. *City of London Electric Lighting Company, [1895] I. Ch. 287*, referred to. A perpetual injunction restraining the defendant from planting trees the roots of which are likely to penetrate the foundation of the plaintiff's building and wall, is held to be unworkable. *Bindu Basini Chowdhrani* v. *Jahnabi Chowdhrani, I. L. R. 24 Calc. 260*, referred to. LAKSHMI NARAIN BANERJEE *v.* TARA PRASANNA BANERJEE (1905) . . **I. L. R. 31 Calc. 944**
s.c. 8 C. W. N. 710

——— s. 56.

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SS. 82 (*c*) AND 86 . . **I. L. R. 27 Bom. 403**

See CIVIL PROCEDURE CODE, 1882, s. 258.
I. L. R. 31 Calc. 480
s.c. 8 C. W. N. 395

See INJUNCTION—

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I. L. R. 27 Bom. 357

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I. L. R. 18 Mad. 338
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I. L. R. 23 Calc. 351

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
I. L. R. 5 All. 429

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I. L. R. 22 Bom. 646

——— s. 57.

See INJUNCTION—SPECIAL CASES—BREACH OF AGREEMENT . **I. L. R. 14 Mad. 18**
I. L. R. 18 Bom. 702
I. L. R. 19 Bom. 764
I. L. R. 26 Mad. 168

——— s. 57, Illus. (*d*)—

See CONTRACT . **I. L. R. 36 Calc. 354**

SPECULATIVE PURCHASE.

See SALE . . **13 C. W. N. 710**

SPES SUCCESSIONS.

See HINDU LAW . **I. L. R. 36 Calc. 481**

See MAHOMEDAN LAW,
I. L. R. 32 Bom. 172

1. ——— *Non-transferable and non-releasable—Mahomedan Law.* The chance of an heir-apparent succeeding to an estate is under Mahomedan Law neither transferable nor releasable. It is only by an application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound. It was not intended by s. 6 (*a*) of the Transfer of Property Act to establish and perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity. In the case of deeds executed by *pardanashin* ladies it is requisite that those who rely on them should satisfy the Court that they had been explained to and understood by those who executed them. *Sudisht Lal* v. *Sheobarat Koer, L. R. 8 I. A. 39, 43; Shambati Koeri* v. *Jago Bibi, I. L. R. 29 Calc. 749*, followed. SUMSUDDIN *v.* ABDUL HUSEIN (1906)
I. L. R. 31 Bom. 165

SPES SUCCESSIONS—*concld.*

2. ——— *Mahomedan Law.* A mere *spes successionis* is unknown to, and not recognised by, Mahomedan Law. ABDOOL HOOSEIN *v.* GOOLAM HOOSEIN (1905)
I. L. R. 30 Bom. 304

SPLITTING CAUSE OF ACTION.

See CIVIL PROCEDURE CODE, 1882, s. 43.
I. L. R. 29 All. 256

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I. L. R. 4 Calc. 18

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See SPECIAL OR SECOND APPEAL—PROCEDURE IN SPECIAL APPEAL.
I. L. R. 13 All. 580
I. L. R. 20 Bom. 791

1. BENGAL REGULATIONS.

——— **Beng. Reg. XII of 1826**—*Receipt for Government paper.* Under the old Stamp Law (Regulation XII of 1826, which was not registered by the Supreme Court), agreements not on stamped paper executed in Calcutta *bonâ fide* by parties residing or carrying on business therein when there was no intention of pleading such documents in the mofussil Courts, were *held* to be good and binding. GOURY CHURN MOOKERJEE *v.* JOGENDRONATH MOOKERJEE . **W. R. 1864, 289**

1. BENGAL REGULATIONS—*concld.*

——— **Beng. Reg. X of 1829**—

See STAMP ACT, 1879, SCH. I, ART. 49.
I. L. R. 7 Calc. 594

——— **s. 31**—*Stamp Act (X of 1862)—Mirasi pottahs.* Mirasi raiyati pottahs, where not required either by the old (Act X of 1829, s. 31) or new Stamp Law (Act X of 1862), to be written on stamped paper. MOHEEOODDEEN AHMED *v.* PRANNATH ROY CHOWDHRY
3 W. R., Act X, 142

2. BOMBAY REGULATIONS.

——— **Bom. Reg. XVIII of 1827**—*Will.* Regulation XVIII of 1827 did not require a will to be stamped during the testator's lifetime. WEBBE *v.* LESTER . **2 Bom. 55 : 2nd Ed. 52**

1. ——— **s. 10**—*Construction of section.* An objection to the validity of a document under Regulation XVIII of 1827, as distinguished from its inadmissibility in evidence, or from a prohibition to Courts of Justice or public officers to Act upon it, was an objection on the merits under Act VIII of 1859. Where two documents were executed in the Island of Bombay, respectively, under date the 29th August 1851 and 4th August 1852, and did not appear to have been originally expressly intended to operate within any of the zillahs subordinate to the Presidency of Bombay:—*Held*, that they did not come within the scope of Regulation XVIII of 1827. That Regulation, being an enactment imposing stamp duties upon the subject, must be strictly construed, and although the High Court believed that those documents were actually intended to operate, so far as the particular property in question in the suit was concerned, in the zillah of Tanna, the High Court declined to hold "expressly" to mean the same as "actually," as nothing appeared on the face of the documents to show where the property mentioned in them was situated. GIRDHAR NAGJISHET *v.* GANPAT MOROBA . **11 Bom. 129**

2. ——— *Signed account—Evidence when unstamped.* A signed account showing a balance up to date, and containing a promise to pay interest upon the consolidated balance, cannot be made use of in evidence to support a claim to interest on that balance, unless it be stamped; but it may be used as a samaduskut or simple admission of a balance due, although not stamped. DHONDU JAGANNATH *v.* NARAYAN RAMCHANDRA. **1 Bom. 47**

3. ——— **sub-s. (3)**—*Mortgage—Lease—Counterpart.* Where an agreement between a mortgagor and mortgagee contain stipulation that the mortgagor should, at the time of redemption, make good the losses arising to the mortgagee from the default of tenants, which it had been agreed the mortgagee might put in, in case the mortgagor made default in payment of the rent

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STAMP—*contd.*

2. BOMBAY REGULATIONS—*contd.*

——— **s. 10**—*concld.*

agreed upon for the term of the mortgage; such an agreement was not a lease, or the counterpart of a lease within the meaning of Regulation XVIII of 1827, s. 10, sub-s. 3, but was a contract of indemnity against losses to be incurred after the determination of the lease, which, not having any operation so long as the lease was in existence, was therefore not exempt from stamp duty under that Regulation. Where an app llant has not tendered the stamp duty and penalty on a document which the Courts below have held to be insufficiently stamped, the High Court will not allow him to do so in special appeal. RAM KRISHNA GOPAL *v.* VITHU SHIVAJI **10 Bom. 441**

——— **s. 12, sub-s. (2)**—*Suit to recover possession of immoveable property—Practice.* In a suit by plaintiff to recover possession of certain immoveable property under a deed of sale executed to him by the defendants' father, while Regulation XVIII of 1827 was in force upon one-anna stamp paper, a question having arisen as to what stamp duty the deed should bear for the purposes of the suit, it was referred to the High Court. *Held*, that the deed was sufficiently stamped under sub-s. (*2*), s. 12 of Regulation XVIII of 1827, but the plaintiff could not obtain on it a judgment for a sum or value beyond what was covered by that stamp unless he paid an additional stamp duty and penalty which the Court might allow him to do. MULJI BECHAR *v.* JETHA JESHANKAR . **I. L. R. 10 Bom. 239**

1. ——— **s. 13**—*Intention to defraud revenue.* On documents insufficiently stamped under Regulation XVIII of 1827 the question did not properly arise, under s. 13 of that Regulation, whether the intention of the parties in not sufficiently stamping them was to defraud Government of its revenue. That question was rendered important, first, by s. 13 of Act XXXVI of 1860, and subsequently, in a more explicit manner, by s. 15 of Act X of 1862. KASTUR BHAVANI *v.* APPA **I. L. R. 5 Bom. 621**

2. ——— *Right to have document stamped—Intention to evade stamp-duty.* A party has a right to have stamped, on payment of the prescribed penalty, an instrument executed while Regulation XVIII of 1827 was in force, and it should not be rejected on the ground of intention by the party to evade the stamp duty. ANTAJI NILKANTH *v.* JANARDAN VASUDEV. **10 Bom. 358**

3. ——— **and s. 14**—*Bond stamped after death of grantor.* A bond or other writing, stamped after the death of the grantor, is valid against his heirs. The personal representatives, or other persons claiming as heirs and kindred of a deceased grantor, stood, with regard to ss. 13 and 14 of Regulation XVIII of 1827, in the same position as the deceased grantor would, and were not third parties within the meaning of s. 14. The

STAMP—*concld.*

2. BOMBAY REGULATIONS—*concld.*

——— **s. 14**—*concld.*

previous decisions of the late Sudder Court to the contrary overruled. RAGHIA *v.* DHARMA JHATU **1 Bom. 52**

1. ——— **s. 14, sub-s. (1)**—*Deed of sale of property given in gift from what time operative.* A donee of the grantor was a third party within the meaning of Regulation XVIII of 1827, s. 14, sub-s. 1, and therefore, as against him, a deed of sale of the property given in gift was only valid from the date on which it was stamped. Precedents on this point questioned, but followed. JAGANNATH VITHAL *v.* APAJI VISHNU . . . **5 Bom. A. C. 217**

2. ——— *Purchaser at sale in execution of decree—Validity of mortgage-deed.* The purchaser at a Court-sale of the right, title, and interest of the judgment-debtor is a third party within the meaning of s. 14, Regulation XVIII of 1827, sub-s. (*1*), and therefore, as against him, a mortgage-deed passed by the latter to a mortgagee is valid, not from the date of its execution, but from that on which it was stamped. *Jagannath Vithal* v. *Apaji Vishnu, 5 Bom. A. C. 217*, followed. NARAYAN DESHPANDE *v.* RANGUBAI **I. L. R. 5 Bom. 127**

3. MADRAS REGULATIONS.

——— **Mad. Reg. XIII of 1816**—*No provision for payment of penalty—Secondary evidence of unstamped document.* In a suit to redeem a mortgage of 1833, executed upon an unstamped cadjan, liable to stamp duty under Regulation XIII of 1816, secondary evidence of the contents of this document was tendered on payment of a penalty. *Held*, that the evidence could not be admitted. KOPASAN *v.* SHAMU . **I. L. R. 7 Mad. 440**

——— **Mad. Reg. II of 1825, s. 4**—*Deed transferring property conditionally—Ad valorem stamp-duty.* An instrument, dated 1853, which purported to be a transfer by the executant of the property inherited by her from her husband subject to the payment of his debts, and in which a provision was made for the maintenance of the executant and for the retransfer of the property in case she gave birth to a son, *held* not to be liable to stamp duty. REFERENCE UNDER STAMP ACT, s. 49 **I. L. R. 16 Mad. 419**

STAMP ACT (XXXVI OF 1860).

See STAMP DUTY.

——— **Security bond given to abkari renter.** A security bond executed by a third party to the abkari renter is not exempt from stamp duty. RAMASVAMI CHETTI *v.* PAPPA REDDI **1 Mad. 190**

——— **s. 14**—*Bond executed on optional stamp.* No larger sum could be recovered under s. 14, Act XXXVI of 1860, upon a bond executed on an optional stamp than that optional stamp covers

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STAMP ACT (XXXVI OF 1860)—*concld.*

——— s. 14—*contd.*

and no amount of penalty can make up the deficiency in the stamp. KERAMUT ALI *v.* ABDOOL WAHAB . . . . **17 W. R. 131**

1. ——— **Sch. A and s. 14**—*Promissory note containing agreement to waive jurisdiction.* A promissory note containing an agreement by the maker that, in case of any dispute or difference arising concerning the payment of the note or the subject-matter thereof, the same shall and may be sued in the Supreme Court, and " to the jurisdiction of which I hereby waive and agree to waive all pleas," properly stamped as a promissory note, did not require an additional stamp as an agreement under Act XXXVI of 1860, Sch. A, and s. 14. RAKHALDASS SINGHEE *v.* ROY CHUNDER DUTT **1 Ind. Jur. O. S. 124**

2. ——— **Sch. A, art. 4**—*Promissory note.* An instrument to the following effect : " On the 14th December 1861 we, *A* and *C*, bind ourselves to pay, with interest to you, *B* and *C*, R566-10, being the balance of dealings held with your firm, and the amount received this day from you in cash on account of stamp :"—*Held*, to be neither a bond nor a hundi, but to be in the nature of a promissory note and to come within the description in Art. 4, Sch. A of Act XXXVI of 1860. HUTUMAN SAHIB *v.* HUSAIN SAHIB . . . . . **1 Mad. 152**

3. ——— **Sch. A, art. 20**—*Partnership agreement.* An agreement on a R24 stamp paper between *A*, who had obtained from Government the abkari farm of a certain talukh, and *B*, stipulating that, in consideration of R2,000 advanced by *B* for payment of deposit, the whole management should reside in *B* ; that the parties should each have a half share and be respectively entitled and liable to profit and loss in respect of his share ; that they should account with one another for the sums laid out by B, and should settle annually the accounts of profit and loss upon the half share :—*Held* to be a partnership agreement, and to be sufficiently stamped under Act XXXVI of 1860, Art. 20, Sch. A. In determining the stamp to be affixed to a document, the state of things at its execution is alone to be regarded. CHINNAIYA NATTAN *v.* MUTTUSVAMI PILLAI **1 Mad. 226**

STAMP ACT (X OF 1862).

——— s. 3.

See GENERAL CLAUSES CONSOLIDATION ACT, 1868, s. 6 . **7 Mad. Ap. 9**

1. ——— *Offence under section—Engrossing deed on unstamped paper.* The mere engrossing of a deed on unstamped paper was not an offence under s. 3 of Act X of 1862, nor did the signing such deed as a witness constitute any such offence. REG. *v.* JETHA MOTI. REG. *v.* VIRJI KUVARJI . . **2 Bom. 135 : 2nd Ed. 129**

REG. *v.* JOTI BIN SATU . . **1 Bom. 37**

2. ——— *Penalty—Attesting witnesses and persons drafting documents.* The words in s. 3 of Act X of 1862, " unless in any case in which a higher penalty is imposed " and " not exceeding," apply both to the penalty of R100, and one higher than ten times the value of the omitted stamp. Attesting witnesses and persons who draft documents and note the fact with their signatures at the foot do not come within the words, " make, execute, sign, or be a party to," used in the section, and are therefore not punishable under it. ANONYMOUS . . . . . **3 Mad. Ap. 27**

STAMP ACT (X OF 1862)—*contd.*

——— s. 3—*contd.*

3. ——— **and s. 52**—*Omission to get sanction of Collector.* A prosecution under s. 3, Act X of 1862, not having been authorized by the Collector of the Stamp Revenue for the district or any other officer specially authorized by the Government in that behalf, was held to be, under s. 52 of that Act, irregular. QUEEN *v.* ADJOODHYA PERSHAD . . . . . **2 N. W. 188**

1. ——— **s. 14**—*Documents improperly stamped—Evidence, admissibility in.* Documents not bearing proper stamps under Act X of 1862 are not admissible in evidence even to show the terms of the deed as against the party producing the same. OOMRAO SINGH *v.* METHAB KOONWER **3 Agra 103a**

2. ——— *Act XXXVI of 1860—Bond stamped after suit.* A bond stamped subsequently to the institution of a suit is valid, under the provisions of the Civil Procedure Code and of the Stamp Acts of 1860 and 1862, provided it be properly stamped when produced at the first hearing of the suit and when the Court is asked to receive it in evidence. ATMARAM GULABRAI *v.* AMIRCHAND RUPCHAND . **3 Bom. A. C. 92**

3. ——— *Calculation of stamp-duty—Nature of instrument.* In determining the stamp required for any particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title is a misnomer. PENDSE *v.* MALSE . . **3 Bom. A. C. 94**

4. ——— *Single document containing two contracts and bearing one stamp—Allowance of value of stamp.* Where a document contained two distinct contracts requiring separate stamps, but the whole was impressed with one insufficient stamp, it was held that this stamp might be taken into account in making up the aggregate of the stamps required. BALAJI MAHADEV *v.* KRISHNAJI BIN CHIMNAJI . **6 Bom. A. C. 95**

5. ——— *Copies of record of criminal trial—Liability to stamp duty.* With the exception of the depositions of the witnesses and the documentary evidence and copies of the final sentences or orders passed by Criminal Courts, which parties desirous of appealing from such sentence were required by s. 416 of the Code of Criminal Procedure, 1861, to file with their petitions of appeal, when the party who was desirous of appealing was in confinement under the operation of the sentence

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STAMP ACT (X OF 1862)—*contd.*

——— **s. 14**—*contd.*

or order at the time that he applied for a copy of the same, it was *held* that copies of any part of the record of a criminal trial could only be furnished to applicants on stamp paper. ANONYMOUS
4 Mad. Ap. 58

6. ——— *Transfer of tenure —Admissibility in evidence.* The transfer of an under-tenure, endorsed upon the back of the tenant's pottah, is not admissible in evidence, unless it be stamped as though it were a separate deed. TETAI ABOM *v.* GAGAI GURA CHAWA
3 B. L. R. Ap. 30

S.C. PITAYE AHUNG *v.* GIRGHEE KOER AJOOAH
11 W. R. 365

7. ——— *Surrender of equity of redemption—Unstamped endorsement.* Where the defendant executed in favour of the plaintiff what purported to be a deed of absolute sale, but an ikrar executed contemporaneously reserved the right of redemption to the defendant, and the plaintiff alleged he had surrendered it by returning the ikrar:—*Held*, that, as the original deed was, on the face of it, an absolute sale, and as the effect of it was merely controlled by the ikrar, the return of the latter extinguished the equity of redemption. A separate document requiring a separate stamp was unnecessary. RAJ COOMAR SINGH *v.* RAM SUHAYE ROY . **11 W. R. 151**

——— **s. 15.**

See STAMP ACT, 1879, s. 34.
I. L. R. 14 Mad. 255

——— **s. 15, sub-s. (6)**—*Application for remission of stamp duty in pauper suits.* It is not the duty of a Civil Court to receive and submit to the Board of Revenue an application from a pauper plaintiff for remission or mitigation of penalty under the stamp law; the pauper should himself make timely application under sub-s. 6, s. 15 Act X of 1862. GOLAM GUFFOOR *v.* EKRAM HOSSEIN CHOWDHRY . . . **10 W. R. 358**

——— **ss. 15 and 17.**

See APPELLATE COURT—REJECTION OF ADMISSION OF EVIDENCE ADMITLED OR REJECLED BY COURT BELOW—UNSTAMPED DOCUMENTS . **2 Mad. 321**
3 Mad. 71
3 B. L. R. A. C. 126; 235
5 B. L. R. Ap. 10
7 B. L. R. 653
I. L. R. 6 Bom. 621

——— **s. 17.**

See APPEAL—ACTS—STAMP ACT, 1862.
3 Bom. O. C. 153

1. ——— *Insufficient stamp.* S. 17 of Act X of 1862 only applied to the reception of documents under s. 15, which had been insufficiently stamped, not to documents on which there was no stamp. Such documents should not be received at all. LALJI SINGH *v.* AKRAM SER
3 B. L. R. A. C. 235 : 12 W. R. 47

STAMP ACT (X OF 1862)—*contd.*

——— **s. 17**—*contd.*

2. ——— *Intention to evade stamp laws.* A bond, executed between a plaintiff who sued upon it and the defendants, contained the following clause: "And inasmuch as we (the defendants) are urgently in want of money, and are unable to procure a stamp at the moment, we have executed the bond on plain paper. Should it be necessary for you (plaintiff) to bring a suit against us, whatever penalty you may have to pay shall be made good by us, with interest." The Small Cause Court Judge, before whom the case was tried, considered the above clause in the bond to be evidence of an intention between the parties to avoid the stamp laws, and refused to receive evidence to the contrary. He also refused to admit the bond in evidence. *Held*, on reference to the High Court, that the clause in question did not amount to an agreement to evade the stamp laws. The Judge might have inferred from it that it was the intention of the parties to evade the stamp laws, but in that case he should have heard evidence to the contrary. SASHI BHUSHAN BANERJEE *v.* TARACHAND KAR
3 B. L. R. A. C. 329 : 11 W. R. 553

3. ——— *Intention to evade payment of duty.* A Court to which a document is tendered in evidence under this section ought not to reject it, unless it clearly appears that there was an intention to evade the payment of stamp duty. ROYAL BANK OF INDIA *v.* HORMASJI KHARSEDJI
3 Bom. O. C. 153

4. ——— *Permission to pay penalty where document is lost. Quœre:* Whether permission to pay the stamp duty and penalty can be given in the case of a lost instrument. ARUNACHELLUM CHETTY *v.* OLAGAPPAH CHETTY
4 Mad. 312

5. ——— *Hundi—Inadmissibility in evidence for want of stamp.* The plaintiff brought a suit against three defendants under the following circumstances: The third defendant was the tenant of a village under the second defendant, the first defendant being the agent and manager of the second defendant. The third defendant owed the second defendant a sum of money on account of rent and drew a hundi on the plaintiff for R1,000 to be paid to the first defendant or order, and containing these words: "For which amount I shall deliver over to you grain in that village and its hamlets, and for which the Dewan (first defendant) will issue an order to the above effect." The hundi was upon a one-anna stamp. Plaintiff, on receipt of this hundi, drew upon the back of it another hundi upon his mother-in-law in the following terms: "On demand please pay to Mahomed Radhamatulla Shaib, Dewan of Venkatagiri (first defendant), or to his order, the within-mentioned amount for grain to be supplied me by Mr. Ward (third defendant) on the order of the said Mahomed Radhamatulla Shaib, the Dewan of Venkatagiri." This was signed by

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STAMP ACT (X OF 1862)—*contd.*

——— **s. 17**—*concld.*

the plaintiff, and beneath his signature was that of the first defendant. The amount mentioned in the hundi was paid to the first defendant; the second hundi was unstamped. The plaintiff's case was, that the first defendant entered upon a binding engagement with him to deliver, or permit the delivery, of grain of the value of R1,000, and that he failed to fulfil his engagement. The Civil Judge decreed for the plaintiff. On appeal:—*Held*, by the High Court, reversing the decision of the Civil Court, that the second hundi was not admissible in evidence, not being stamped, and that there was no evidence of such an agreement as that relied on by the plaintiff. MAHOMED RAHAMATULLA *v.* WARD
5 Mad. 391

6. ——— **s. 17 and s. 15**—*Intention to evade payment of duty—Jurisdiction.* In a suit brought in a Small Cause Court to recover money, being a debt secured by a hissab entered on a leaf of a khatta book, where the defendant objected to the admission of the leaf as evidence, because it did not bear a proper stamp:—*Held*, that under ss. 15 and 17, Act X of 1862, it was competent to the Judge to find, on the facts before him, whether the absence of the stamp was owing to an intention to evade payment of the stamp duty, and that no question arose for reference to the High Court. RAJ CHUNDER SHAHA *v.* GOBIND CHUNDER KOOLAL
13 W. R. 102

7. ——— *Insufficiently-stamped document—Procedure—Admissibility in evidence.* The plaintiff sued his elder brother for a share in certain family property. The defendant raised a question of family custom, and relied on a certain deed of release which he said the plaintiff had given him, but the existence of which the plaintiff denied. That document was not stamped, though, on the face of it, it stated that it was to be stamped. No objection was taken on that score to the document before the first and lower Appellate Courts, who considered that the document was a genuine document executed by the plaintiff. After its production, it had an insufficient stamp of two annas put upon it. The High Court, on appeal, left the deed as part of the evidence in the case, but qualified its effect and the extent of its operation by making it a deed of release releasing so much of that which the plaintiff might otherwise claim as would be covered by the insufficient stamp of two annas. *Held*, that the High Court might either have refused to admit the document for want of a stamp, or—which would be more correct—it might have required it to be properly stamped and the penalty paid into Court; but the course taken was entirely without precedent, without principle and without authority. MANTAPPA NADGOWDA *v.* BASWANTRAO NADGOWDA
15 W. R. P. C. 33 : 14 Moo. I. A. 24

1. ——— **s. 22**—*Promissory note—Interest.* A promissory note is sufficiently stamped if the stamp covers the principal sum named in the note without reference to the interest. GOMEZ *v.* YOUNG
2 B. L. R. O. C. 165 : 12 W. R. O. C. 1

STAMP ACT (X OF 1862)—*contd.*

——— **s. 22**—*contd.*

2. ——— *Promissory note—Admissibility in evidence.* *A B*, by an instrument in writing dated 6th August, promised to pay *C D* "on demand," R4,310-13-3. In the margin of the instrument was written due "30th August," and annexed to *A B*'s signature was the following memo.: "The sum of R4,310-12-6 only, forty-five days from the 5th of August." *Held*, that the instrument was properly stamped as a promissory note payable on demand, and ought to have been admitted in evidence. *Per* PEACOCK, *C.J.*—A promissory note payable on demand ought to be stamped as such, notwithstanding there may be a collateral agreement between the parties that the holder will not present it for a given time, or if paid on demand that the maker shall be entitled to discount. CHANDRAKANT MOOKERJEE *v.* KARTIK CHARAN CHAILE . **5 B. L. R. 103 : 14 W. R. O. C. 38**

3. ——— *Promissory note—Ambiguity.* Where the wording of a promissory note bearing a one-anna stamp appears to be ambiguous as to whether it is payable on demand, the Court will take the evidence of the parties as to the intention, and will then decide whether it is properly stamped. Under such circumstances, the Court will take evidence of usage. BANK OF HINDUSTAN, CHINA, AND JAPAN *v.* SEDGWICK
1 Ind. Jur. N. S. 107

——— **s. 26.**

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.
1 Mad. 217
12 W. R. 376

——— *Refund of stamp duty—Commencement of suit.* *Held*, that, for the purpose of refund of half stamp duty under s. 26 of Act X of 1862, the hearing of a suit in a Small Cause Court commenced when proof of the service of the summons was taken on the day appointed for the hearing; and where proof of the service of the summons had been previously taken, it must be considered as taken at the commencement of the proceedings on the day appointed for hearing. AMIRCHAND JAMNADAS *v.* MAGGAN AMTHU
4 Bom. A. C. 176

——— **s. 27**—*Right to recover on contract only amount covered by stamp where stamp is optional.* Where a written contract liable to an optional stamp is put in evidence by the defendants, the plaintiffs cannot recover a larger amount under it than (if stated) the optional stamp upon the instrument would have been sufficient to cover. In a suit for the recovery of money due under a written contract the defendants admitted that a sum of R6,328-4-0 was due to the plaintiffs, subject to certain deductions which they claimed to be entitled to set off against the plaintiffs' claim. The defendants put in evidence the written contract, the stamp upon

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STAMP ACT (X OF 1862)—*contd.*

——— **s. 27**—*concld.*

which was only sufficient to cover the sum of R5,000. *Held*, that, notwithstanding the admission of the defendant, the plaintiffs could only recover R5,000 in the suit. KISTNASAMY PILLAY *v.* MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS . . . . **4 Mad. 120**

——— **s. 32**—*Appeal on valuation of claim.* Under s. 32, Act X of 1862, an appeal relating to the valuation of a claim can be entertained by the High Court. BASOO MAD FUROSH *v.* HUREE PANDEY . . . . . **11 W. R. 479**

——— **s. 50, sub-s. (2)**—*Jurisdiction of Collector—Offence under Criminal Procedure Code (Act XXV of 1861), ss. 169, 171.* An application was made to a Collector under s. 50, sub-s. (*2*), Act X of 1862, to replace a damaged stamp by a new one. As it appeared that the stamp had been tampered with for fraudulent purposes, the Collector made over the parties to the Magistrate for trial. *Held*, that, the document not having been given in evidence in any proceeding in Court, the Collector was not bound to proceed under ss. 169, 171 of the Criminal Procedure Code. QUEEN *v.* GOUR MOHAN SEN . **3 B. L. R. A. Cr. 6 : 11 W. R. Cr. 48**

——— **Sch A, Art. 1**—*Promissory note for payment of grain.* An instrument in the form of a promissory note for grain should be stamped, under Art. 1 of Sch. A of Act X of 1862, with a stamp of the value of one rupee. LACHIRAM JAYASANGJI *v.* RAMJI BIN SHIVAJI . . **6 Bom. A. C. 107**

——— **Art. 3**—*Petition for a lease.* In a suit for payment of rent for use and occupation of land, where the basis of plaintiff's claim was for a kabuliat, the agreement produced as evidence of the contract, not being the deed of contract itself, was *held* to be not liable to be stamped under Art. 3, Sch. A, Act X of 1862. CHOONEE MUNDUR *v.* CHUNDEE LALL DASS . . . **14 W. R. 334**

Affirming on review s.c. . **14 W. R. 178**

1. ——— **Art. 4**—*Agreement—Bond.* In a suit for breach of contract to cultivate and deliver indigo, for recovery of the amount specified in the contract :—*Held*, that the stamp duty depended on the amount of consideration for the undertaking. DOYLE *v.* MUNDAREE MUNDUL **5 W. R. S. C. C. Ref. 10**

2. ——— **and Art. 15**—*Agreement to supply cotton.* An agreement to supply cotton in consideration of a sum of money received should be stamped under Art. 4, and not under Art. 15, Sch. A, Act X of 1862. SAMSUDDIN SULTAN *v.* RAMJI BHIKA . . . **5 Bom. A. C. 151**

1. ——— **Art. 10**—*Promissory note—Bond.* A promissory note, attested by a witness, does not require to be stamped as a bond under Act X of 1862, Sch. A, Art. 10. The words in that clause "not being a bond, instrument, or writing bearing the attestation of one or more witnesses," referred only to the preceding words, "other order or obligation for the payment of money." Also the

STAMP ACT (X OF 1862)—*contd.*

——— **Art. 10**—*concld.*

words "bearing the attestation of one or more witnesses" apply only to the words "instrument or writing," and not to the word "bond." GLADSTONE *v.* SADOO CHURN DUTT **2 Ind. Jur. N. S. 203**

2. ——— *Promissory note.* In a suit, brought by a joint-stock company in liquidation against a former director of the company, for R27,30,000 on a promissory note, dated the 1st of March, and purporting to be paid on demand, but with the words in pencil "due 4th June" put on it, the same day it was signed, in accordance with an understanding between the defendant and the other directors that they would not press him for payments before the latter date, and signed by the defendant some days after the day it bore date :—*Held*, that a one-anna stamp was not sufficient under Sch. A, Art. 10, of Act X of 1862. EASTERN FINANCIAL ASSOCIATION *v.* PESTANJI CURSETJI . . . **3 Bom. O. C. 6**

3. ——— *Written direction by master to servant for payment of money.* A written direction given by a master to a servant for the payment of money belonging to the former in the hands of the latter was *held* to be not an order for the payment of money within the scope of the terms used in Art. 10, Sch. A, Act X of 1862, as amended by Act XXVI of 1867. PUTBULWANT RAO *v.* FUTTEHOODDEEN **1 N. W. Ed. 1873, 143**

1. ——— **Art. 12**—*Security bonds for costs of appeal to Privy Council.* Security bonds for costs of appeal to the Privy Council come within Art. 12, Sch. A, Act X of 1862, and ought to be executed on a stamp as therein specified. SOONJHAREE KOONWUR *v.* RAMESSUR PANDEY **5 W. R. Mis. 47**

2. ——— *Solehnamah admitting satisfaction of decree—Petition—Agreement—Act XXVI of 1867, Art. 10.* In a suit upon a bond for R40 with interest, the defendant filed a solehnamah admitting that the amount due from him was R25 and agreeing to pay that sum by instalments. *Held*, that the solehnamah was not a petition within the meaning of art. 10, Act XXVI of 1867, but an agreement within the meaning of Sch. A of Act X of 1862, and was liable to a stamp duty of 2 annas as for an instalment bond. MANICK CHUNDER ROY *v.* LALLMON SHEIKH. PUNCHANUN SIRCAR *v.* GUNESH MUNDUL . **8 W. R. 214**

——— **Art. 18**—*Penalty—Obligation for payment of money.* Where the parties to an agreement added to the stipulations which it contained a provision whereby a sum of money was made payable by way of fine or penalty, in the event of the non-performance, at the appointed time, of the work contracted to be done, such a provision was *held* to be in the nature of an obligation for the payment of money, and for the due execution of work within the meaning of Art. 18 of Sch. A of the Stamp Act, X of 1862, and required an optional stamp. COLLINS *v.* DEWAN SINGH . . . . **2 N. W. 465**

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STAMP ACT (X OF 1862)—*contd.*

——— **Art. 42**—*Lease—Instrument purporting to create relation of landlord and tenant.* Where a written instrument purported to create the relation of landlord and tenant for five years, the plaintiff's (lessor's) tenure being that of a mirasidar, that is, an hereditary tenancy under Government, determinable on default in payment of the proportion of the Mothee Faisal assessment payable for the land:—*Held*, that the written instrument was a lease, and was not liable to be stamped, by virtue of the exemption of Art. 42, Sch. A of Act X of 1862. SAMINATHAIYAN *v.* SAMINATHAIYAN . . . . . **4 Mad. 153**

1. ——— **Art. 43**—*Sanad to gomashta to collect rents.* A sanad, which authorized a gomashta to collect rents, and to sue for them, requires to be stamped. Such a sanad required a four-rupee stamp under Art. 43, Sch. A of Act X of 1862. RAGHU NANDAN THAKUR *v.* RAMCHARAN KAPALI **1 B. L. R. F. B. 55 : 10 W. R. F. B. 39**

2. ——— *Instrument operating as power-of-attorney.* *J M* executed in favour of *P* an instrument authorizing *P* to recover, by suit or otherwise, from Messrs. *W* and *N*, a sum of R22,500 (or thereabouts) which contained this clause: "From whatever sum *P* may recover from *W* and *N* he is to pay himself the sum of R8,640 which is due to himself, and also the expenses he may incur in making recovery, and he is to hand over the surplus to me." *Held*, that the above instrument operated as a power-of-attorney, and not as an assignment, and was properly stamped under Act X of 1862, Sch. A, Art. 43, with a stamp of R4. PESTANJI MANCHARJI WADIA *v.* MATCHETT **7 Bom. A. C. 10**

——— **Art. 54**—*Deed of partition—Each sharer's copy of in instrument.* Under Act X of 1862, Sch. A, Art. 54, each sharer's copy meant each sharer's part as exemplification of an instrument executed in duplicate, triplicate, etc. Where a document, bearing the date June 1863 and purporting to be a deed of partition between two brothers, was unstamped:—*Held*, that it should be stamped as each sharer's copy of an instrument under Act X of 1862, Sch. A, Art. 54. NARAYAN RAGHUNATH *v.* KASHINATH . **I. L. R. 8 Bom. 299**

1. ——— **Sch. B, Art. 11**—*Suit for declaration of title to portion of land paying revenue to Government—Interest in land.* A suit for the declaration of title to a fractional share in a zamindari paying revenue to Government is not a suit "for lands forming one entire mehal or a specific portion thereof with a defined jumma:" such share being "an interest in land" should be valued according to the provisions of note (*e*), Art. 11 Sch. B, Act X of 1862. RAJ CHUNDER ROY *v.* CHUNDEE CHURN NAIK . . . . **8 W. R. 437**

2. ——— *Time for obtaining copy of decree.* The rule of circular No. 31, dated 3rd October 1864, that the time allowed for obtaining a copy of judgment or decree shall not begin to count till the whole of the requisite pieces

STAMP ACT (X OF 1862)—*concld.*

——— **Sch. B, Art. 11**—*concld.*

of stamp paper are put in, was held to extend also to plain paper filed under the general rule at end of Sch. B, Act X of 1862, when the copy cannot be comprised within the stamp paper put in. CHUMUN CHOWDHRY *v.* ALI AZIM . . **9 W. R. 138**

3. ——— *Suit for resumption—"Revenue."* A suit to resume lands as lakhiraj fell in respect of stamp duty under cl. (*d*), Art. 11, Sch. B of Act X of 1862. The term "revenue" in cl. (*b*) must be read as meaning revenue or rent, whether to Government or to a zamindar. GOPEE MOHUH MOJOOMDAR *v.* MACKINTOSH **9 W. R. 395**

STAMP ACT (XXVI OF 1867).

See COURT FEES ACT, XXVI OF 1867.

STAMP ACT (XVIII OF 1869).

See GENERAL CLAUSES CONSOLIDATION ACT (I OF 1868), S. 3 . **7 Mad. Ap. 9**

See STAMP DUTY.

1. ——— *Insufficiency of stamp.* The Civil Court is authorized, under Act XVIII of 1869, to receive the proper amount of stamp which should have been affixed on the plaintiff's pottah under the law in force when it was executed. MAHOMED RIJAH *v.* COLLECTOR OF CHITTAGONG **6 B. L. R. Ap. 117 : 15 W. R. 116**

2. ——— *Agreement executed both in England and India—Liability to stamp duty—Admissibility in evidence.* An agreement was first executed in England by *D* and *E*, and by *A*, the senior partner in the firm, and stamped with the stamp required by English law for agreements executed in England, and it was subsequently executed in India by *B* and *C*, the other two partners, but not stamped with an Indian stamp. *Held*, that the agreement was liable to Indian stamp duty, and was not admissible in evidence unless and until the proper stamp duty and penalty under Act XVIII of 1869 were paid. OAKES *v.* JACKSON **I. L. R. 1 Mad. 134**

3. ——— *Orders on tenants to pay rent to person to whom landlord has executed release.* Orders upon tenants to hold themselves responsible to a particular person to whom a release has been made by their landlord are not documents which the law requires to be stamped, and ought not to be rejected as evidence on the ground of their not being stamped. BUKSHEE KUNNEE LALL *v.* THAKOORNATH SAI . . . **25 W. R. 80**

1. ——— **s. 3, sub-s. (5)**—*Bond—Definition of bond.* The definition of the word "bond" in the Stamp Act of 1869 is not exhaustive; the word "includes" in sub-s. 5 of s. 2 has an extending force, and does not limit the meaning of the term to the substance of the definition. *In the matter of the petition of* NASIBUN. NASIBUN *v.* PREOSUNKER GHOSE . . **I. L. R. 8 Calc. 534**

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STAMP ACT (XVIII OF 1869)—*contd.*

——— s. 3—*contd.*

2. ——— *Entry of loan in account books.* Entries of loans in account books cannot be treated as bonds within the meaning of sub-s. (5) of s. 3 of Act XVIII of 1869. QUEEN *v.* BULDEO . . . . . **2 N. W. 453**

3. ——— sub-s. (11)—*Conveyance.* An instrument which purports to convey two or more properties for a sum of money, composed of items described in the instrument as the values of those properties is simply a deed of sale coming under the definition of " conveyance " in Act XVIII of 1869, s. 3. The stamp duty, properly leviable upon such an instrument, should therefore be calculated upon the aggregate sum specified therein, and not upon the various items composing that sum. *In re* TUKARAM HARI ATRE . . **10 Bom. 354**

4. ——— *Sale-certificates—Conveyance—Mad. Act VIII of 1845, ss. 35 and 40.* Certificates of sale issued under ss. 35 and 40 of Madras Act VIII of 1865 are not conveyances subject to stamp duty. . ANONYMOUS. **8 Mad. 112**

5. ——— s. 3, sub-s. (15)—*Lease—Contract to pay sum of money in consideration of a grant.* An engagement by a proprietor of land to pay to a superior a sum of money in consideration of a grant of the right to farm dues, in the nature of revenue, is a " lease " within the meaning of the General Stamp Act, 1869. COLLECTOR OF TANJORE *v.* RAMASAMIER . . . **I. L. R. 3 Mad. 342**

6. ——— *Second lease altering first stamped and registered.* After a complete lease has been executed, stamped, and registered, if another document is prepared and executed with a view to alter the first, and substitute new terms so far as the rent is concerned, it requires, under the Stamp Act, to be itself stamped provided for a lease. BYJNATH DUTT JHA *v.* PUTSOHEE DOBAIM . . . **20 W. R. 36**

7. ——— sub-ss. (18) and (26) and Sch. I, Art. 10—*Mortgage—Pledge by letters of assignment of property not in esse.* *M*, the manager of an indigo concern, appointed under s. 243 of Act VIII of 1859, without communicating with *A* and *B*, mortgagees of the concern, and with only the verbal sanction of the Court, applied to the plaintiffs for money, and on the 26th April the plaintiffs wrote to *M* that they would make advances to the extent of R50,000, upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment for *M's* signature, which he duly signed, and returned to the plaintiffs on the 3rd May. This document bore a 2-rupee stamp. In September and October *M* obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment which also bore 2-rupee stamps. The indigo when manufactured was claimed by *A* and *B* under their mortgage, and their claim being resisted by *M*, who set up against them the plaintiff's rights under the letters of assignment, *A* and *B* brought a suit to enforce the provisions of their mortgage-deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued *A*, *B*, *M*, and the holders for sale to establish their first charge in respect of their advances to *M* upon 360 maunds of the indigo on the strength of their letters of assignment. *Held, per* GARTH, *C.J.*, and MACPHERSON, *J.*, that the letters of assignment to the plaintiffs were not mortgages within the definition of the Stamp Act XVIII of 1869, and that the proper stamp to be affixed to such document was a stamp of 8 annas. MORAN *v.* MITTU BIBEE **I. L. R. 2 Calc. 58**

8. ——— sub-s. (25)—*Promissory note insufficiently stamped—Express contract.* A suit on a promissory note payable on demand which was not stamped was *held* to have been rightly dismissed, the note being inadmissible as evidence with reference to Act XVIII of 1869, s. 3, sub-s. 25. *Held*, that in such a case the plaintiff, if he recovers at all, must do so on the contract actually made and not on any implied contract. ANKUR CHUNDER ROY CHOWDHRY *v.* MADHUB CHUNDER GHOSE **21 W. R. 1**

9. ——— *Promissory note—Bond.* The defendant, having borrowed R50 from the plaintiff, gave him, on the 9th November 1878, an instrument, which was in effect as follows : " *B* (defendant) writes this rukka in favour of *A* (plaintiff) for R50 cash received, to be repaid on the 13th November 1878 : in the event of default, he shall pay interest at R1 per diem. *Held* (STUART, *C.J.*, dissenting), that such instrument was a " promissory note " within the meaning of the Stamp Act of 1869, and not a " bond " or " an agreement not otherwise provided for," within the meaning of that Act. BANSIDHAR *v.* BU ALI KHAN **I. L. R. 3 All. 260**

10. ——— and Sch. II, Art. 5—*Note or memorandum acknowledging debt—Promissory note—Insufficiently stamped document, admissibility in evidence of.* The plaintiff sold and delivered certain goods to the defendant. The defendant gave the plaintiff, in respect of the price of such goods, the following instrument : " Agra, 14th November 1877. Due of *K*, cloth merchant, the sum of R200 only, to be paid next January 1878." This instrument was stamped with a one anna adhesive stamp. The plaintiff claimed in the present suit from the defendant R200, and interest on that amount at 12 per cent. per annum from the 14th November ber 1877 to the date of suit. *Held*, by STUART, *C.J.*, and PEARSON, OLDFIELD, and STRAIGHT *JJ.*, treating the suit as one for a debt, that although such instrument was not admissible in evidence as a promissory note, as it was insufficiently stamped, it was nevertheless admissible as proof of an acknowledgment of such debt. *Per* SPANKIE, *J.*, treating the suit as based upon a promissory note, that such instrument, being insufficiently stamped, was not admissible in evidence. KANHAYA LALL *v.* STOWELL **I. L. R. 3 All. 581**

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STAMP ACT (XVIII OF 1869)—*contd.*

——— s. 3—*concld.*

See BENARSI DAS *v.* BHIKARI DASS
I. L. R. 3 All. 717

GOPAL CHAND MARWAREE *v.* MOHOKOOM KOOAREE . . . . **I. L. R. 3 Calc. 314**

and AKBAR *v.* KHAN . **I. L. R. 7 Calc. 256**

——— s. 4—*Document executed in foreign territory.* An unstamped instrument executed in foreign territory, and valid under the law of the place of execution, is admissible as evidence in Court of British India, provided it does not affect any property situated in British India (Act XVIII of 1869, s. 4). NARAYAN SADASHIV *v.* BAPUJI BALAL . . . . **7 Rom. A. C. 140**

——— s. 9—*Account stated—Interest*—Under Act XVIII of 1869, s. 9 a one-anna stamp is the proper stamp for a document containing an account stated, and stipulating for payment of interest. GIRDHAR NARAN *v.* UMAR AJU
I. L. R. 4 Bom. 326

1. ——— s. 18—*Admission in written statement and evidence. Quœre:* Although there have been decisions in the English Courts upon the Stamp Act which support the contention that a defendants' written statement and deposition may contain such an admission as renders it unnecessary for the plaintiff to put the written contract in evidence, yet do not the words of s. 18 of Act XVIII of 1869 prevent such a contention? ANKUR CHUNDER ROY CHOWDHRY *v.* MADHUB CHUNDER GHOSE
21 W. R. 1

2. ——— and Sch. I, Art. 14, and Sch. II, Art. 36—*Admissibility of unstamped document for collateral purpose.* The plaintiff, as administrator of *D*, sued to recover from the defendants the sum of R3,000, alleging that, in February 1878, the said sum had been entrusted to defendant Nos. 1 and 2 for investment on *D's* account, and had been advanced by them as a loan to defendant No. 3. The defendants alleged that the money was originally the property, not of *D* but of the plaintiff himself; that he had made it over as a gift to his daughter *P*, by whom it had been lent to defendant No. 3 and that defendant No. 3 had duly repaid it to *P*. In the defendants' written statement it was alleged that the gift to *P* had been made in the month of February 1878, and evidence to this effect was given at the trial. At the trial, however, the defendants also alleged that in July 1878 the plaintiff had executed an instrument of gift of R3,000 to *P* and they produced a document, dated 3rd July 1878, purporting to be signed by the plaintiff, whereby he made over R3,000 to *P*, of which R1,000 was to be held by *P*, in trust for *D* during *D's* life, and to be paid back to plaintiff on *D's* death, and the remaining R2,000 were to be the property of *P* absolutely. When tendered in evidence, the document was objected to as being unstamped, and therefore inadmissible. *Held*, that the document, though unstamped, was admissible in evidence on the ground that the purpose for which it was tendered was collateral to the object

STAMP ACT (XVIII OF 1869)—*contd.*

——— s. 18—*concld.*

of the document, and that its admission did not involve giving effect to it as operative between the parties to it. RUSTOMJI EDULJEE CROOS *v.* CURSETJEE SORABJEE CROOS . **I. L. R. 4 Bom. 349**

3. ——— *Document referred to as basis of suit inadmissible as being unstamped—Admissibility of other evidence.* Even if a document is not admissible as being unstamped, the plaintiff might recover on such part of the case as he could make out by other evidence (provided it is recoverable with reference to the law of limitation) notwithstanding that he had in his plaint referred to such document as the basis of his suit. NOOR BIBEE *v.* RUMZAN . . . **4 W. R. 198**

——— s. 19.

See STAMP ACT, 1879, s. 26.
I. L. R. 3 Mad. 342

——— s. 20.

See APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT BELOW—UNSTAMPED DOCUMENTS.
I. L. R. 4 Calc. 213

See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL—EVIDENCE, MODE OF DEALING WITH.
10 Bom. 406

1. ——— *Hundi—Insufficient stamp—Evidence—Penalty.* Insufficiently-stamped hundies cannot be received in evidence even on payment of a penalty under s. 20 of Act XVIII of 1869. MOTHOORA MOHUN ROY *v.* PEARY MOHUN SHAW . . **I. L. R. 4 Calc. 259**
2 C. L. R. 409

2. ——— *Bond written partly on one and partly on another paper—Deficiency in stamp.* A bond written partly on one and partly or another stamp paper the two aggregating the proper stamp leviable, was tendered in evidence without the certificate required by s. 49 of the Stamp Act. *Held*, that there was a deficiency in the stamp on the bond, and therefore a liability to the penalty under s. 20. The deficiency must be calculated to be equivalent to the difference between the value of the stamp on one of the papers, and the whole value chargeable. ANONYMOUS . **7 Mad. Ap. 36**

3. ——— *Lost deed proved to be unstamped.* In cases where a lost deed is shown not to have been stamped, the Court should require the same money to be paid, as if the deed itself were produced. HARAN CHUNDER BHOOREE *v.* RUSSICK CHUNDER NEOGY . **20 W. R. 63**

4. ——— and s. 22—*Admission of unstamped document on payment of penalty.* Where a Subordinate Judge admitted an unstamped document after payment of stamp duty and penalty under Act XVIII of 1869, s. 20, and endorsed on it a certificate that the proper stamp had been levied, but found out afterwards that the original omission was owing to an intention to evade payment of

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STAMP ACT (XVIII OF 1869)—*contd.*

——— s. 20 and s. 22—*concld.*

stamp duty:—*Held*, that the certificate was not such as was contemplated by s. 20, and did not make the document admissible; and that the Judge ought, under s. 22, to have impounded the document and sent it to the Collector. PROSUNNO NATH LAHIREE *v.* TRIPOORA SOONDUREE DABEE **24 W. R. 88**

——— s. 24 and ss. 29 and 44—*Evasion of stamp law—Promissory note not duly stamped.* That which the Magistrate has to adjudicate upon on a prosecution coming before him, under s. 24 of the Stamp Act, is whether an offence against the Act has been committed, and whether the prosecution has been brought before him by the proper officer. Any person who makes himself liable by committing an offence within the terms of s. 29 and the following sections, and who is prosecuted by the Collector or other officer duly empowered, may be convicted by the Magistrate under s. 44. If an instrument called a promissory note or other document of that kind and as such liable to the duty imposed by the Act is not duly stamped the person subject to penalty is the person who makes it and not the person in whose favour it is made. The Magistrate of the district should not himself try a case in which he instituted the prosecution as Collector. QUEEN *v.* NADI CHAND PODDAR . . . . . **24 W. R. Cr. 1**

1. ——— s. 28—*Document requiring anna stamp—Stamp affixed subsequently to execution of document.* A document which by law requires a one-anna adhesive stamp to be affixed must be received in evidence, if, at the time of its being tendered, it bears the requisite stamp, even though such stamp has been affixed subsequently to the execution of the document. BHAURAM MADAN GOPAL *v.* RAMNARAYAN GOPAL . . . . . **12 Bom. 208**

NOOR BIBEE *v.* RUMZAN . **24 W. R. 198**

KALI CHURN DAS *v.* NOBO KRISTO PAL **9 C. L. R. 272**

2. ——— *Power to receive in evidence unstamped note on payment of penalty.* Under s. 28 of Act XVIII of 1869, a Court has no power to admit in evidence an unstamped promissory note (payable on demand or otherwise) upon the payment of the stamp duty and the penalty laid down in s. 20 of that Act. DOSABHAI KAVASJI *v.* KHERBADJI HORMASJI . **7 Bom. O. C. 180**

3. ——— *Promise to pay money and grain—Promissory note.* A document which contains a promise to pay money and a certain quantity of grain is not a promissory note for the purpose of the General Stamp Act, 1869, s. 28. MUTTU CHETTI *v.* MUTTAN CHETTI **I. L. R. 4 Mad. 296**

4. ——— *Promissory note—Admissibility in evidence.* In a suit brought on the following document, dated 25th October 1869: "Whereas I, defendant, have borrowed R1,500 from you without interest without a bond, hence I declare that I shall repay, on or before 15th Falgun,

STAMP ACT (XVIII OF 1869)—*contd.*

——— s. 28—*concld.*

the whole amount as one sum and take back this chitta: should I fail to repay the amount in question on the above date, I will pay interest on the same,"—it was objected that, the document being unstamped under s. 3, Act X of 1862, the Stamp Act in force at the date of its execution, it was inadmissible in evidence, and it was contended for the plaintiff that it was admissible on payment of the penalty. The judge applied s. 28, Act XVII of 1869, and held he had no power to receive it on payment of the penalty. *Held*, that the Judge was bound to comply with Act XVIII of 1869, and was therefore right in refusing to receive the document. *Held*, also, that the document was a promissory note within s. 28, Act XVIII of 1869. NANDAN MISSER *v.* CHATTER BATI . . . . . **13 B. L. R. Ap. 33**

S.C. NUNDUN MISSER *v.* CHITTUR BUTEE **21 W. R. 446**

5. ——— *Promissory note—Insufficiency of stamp.* The following document bearing a one-anna stamp, was admitted by the Court of first instance and accepted by the lower Appellate Court as bearing a sufficient stamp: "My dear sister *M*—Be it known that R750 on account of the former note of hand and R225 of to-day's date, amounting in all to R975, are due to you by me. I promise to pay you this sum in two months. I am already negotiating for a loan from another place. Rest assured no harm will come to your money, and for your satisfaction and security this note of hand is given to you. Keep this as a voucher and consider the former note of no use. At the time of payment this note is to be returned to me." *Held*, that the document was a promissory note, and should have borne a stamp of 12 annas. The deficiency in the stamp could not have been supplied when the document was offered in evidence MAKBUL AHMAD *v.* IFTIKHARUNNISSA BEGUM. **7 N. W. 124**

6. ——— *Document on one-anna stamp—Admissibility in evidence on payment of penalty.* A promissory note upon a one-anna stamp dated in August 1870 provided for the repayment of the amount mentioned in it on or before the 12th July 1871. In a suit upon the promissory note:—*Held*, that it was not receivable in evidence upon payment of a penalty. CHINNA PERUMAL NAICKER *v.* ANNAMAL . . **7 Mad. 361**

1. ——— s. 29—*Prosecution by Collector—Intention to evade payment of stamp-duty.* A Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider whether a person prosecuted under s. 29, Act XVIII of 1869, had any intention to defraud by evading payment of stamp duty. EMPRESS *v.* DWARKANATH CHOWDHRY . **I. L. R. 2 Calc. 399**

2. ——— *Intention to evade payment of duty—Donor and donee of deed of gift.* Intention to evade payment of stamp duty is not an essential ingredient in the offence described in s. 29 of Act XVIII of 1869. *Held*, that the donor

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STAMP ACT (XVIII OF 1869)—*contd.*

——— s. 29—*concld.*

under a deed insufficiently stamped was properly convicted, but that the donee had committed no offence under the section. ANONYMOUS
6 Mad. Ap. 5

——— **ss. 34 and 41 and Sch. II, Arts. 5 and 20**—*Collateral instrument—Policy of Insurance—Assignment and re-transfer by endorsement.* A policy of insurance bore three endorsements: the first, an assignment of all the right, title, and interest of the assured to the P Bank; the second, a retransfer from the P Bank to the assured, all claims having been satisfied; the third, an assignment by the assured similar to the first assignment to Messrs. *B R S & Co. Held,* by MARKBY and AINSLIE, *JJ.*, that the first and third endorsements were liable, as collateral instruments under Sch. II, Art. 20, of the General Stamp Act, to a stamp of one rupee, and that the second endorsement was not chargeable with stamp duty. *Held,* by GARTH, *C. J.*, that none of the endorsements were chargeable with duty. *In the matter of* THOMPSON'S POLICY . . . . **I. L. R. 3 Calc. 347**

——— **ss. 39-40**—*Promissory note—Evidence.* A promissory note, not payable on demand, executed on unstamped paper, was brought to a Collector, under s. 39 of Act XVIII of 1869, for adjudication as to the proper stamp, who, upon the payments provided in that section having been made, made the endorsement thereon provided in that section. *Held,* that the irregularity of the Collector in making such endorsement did not render such promissory note inadmissible in evidence. GRIDHARI DAS *v.* JAGAN NATH
I. L. R. 3 All. 115

——— **s. 43.**

See COLLECTOR . **I. L. R. 2 All. 806**

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—STAMP ACT, 1869.
I. L. R. 3 Calc. 622

1. ——— **Sch. I and Sch. II, Art. 11**—*Bond for payment of money.* The plaintiffs drafted the following letter, dated 5th June 1871, and sent it to the defendant for signature: "I have this day sold to you 500 to 700 cases of first quality of hogs' lard of my manufacture and mark, at R43 per case of eight tin of ten seers each, or to bazar maunds nett, as usual, delivery to be given and taken in all twelve months, as it is prepared, by instalments of forty to sixty cases at a time from my manufactory, commencing from this day. Cash on delivery of each lot. I engage not to sell any hogs' lard to any party besides yourselves, nor to make any shipments during the term of this contract without first obtaining your consent in writing, or I will render myself liable to yourselves to a penalty of R5,000 by way of liquidated damages, without prejudice to your others rights. Should I fail to deliver the hogs' lard to you according to this contract, and should you fail to take delivery in any month of any of the instalments of hogs' lard when ready and after I have given you notice in writing, you must render yourselves similarly liable to a penalty of R5,000 as and by way of liquidated damages." This latter was signed by the defendant, and, as the plaintiffs alleged, formed the contract between them. The letter bore a stamp of one anna. In an action for a breach of the contract, it was tendered in evidence by the plaintiffs, and objection was taken to it that it was insufficiently stamped and that it required an *ad valorem* stamp as being a bond for the payment of money under Act XVIII of 1869, Sch. I. *Held,* that it was a document which required an 8-anna stamp only under Art. 11 of Sch. II of the Act, and the document was admitted on payment of the stamp and penalty. ROBERT AND CHARRIOL *v.* SHIRCORE . **7 B. L. R. 510**

2. ——— *Letter assigning chose in action out of British India.* A letter by which a chose in action (a debt) was equitably assigned does not require a stamp where the chose in action is not in British India at the time of the assignment. MEGJI HANSRAJ *v.* RAMJI JOITA
8 Bom. O. C. 169

1. ——— **s. 43, Art. 15**—*Conveyance—Shares in public company—"Amount."* No *ad valorem* stamp duty is payable under Act XVIII of 1869 upon a conveyance where the consideration consists of shares in a public company made over to vendor. The word "amount" in Art. 15, Sch. I of that Act, signifies the sum total, or amount of money, forming the consideration, and the words "or secured" apply only to cases of mortgages and the like, not to an out-and-out conveyance. *In the matter of* PORT CANNING LAND COMPANY
16 W. R. 208

2. ——— *Conveyance—Indemnity bond.* Where a document, purporting to be a conveyance, and for only one consideration, contains word which merely express, though very informally, the usual covenants for title which every properly-drawn English conveyance contains, those words cannot be considered as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to stamp duty to which it is liable as a conveyance. ANONYMOUS . **I. L. R. 1 Mad. 133**

1. ——— **Sch. II, Art. 5**—*Adjustment of account.* An adjustment of account is not admissible in evidence unless stamped with a one-anna stamp. TARINEY CHURN NANDY *v.* ABDUR ROHOMAN
2 C. L. R. 346

2. ——— *Balance of running account.* In a running account, a balance brought forward from the close of a previous year is not to be considered a new balance requiring a fresh stamp; Act XVIII of 1869, Sch. II, Art. 5, providing for one stamp only to be affixed in such a case. INDRA CHAND ASWAL *v.* KALEE DOSS MITTER
24 W. R. 439

3. ——— *Note or memorandum balancing an account.* On the 9th October 1875

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STAMP ACT (XVIII OF 1869)—*contd.*

——— **Sch. II, Art. 5**—*concld.*

the book containing the accounts between the plaintiff and defendant kept by the plaintiff was examined by the parties and a balance was struck in the plaintiff's favour which was orally approved and admitted by the defendant. In a suit by the plaintiff for the amount of this balance on the basis of the account book :"—*Held*, that, the entry of the balance struck not being signed by the defendant, was not a note or memorandum of the kind mentioned in Art. 5, Sch. II of Act XVIII of 1869, and did not therefore require to be stamped. NAND RAM *v.* RAM PRASAD . **I. L. R. 2 All. 641**

4. ——— *Hath-chitta—Balance of accounts.* A *hath-chitta*, drawn up by only one of two parties to a money transaction, and purporting to represent the balance of accounts between them but not assented to in any way by the other party, is not such a document as is contemplated by Art. 5, Sch. II of the General Stamp Act, and does not require to be stamped. KOONJO MOHUN DOSS *v.* KRISHNA CHUNDER SHAHA **25 W. R. 361**

5. ——— *Stamp on entry in hath-chitta.* When an account in a *hath-chitta* has two sides to it, the one headed " amount advanced " and the other headed " amount received," and the amount actually due on such account varies from time to time, and depends upon the relation of the amount advanced to the amount received, and the signature or seal of the borrower is affixed to each entry showing an advance, such an entry is not a note or memorandum whereby any debt is acknowledged to be due, and does not require a stamp under Art. 5, Sch. II of Act XVIII of 1869. BROJENDER COOMAR *v.* BROMOMOYE CHOWDHRANI **I. L. R. 4 Calc. 885 : 3 C. L. R. 520**

BROJO GOBIND SHAHA *v.* GOLUCK CHUNDER SHAHA . . . . **I. L. R. 9 Calc. 127**

——— **Art. 5 and Art. 11.**

See APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED BY COURT BELOW—UNSTAMPED DOCUMENTS . **I. L. R. 4 Calc. 213**

——— **Art. 7**—*Bank memorandum—Receipt.* A bank memorandum informing one of their customers that money has been paid to his account by a third person, and has been credited to that account, does not require to be stamped under Art. 7, Sch. II of Act XVIII of 1869. *In the matter of* ACT XVIII OF 1869, *and of the* UNCOVENANTED SERVICE BANK **I. L. R. 4 Calc. 829 : 3 C. L. R. 597**

1. ——— **Sch. II, Art. 11**—*Agreement to remunerate pleader for his services.* Where a pleader is to receive a remuneration under a special agreement contained in his vakalatnama, or in a separate document, the document containing the agreement must bear a stamp of adequate value. NUTHOO LALL *v.* BUDREE PERSHAD **3 Agra 286**

STAMP ACT (XVIII OF 1869)—*contd.*

——— **Sch. II, Art. 11**—*concld.*

2. ——— **and s. 14**—*Agreement—Bond.* When an instrument consisted of two parts the first containing a promise to repay with interest a sum of R12-8-0 and the second a further promise to give a quantity of grain :—*Held*, that, as an agreement, the instrument required a stamp of 8 annas under s. 14 of Act XVIII of 1869 and Sch. II, Art. 11 ; but that, as a simple money bond, it was properly stamped with a stamp of 2 annas, and that, if the promise abandoned his claim for grain, he could recover upon it the principal sum advanced with interest. CHIMNAJI *v.* RANU **I. L. R. 4 Bom. 19.**

3. ——— *Bond—Agreement with covenant sounding in damages.* An instrument containing a covenant to do a particular act, the breach of which is to be compensated in damages, is not a bond, and requires an 8-anna stamp only. Remedies on such an instrument and on a bond discussed. GISBORNE & CO. *v.* SUBAL BOWRI **I. L. R. 8 Calc. 284 : 10 C. L. R. 219**

4. ——— **and Sch. I, Art. 5**—*Bonds for performance of contracts of public works.* A contract taken by the Department of Public Works for the execution of works falls within Art. 11, Sch. II, Act XVIII of 1869, and must bear a stamp of 8 annas. Where a contractor's sureties give bonds for the performance by him of his agreement, the bonds are chargeable with duty under Art. 5, Sch. I. ANONYMOUS . **13 W. R. 353**

5. ——— *Agreement.* A postscript to a document contained a stipulation that the defendant should return two promissory notes deposited with him when a certain house was given back to him in good order. *Held*, that the document required a stamp of 8 annas under Act XVIII of 1869, Sch. II, Art. 11. MOTILAL *v.* MUNSHOOK KURAMCHAND . **I. L. R. 4 Bom. 328**

6. ——— *Receipt for money and stipulating payment of interest.* An instrument which acknowledged receipt of a sum of money and provided for the payment of interest at a specified rate per mensem was *held* to be an agreement falling within Act XVIII of 1869, Sch. II, Art. 11. FERRIER *v.* RAM KALPA GHOSE **23 W. R. 403**

——— **Sch. II, Art. 13**—*Power of attorney under Registration Act, 1871, s. 33.* For a power-of-attorney executed under the provisions of s. 33 (*a*) of the Registration Act of 1871 (Act VIII of 1871), a stamp of 8 annas is sufficient under Art. 13, Sch. II of the General Stamp Act (XVIII of 1869). *In re* KESHAV KASHINATH . **9 Bom. 43**

——— **Art. 15**—*Schedule appended to deed of sale—Collateral instrument.* A schedule appended to a deed of sale does not require to be stamped under the provisions of Act XVIII of 1869. ANONYMOUS . . . . . **6 Mad. Ap. 36**

1. ——— **Art. 32**—*Power-of-attorney.* An instrument authorising a person to receive on behalf of another such sums as should become due in the couse of the execution of a certain work is not

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STAMP ACT (XVIII OF 1869)—*concld.*

——— **Art. 32**—*concld.*

an assignment of money, but a power-of-attorney, and is covered by a stamp of R8, whatever may be the amount recoverable under it. BHAGVANDAS KISHORDAS *v.* ABDUL HUSEIN MAHOMED ALI
I. L. R. 3 Bom. 49

2. ——— *Vakalatnama.* Vakalatnama authorising a pleader to receive, during the course of a suit which he has been empowered to conduct, money or documents receivable by his client in the ordinary course of such suit or in consequence of the order or decree of the Court in such suit, does not require a stamp under XVIII of 1869. ANONYMOUS **I. L. R. 3 Calc. 767**

S.C. *In the matter of* ACT XXIII OF 1869
3 C. L. R. 13

——— **Art. 38**—*Instrument of transfer.* The accused was prosecuted under Act XVIII of 1869, s. 29, for executing a document on insufficiently stamped paper. The document recited that "whereas *A* and *B* have sold to me 2 gundas 3 cowries of land under a kobala, dated the 9th of Jeyt 1283, in lieu of a consideration of R695, and whereas I have returned to the vendors in all 4 cottahs of land worth about R25, and whereas in lieu of the said land the said vendors have given me 4 cottahs of zerait land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me, the purchaser; hence I have executed this chitti by way of conveyance or deed of exchange which may be of service when required." This document bore a stamp of 8 annas, and it was executed only by the accused and presented by him for registration. *Held*, that the document was an instrument of transfer within the meaning of Art. 83, Sch. II, Act XVIII of 1869. EMPRESS *v.* DWARKANATH CHOWDHRY . **I. L. R. 2 Calc. 399**

STAMP ACT (I OF 1879).

See STAMP DUTY.

——— **s. 2, cl. 13**—*Specified property.* An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement. *Held*, that the fund intended to be created under the agreement was not "specified property," within the meaning of s. 2, cl. 13 of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46 . **I. L. R. 11 Mad. 216**

——— **s. 3.**

See PROMISSORY NOTES, FORM OF.
I. L. R. 16 Mad. 283

1. ——— *Hundi stamped with adhesive stamps—Admissibility in evidence—"Duly stamped."* The words "duly stamped" in s. 3 of the Stamp Act signify "stamped or written upon paper bearing an impressed stamp." GISBORNE & Co. *v.* SUBAL BOWRI
I. L. R. 8 Calc. 284 : 10 C. L. R. 219

STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*contd.*

2. ——— **Sub-s. (4)**—*Bond—Promissory note.* Where an instrument bearing the date the 24th September 1881, stamped with an adhesive stamp of 1 anna, and attested, recited that an account was made up of the principal and interest due on a former bond executed by the defendant to the plaintiff, and that a certain sum was found due at the date of the instrument, the defendant promising to pay interest at a certain rate on the sum thus found due and pay the principal on demand:—*Held*, that the instrument was a bond within the definition given in Act I of 1879, and should be stamped accordingly. BALKRISHNA TRIMBAK *v.* GOVIND PAND NAIK . . **I. L. R. 8 Bom. 297**

3. ——— *Agreement—Bond—Loan of grain in consideration of repaying a larger measure of grain.* An attested instrument, in which the obligor states that he borrowed a certain quantity of grain from the obligee and agreed to repay it at a future time in greater quantity, is a bond within the meaning of s. 3 (4) (*b*) of Act I of 1879, although the instrument is silent as to the money value of the grain. Where the value of such an instrument was ascertained to be less than R10, it was *held* to be properly stamped as a bond with a stamp of 2 annas. MAGANDAS KHEMCHAND *v.* RAMCHANDRA HIRAJI . **I. L. R. 7 Bom. 137**

4. ——— *Bond. A* executed a document, by which he promised to pay on demand R16 to *B*. The writer of the document signed the document as writer, for the purpose of attesting *A's* signature. *Held*, that the document was liable to stamp duty as a bond. REFERENCE UNDER STAMP ACT, s. 46. . **I. L. R. 10 Mad. 158**

5. ——— *Bond—Contract for personal service.* The defendant signed an agreement in England with a Raliway Company whereby he contracted to serve the Company exclusively for four years in India under a penalty of £100. The defendant, having come to India at the expense of the Company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent. *Held*, that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond. MADRAS RAILWAY CO. *v.* RUST . **I. L. R. 14 Mad. 18**

6. ——— *Bond. R* executed a document, by which he promised to pay on demand R10-12-0 with interest to *S R*. The writer of the document and some others signed the document as witnesses. *Held*, that the document was a bond and liable to stamp duty as such. REFERENCE UNDER STAMP ACT, s. 49
I. L. R. 13 Mad. 147

7. ——— *Khata in the name of the debtor, but in the handwriting of another—Bond—Acknowledgment.* A khata in the name of a debtor acknowledging the receipt of the amount advanced and bearing the signature of the writer

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STAMP ACT (I OF 1879)—*contd.*

———— s. 3—*contd.*

of the khata as writer of it merely, *held* to be an acknowledgment only, and not a bond within the meaning of s. 3, sub-s. 4 (*b*), of the Stamp Act (I of 1879). DULABH VANMALI *v.* REHMAN JAMAL
I. L. R. 14 Bom. 511

8. ———— and s. 61—*Acknowledgment of debt in writing—Attestation by witnesses—Bond.* Documents which are in form acknowledgments only are not converted into bonds, as defined in s. 3 sub-s. 4 (*b*), of the Stamp Act (I of 1879), merely because they contain memoranda as to the rate of interest at which the loan is made and are attested by witnesses. No document can be a bond within the above section, unless it is one which by itself creates an obligation to pay the money. HIRA LAL SIRCAR *v.* QUEEN-EMPRESS
I. L. R. 22 Calc. 757

9. ———— *Bond—Promissory note—Attestation by witness.* A document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest is not "attested by a witness" within the meaning of cl. (*b*) of sub-s. 4 of s. 3 of Act I of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document, that the document was correct and was written by his pen. REFERENCE UNDER STAMP ACT, s. 49.
I. L. R. 17 All. 211

10. ———— and Sch. I, Art. 5—*Court Fees Act, Sch. II, Art. 1 (b)—Petition to withdraw suit—Agreement—Bond.* A petition, stamped as an agreement, having been presented to a district Court by the parties to a suit, informing the Court that they have entered into an agreement, whereby, *inter alia*, the defendant was bound to deliver to the plaintiff certain wood, and requesting that the suit might be removed from the file, the District Judge impounded it, levied a sum for insufficient stamp duty and a penalty, on the ground that it was a bond, and forwarded it to the Collector. Upon a reference made by the Board of Revenue at the instance of the Collector:—*Held*, that the instrument was not a bond, but a petition to the Court, requiring a Court-fee stamp. REFERENCE UNDER STAMP ACT, 1879 . **I. L. R. 8 Mad. 15**

11. ———— and Sch. I, Art. 11—*Promissory note—Bond—Impressed label—Impressed sheet—Rule 9½(a) of the Rules of Government of India of 26th February 1881.* By a document dated 8th March 1882, which purported to be a promissory note attested by three witnesses and written on an impressed lable of 2 annas, *A* promised to pay *B* before a certain date R135. *Held*, that the document was a bond and must be treated as unstamped for the purposes of s. 34 of the Stamp Act, 1879. By a document, dated 23rd June 1880, stamped with an adhesive stamp of one anna, purporting to be a promissory note attested by two witnesses, *A* promised to pay R56 to *B* or order on demand. *Held*, that the document was not a bond, but a promissory note. REFERENCE UNDER STAMP ACT, 1879 . . **I. L. R. 8 Mad. 87**

12. ———— and sub-s. (13)—*Bond—Mortgage—Stamp Act, 1879, ss. 7, 26, and Sch. I, Arts. 13, 44.* A grower of sugarcane executed a deed whereby he borrowed a sum of R25 as "earnest money" and covenanted to deliver to the lender on certain date 21 maunds of rab (unrefined sugar) upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows: "If the supply of the rab be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of R1 per maund; that in case of my not supplying the rab at all, or selling it at some other place I will pay the whole mount at once, including the said profits." As collateral security, he hypothecated the produce of a field of sugarcane, the value of which was not stated. *Held*, by the Full Bench, that the instrument was a "mortgage-deed" within the meaning of s. 3, sub-s. (13), and Art. 44 (*b*) of Sch. I of the Stamp Act (I of 1879). *Held*, by STUART, *C.J.*, STRAIGHT, *J.*, and BRODHURST, *J.*, that it was also a "bond" within the meaning of s. 3, sub-s. 4 (*c*) and Art. 13 of Sch. I and with reference to the provisions of s. 7 was chargeable with stamp duty solely as a bond under Art. 13, the contract being a single one. *Held*, by the Full Bench, that the proper stamp duty payable on the instrument was four annas. *Held* by STUART, *C.J.*, and STRAIGHT, *J.*, that in estimating the stamp duty payable on the instrument, the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the rab must be taken into account. *Reference by Board of Revenue, N.-W. P., I. L. R. 2 All. 654*, doubted, and *Gisborne* v. *Subal Bowri, I. L. R. 8 Calc. 284*, referred to by STRAIGHT, *J.* *Per* STUART, *C.J.*, that for the purpose of estimating the stamp duty, the amount secured by the instrument was R25, the amount borrowed, *plus* R11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, *i.e.*, the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp duty. *Per* OLDFIELD, *J.*, that the amount secured or limited, to be ultimately recoverable under the instrument, was R25, the amount borrowed, *plus* R21, the sum recoverable at R1 per maund, in the event of the borrower's non-delivery of the 21 maunds; and stamp duty was payable on his amount. *In the matter of* GAJRAJ SINGH . . **I. L. R. 9 All. 585**

13. ———— and s. 23—*Bond—Interest.* A bond for a loan of R100 stipulated that the obligor should "pay twice the amount, including R100 for interest, total R200, in eight years from 1301 to 1308, according to kists given in the schedule."

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STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*contd.*

Held, that the amount secured by the bond was R200 and the bond must be stamped accordingly. S. 23 of the Stamp Act (I of 1879) did not apply to the instrument. SAMBHU CHANDRA BEPARI *v.* KRISHNA CHARAN BEPARI . **I. L. R. 26 Calc. 179**

14. ——— **and Sch. I, Art. 13**—*Bond—Attestation.* A company agreed to pay £220,000 in five instalments for the cost of constructing a railway, on the terms, among others, that debentures on the railway should be handed over to the company on each payment being made, and that, in the event of the other party failing to perform his liabilities as to the construction of the railway, the company should be entitled to sell the debentures, and also to recover damages, and also to discontinue payments of the above instalments. It was also provided that the company should be at liberty to retain £40,000 as compensation for risk, expenses, etc. The agreement was sealed with the seal of the company in the presence of two Directors and the Secretary. *Held*, that the instrument was liable to stamp duty as a bond for £220,000 under Act I of 1879. REFERENCE UNDER STAMP ACT, S. 46 **I. L. R. 15 Mad. 193**

——— **s. 3, sub-s. (6)**—*Order for payment of money of a person not a banker.* The plaintiff agreed to lend money to the defendant for payment of his trade debts, etc. In pursuance of the agreement, the defendant gave his creditors "chits" for certain sums. These " chits " were addressed to the plaintiff, and requested him to pay the amounts mentioned therein. He did so, and then sued for the amount advanced. It was contended by the defendant that the " chits," being cheques or bills of exchange, were inadmissible in the evidence, because unstamped. The court found that by the agreement the plaintiff was not constituted the defendant's banker within the meaning of sub-s. 6, s. 3 of the Stamp Act, 1879. *Held*, that the " chits " did not require a stamp. RATULAL RANGILDAS *v.* VRIJBHUKHAN PARABHURAM **I. L. R. 17 Bom. 684**

1. ——— **s. 3, sub-s. (9)**—*Conveyance—Transfer by trustee to cestui que trust—Release.* Where three executors of a will purported to convey by deed to one of them, in consideration of a sum of R10, a house to which the latter was entitled under the will:—*Held*, that the deed, having been drawn in the form of a conveyance was liable to stamp duty as such. REFERENCE UNDER STAMP ACT, 1879 **I. L. R. 7 Mad. 350**

2. ——— **and sub-ss. (11) and (19)**—*Deed of family arrangement.* By a deed of family arrangement, one brother conveyed a pergunnah and the sum of two-and-a-half lakhs of rupees to a younger brother, on condition that the latter should release certain family property on which he had claims. *Held*, that, the deed was neither a conveyance or a settlement, nor an instrument of partition within the meaning of Act I of 1879. *In the matter of* THE MAHARAJAH OF DURBHANGAH **I. L. R. 7 Calc. 21**

STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*contd.*

3. ——— *Conveyance—Transfer of land in pursuance of compromise.* A transfer of land, in pursuance of a compromise of a widow's suit for maintenance, is a conveyance, and must be stamped accordingly. REFERENCE UNDER STAMP ACT, S. 46 . **I. L. R. 21 Mad. 422**

1. ——— **s. 3, sub-s. (10)**—*Unduly stamped—Rule 5 (e) of the Government of India. 3rd March 1882 (attestations of plain sheets subjoined to stamped documents), ultra vires.* Of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act, 1879, rule 5 (*e*) requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper must be attested by the parties executing, and by the witnesses to the document. *Held*, by KERNAN, MUTTUSAMI AYYAR, and BRANDT, *JJ.* (TURNER, *C.J.* dissenting), that the rule is *ultra vires* and inoperative for the purpose of declaring an instrument, written contrary to the provisions thereof, unduly stamped within the meaning of s. 3 (*10*) of the Act. *Per* TURNER, *C.J.*—An instrument not written in accordance with the directions in rule 5 (*e*) is not duly stamped. REFERENCE UNDER STAMP ACT, 1879 . . . . **I. L. R. 8 Mad. 532**

2. ——— *Duly stamped—Document issued without endorsement required by rules passed and published under ss. 55 and 57.* The omission of a stamp vendor to endorse on a stamped paper the particulars required by rule (9) of the revised rules published under ss. 55 and 57 of the Indian Stamp Act, 1879, by the Government of Madras, with the approval of the Governor-General in Council, does not render a document " not duly stamped " within the meaning of s. 3 (10) of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46 . . . **I. L. R. 11 Mad. 377**

3. ——— *Instrument professing to effect a partition ultra vires of the executants—Instrument of partition.* Persons incorrectly purporting to be co-owners of certain property agreed to divide it in severalty by written documents. *Held*, that the arrangement fell within the definition of " instrument of partition " in the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879 **I. L. R. 12 Mad. 198**

4. ——— *Instrument " duly stamped "—Rule 5 (b) of the rules made by the Governor-General in Council under Notification No. 1288 of 3rd March 1882.* The absence of the certificate required by rule 5 (*b*) of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act (I of 1879), does not make the document in question not " duly stamped " within the intention of the Stamp Act. QUEEN-EMPRESS *v.* TRAILAKYA NATH BARAL **I. L. R. 18 Calc. 39**

5. ——— *Promissory note not chargeable with duty of 6, 10, or 12 annas—Such promissory note written on impressed sheet of proper*

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STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*contd.*

value bearing the word "hundi"—Note duly stamped—Rules by Governor-General in Council under s. 9 of Stamp Act—Notification No. 1288 of 3rd March 1882, rules 3, 4, 6—Notification No. 2955 of 1st December 1882, rule 6 A. The effect of Notification No. 2955 of the 1st December 1882, amending the rules made by the Governor-General in Council under s. 9 of the Stamp Act (I of 1879) and published in Notification No. 1288 of the 3rd March 1882, is not to prohibit all promissory notes except those chargeable with a duty of 6, 10, or 12 annas being written on impressed sheets bearing the word "hundi." A rule which says that certain promissory notes shall be written on impressed sheets bearing the word "hundi" cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word "hundi." A promissory note for an amount not exceeding R200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, is duly stamped if written on an impressed sheet of the value of two annas, though that impressed sheet bears the word "hundi." RADHA BAI *v.* NATHU RAM . **I. L. R. 13 All. 66**

6. ——— **and s. 34**—*Rules 4 and 6 of rules made under s. 9 of the Stamp Act—Promissory note—Hundi stamp.* In a suit on a promissory note for R4,300, which was executed on an impressed sheet bearing an impressed stamp with the word "hundi" at the top and the words "three rupees" at the bottom of the impression:—*Held*, that, with reference to rules 4 and 6 of the rules made under s. 9 of the Stamp Act and dated 3rd March 1882 and the 1st December 1882, the instrument was "duly stamped" as to the amount of duty, and was admissible in evidence. BANK OF MADRAS *v.* SUBBARAYALU . . . **I. L. R. 14 Mad. 32**

1. ——— **s. 3, sub-s. (11)**—*Partition deed—List of divided property—Agreement of divide outstandings.* In a document signed by the members of a Hindu family and attested by witnesses, which purported to be an account or list of the share of one member of the family in the family property, it was recited that the parents of the family were to enjoy certain lands, and that the outstanding debts should be divided at a future date. *Held*, that this document was not liable to stamp duty as a partition deed. REFERENCE UNDER STAMP ACT, 1879 . . . . **I. L. R. 7 Mad. 385**

2. ——— *Award of arbitrators for division of family property—Written agreement to effect division according to the terms of the award, effect of—Division of the property in severalty—Partition deed.* The co-sharers in an undivided Hindu family having under a written instrument agreed to divide the family property according to the terms of the award passed by the arbitrator:—*Held*, that the instrument was an agreement to divide the property in severalty, and was therefore a partition deed within the definition

STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*contd.*

in sub-s. (*11*) of s. 3 of the General Stamp Act (I of 1879). *In re* VASANJI HARIBHAI
I. L. R. 15 Bom. 677

3. ——— **and s. 29, and Sch. I, Art. 37**—*Instrument of Partition—Computation of value of property. Held*, that the words "the final order" used in the definition of an "instrument of partition" in Act I of 1879 mean not the order authorizing a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. Also, that the stamp duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that, for the purposes of that Act, the value of the property is to be computed with reference to its market value and not with reference to the Court Fees Act, 1870. REFERENCE BY BOARD OF REVENUE
I. L. R. 2 All. 664

4. ——— **and s. 29(e)**—*Instrument of partition.* Three out of seven brothers, constituting an undivided Hindu family, executed documents whereby each acknowledged the receipt of certain property made over to him, "a division of family property having been effected," and acknowledged himself liable for one-seventh of the debts of the family. One of the documents contained a clause to the effect that the executant had no further claim on property of the family:—*Held*, that the document should be stamped as instruments of partition, each member paying according to the share taken by him under the partition. REFERENCE UNDER STAMP ACT, S. 46
I. L. R. 15 Mad. 164

1. ——— **s. 3, sub-s. (13)**—*Definition of "mortgage"—Transfer of Property Act (IV of 1882).* For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act, not as defined in the Transfer of Property Act. QUEEN-EMPRESS *v.* DEBENDRA KRISHNA MITTER
I. L. R. 27 Calc. 587
4 C. W. N. 524

2. ——— *Mortgage—Indemnity bond.* An agreement entered into by the Secretary of State and a salt contractor recited that the contractor had deposited certain promissory notes to secure the due fulfilment of the contract, and provided that the promissory notes should be returned on the due fulfilment of the contract. *Held*, that the agreement was a mortgage as defined by the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46 . . . **I. L. R. 11 Mad. 39**

3. ——— *Lease—Mortgage.* An instrument, therein described as a lease, was executed in consideration of one hunderd and twenty rupees, and it provided that the party paying that sum should remain in possession of certain

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STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*contd.*

land for twelve years, but contained no provision for repayment of that sum or for the payment of rent. *Held*, that the instrument was a usufructuary mortgage, and not a lease. REFERENCE UNDER STAMP ACT, S. 46 . **I. L. R. 21 Mad. 358**

1. ——— **s. 3, sub-s. (15)**—*Policy of insurance or memorandum of proposed insurance—Document on the face of it not contemplating necessity of any other formal document.* A document not being a mere "slip" or memorandum of a proposed insurance, and mentioning the sum for which the assurer declares the name of the ship, the voyage and the premium, and providing for the losses being paid on its production, in conformity with certain conditions in the possession of the assurers, and lastly, expressly guaranteeing payment of losses and claims settled under it, and which, on the face of it, does not contemplate the necessity of any other document of a more formal character being passed to the assured, requires to be stamped as a policy under sub-s. (*15*), s. 3 of the Stamp Act (I of 1879). *In re* MARINE INSURANCE CERTIFICATE . . . **I. L. R. 19 Bom. 130**

2. ——— **and s. 25**—*Policy of insurance—Uncovenanted Service family Pension Fund, stamp on entrance certificate of.* An entrance certificate granted under the rules of the Uncovenanted Service Family Pension Fund is a life-policy within s. 3(5) of the Stamp Act for an amount not exceeding R1,000, and is therefore chargeable with a duty of 6 annas. Such an instrument is not within the scope of s. 25 (*c*) of the Stamp Act. REFERENCE UNDER STAMP ACT, 1879, S. 46 **I. L. R. 19 Calc. 499**

——— **s. 3, sub-s. (17)**—*Receipt—Memorandum of payment—Document containing no acknowledgment of payment.* *A* made a payment of R22 to *B*. At *A's* request, *C* made a memorandum in writing to the following effect: "*B* has received R22," but affixed no stamp to it. He was charged and convicted, under s. 61 of the Indian Stamp Act (I of 1879) for not affixing a receipt stamp to the memorandum. *Held*, reversing the conviction, that the memorandum was not a receipt. To constitute a receipt within the meaning of s. 3 (*17*) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt and not a mere statement that money was received. *In re* JAMNADAS HARINARAN **I. L. R. 23 Bom. 54**

1. ——— **s. 3, sub-s. 19 (b)**—*Settlement—Gift.* The word "settlement," as defined in s. 3 of the Stamp Act, suggests the creation of a separate interest in favour of several persons who may have a legal or moral claim on the settlor or for whom he may desire to make a provision. *Held*, therefore, that where, because of natural affection, a person bestowed upon his sister and her son certain land, the document was liable to stamp duty as a gift and not as a settlement. REFERENCE UNDER STAMP ACT, 1879 . . . **I. L. R. 7 Mad. 349**

STAMP ACT (I OF 1879)—*contd.*

——— **s. 3**—*concld.*

2. ——— *Settlement—Gift.* An instrument whereby a life-interest in land is created with remainder to the settlor and his heirs is a settlement within the meaning of the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46 **I. L. R. 21 Mad. 422**

——— **s. 5.**

See POWER-OF-ATTORNEY. **I. L. R. 23 Calc. 187**

——— **s. 6**—*Endorsement of consent of relative and co-sharer on deed of conveyance—Document completing transaction.* The document marked A was a document on a three-rupee stamp paper executed by *H* to one *V* purporting to convey to him certain immoveable property absolutely for the consideration of R275. On the same deed of sale *R*, the undivided nephew of the executant, endorsed his consent to the sale. *Held*, that the endorsement of consent and the conveyance were several instruments employed to complete a transaction within the contemplation of s. 6 of the Stamp Act (I of 1879), and the consent ought to have been written on a separate stamp paper of the value of one rupee. *In the matter of* HANMAPA **I. L. R. 13 Bom. 281**

1. ——— **s. 7, and s. 3, sub-s. (4), Sch. I, Art. 5**—*Bond—Agreement with penalty in case of breach.* One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of the instrument, to pay the other party thereto a penalty of R5,000, being regarded as a "bond," within the meaning of Act I of 1879, such instrument, if that clause were not so regarded, being an agreement chargeable under that Act with a stamp duty of 8 annas:—*Held* (STUART, *C.J.*, dissenting), that the instrument was chargeable, under s. 7 of that Act, with the stamp duty leviable on a bond for R5,000. *Per* STUART, *C.J.*—That for the purposes of that Act, the penal clause in the instrument should not be regarded separately as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument was only chargeable with a stamp duty of 8 annas. REFERENCE BY BOARD OF REVENUE **I. L. R. 2 All. 654**

2. ——— *Contracts or several loans of rice on a single bond—Construction.* Sixteen persons borrowed a quantity of rice from the plaintiff, and executed to him a bond for the debt, showing how much rice had been borrowed by each of them. They did not bind themselves to repay the entire debt jointly and severally. *Held*, that the instrument should be regarded as comprising sixteen distinct contracts, so as to fall within the perview of s. 7 of the Stamp Act (I of 1879), and should be stamped accordingly. SHABUDIN MAHOMED *v.* HIRNAK RAJNAK **I. L. R. 10 Bom. 47**

3. ——— **para. 2**—*Stamp duty—Lease—Pottah—Mortgage.* By an instrument which recited

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STAMP ACT (I OF 1879)—*contd.*

——— s. 7—*contd.*

that *A* was indebted to *B* in the sum of two lakhs of rupees, and that *A* had taken a fresh loan of R2,59,000 from *B*, the former leased certain mouzahs to the latter for a term of twenty years, at a yearly rental R1,40,000. It was provided that, from the rent of each year, a portion should be deducted in payment of *A's* debt to *B*; so that in this way the whole debt should be paid by a series of instalments extending over the term of the lease. The instrument also contained the usual clauses found in pottahs. On the question what was the proper amount of stamp duty leviable on the document:—*Held*, that, though the arrangement intended to be effected was partly a lease and partly an usufructuary mortgage, yet the instrument came within the provisions of s. 7, para. 2, of the Stamp Act, and should be stamped as a mortgage only. *In the matter of a reference from the* BOARD OF REVENUE UNDER S. 46 OF THE GENERAL STAMP ACT. *Ex parte* HILL
I. L. R. 8 Calc. 254 : 10 C. L. R. 33

4. ——— *Lease and mortgage combined in one document—Stamp Act (I of 1879), s. 3, sub-s. (13).* A zamindar leased certain land in his village to some cultivators at a rent of R365 per annum in cash and of certain cart-loads of straw and grass, by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent, and for the performance of the agreement for the delivery of the other articles. *Held*, that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, sub-s. (13) of Act I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. *Ex parte Hill, I. L. R. 8 Calc. 294*, referred to. REFERENCE UNDER STAMP ACT, S. 49 . . . . I. L. R. 17 All. 55

5. ——— and Art. 54—*Release—Debts—Annuity.* *J* and *S* passed to their brother *E* an instrument which set forth (1) that *J* and *S* relinquished their right to certain property in favour of *E*; (2) that *E* was to discharge certain debts; and (3) that *E* was to pay to *J* and *S* an annuity. *Held*, that the provisions in favour of *J* and *S* were a mere recital of the consideration moving from *E*; that no interest was created in favour of *J* and *S*; and that therefore the instrument should be stamped as a release only. EKNATH S. GOWNDE *v.* JAGGANNATH S. GOWNDE . . I. L. R. 9 All. 417

6. ——— *Instrument relating to "several distinct matters"—Consideration for lease being rent payable each month and one month's rent payable in advance to be repaid at end of term.* Where the consideration for a lease consists partly of rent to be paid each month and partly of a sum equal to a month's rent paid in advance and repayable at the end of the lease, the instrument relates to only one matter, namely, the lease, and is not chargeable with duty as an

STAMP ACT (I OF 1879)—*contd.*

——— s. 7—*concld.*

instrument 'dealing with two distinct matters." REFERENCE UNDER STAMP ACT, s. 61 (*1*) (1902)
I. L. R. 26 Mad. 473

——— s. 10—*Hundi.* A hundi for a sum of R380, payable otherwise than on demand, cannot be stamped with an adhesive stamp. The words "drawn or made out of British India" in cl. (*b*) of s. 10 of the Stamp Act of 1879 apply to the entire clause. DEVAJI *v.* RAMAKRISTNIAH
I. L. R. 2 Mad. 173

——— s. 11—*Act II of 1899, s. 12 (3)—Adhesive stamp—Cancellation.* The mere drawing of two parallel lines without moreover a receipt stamp affixed to an instrument does not have the effect of cancelling it "so that it cannot be used again" within the meaning of the Stamp Act. VIRBHADRAPA *v.* BHIMJI (1904)
I. L. R. 28 Bom. 432

——— s. 11 and ss. 61, 62—*Instrument requiring to be stamped before or at time of execution—Non-cancellation of adhesive stamp—Sanction to prosecution.* The first paragraph of s. 11 of the General Stamp Act (I of 1879) applies to cases in which the instruments chargeable with duty may be stamped after execution. A bill for the monthly salary of a Government official was sent to the treasury for payment, when it was discovered that the one-anna receipt stamp affixed thereto was not cancelled, and a prosecution was thereupon instituted by the Collector against the official in question, who had executed the instrument, under s. 62 of the General Stamp Act. The accused was convicted under that section by the Deputy Magistrate, and the District Magistrate on appeal, holding that, upon the evidence, the conviction should have been for abetment and not for the principal offence, altered the finding accordingly to a conviction under s. 109 of the Penal Code, read with ss. 11 and 62 of the General Stamp Act. *Held*, that the receipt to the salary bill in question was an instrument which was required to be stamped before or at the time of execution, and was not of the kind contemplated by the first paragraph of s. 11 of the General Stamp Act; that consequently there was no abetment of any offence under ss. 11 and 62 of the Act; that the offence which appeared to have been committed was one under the second paragraph of s. 61; but that, no sanction having been given by the Collector under s. 69 for a prosecution under s. 61, it was not advisable to interfere further than by setting aside the conviction and sentence. QUEEN EMPRESS *v.* RAHAT ALI KHAN
I. L. R. 9 All. 210

——— s. 12 and s. 7—*Contract by principal and surety on same stamp paper, but separately written—Writing on the reverse of a stamp paper—Government notification under the Stamp Act, force of.* In a bond engrossed on a stamp paper of sufficient value, and dated the 19th April 1879, the contract of the principal was written first, and after his signature followed the contract of the surety, signed by the latter. The document commenced on

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STAMP ACT (I OF 1879)—*contd.*

——— **s. 12**—*contd.*

the side other than that on which the stamp was impressed, and terminated on the side impressed with the stamp. The stamp was not in any way defaced, nor was the paper so written as to admit of the stamp being used again. *Held*, that the bond constituted only one instrument, and was properly stamped, not being open to objection under ss. 7, 12, 13, and 14 of the Stamp Act, 1879. The construction of the words " on the face of the instrument," used in s. 12 of Act I of 1879, considered. *Quære:* Whether certain Government notifications —to the effect that an instrument, commenced on the side of the paper other than that on which the stamp is impressed and completed on the side on which the stamp is impressed, is, under s. 12 of Act I of 1879, to be treated as unstamped, and prohibiting writing on the reverse of an impressed stamped paper—are *ultra vires* as being more stringent than, and therefore inconsistent with, that Act ? DOWLATRAM HARJI *v.* VITHO RADHOJI
I. L. R. 5 Bom. 188

1. ——— **s. 13**—*Suit on bond—Stamp, sufficiency of.* A bond stipulated that for the consideration of a loan of R80 the debtor should deliver to the creditor on a future day " 800 arris of grain valued at R10 per 100 arris." The bond was engrossed on an 8-anna stamp paper. In a suit on the bond for the recovery of 800 arris at 4 arris per rupee or its price, R200 :—*Held*, that the bond was adequately stamped. BHAIRAB CHUNDRA CHOWDHRI *v.* ALEK JAN . **I. L. R. 13 Calc. 268**

2. ——— **and s. 34**—*Money-bond—Endorsement of transfer.* The endorsement of transfer written on a simple money-bond duly stamped requires a stamp, and can be stamped under s. 34 of the Stamp Act. PRALHAD LAKSHMANRAV *v.* VITHU . . . **I. L. R. 17 Bom. 687**

1. ——— **s. 16 and ss. 11 and 34**—*Hundi —Execution—Stamp affixed at time of execution and subsequently cancelled on delivery of hundi—Evidence, admissibility of.* Where a hundi was written by the defendant and stamped by him with a one-anna stamp which was left uncancelled, and the hundi was subsequently taken by him to the plaintiff's son who received it from him and at the time of receiving it cancelled the stamp by writing the date across it :—*Held*, that the hundi was duly stamped under ss. 10 and 16 of the Stamp Act (I of 1879) and was admissible in evidence. If at the time of delivery, which completed its legal character the hundi was stamped, and if the cancellation took place at that time as part of the same transaction, it was sufficient. A deed is duly stamped if the stamp is affixed and cancelled at the time of execution, or if having been at any time previously affixed, it is cancelled at the time of execution. When applied to a document, the term " execution" means the last act or series of acts which completes it. It might be defined as formal completion. The contract on a negotiable instrument until delivery is incomplete and revocable. Until delivery, a hundi is not clothed with the essential

STAMP ACT (I OF 1879)—*contd.*

——— **s. 16**—*concld.*

characteristics of a negotiable instrument. BHAWANJI HARBHUM *v.* DEBJI PUNJA
I. L. R. 19 Bom. 635

2. ——— " *Stamped at the time of execution"—Stamp Act (II of 1899)—Affixing and cancelling stamp immediately after signature—Letters Patent, cl. 12—Part of the cause of action—Promissory note payable in Madras or Secunderabad—Payments of interest in Madras—Jurisdiction.* A promissory note was executed in plaintiff's favour at Vizianagram, payable in Secunderabad or Madras. Payments of interest due on the note were made in Madras. The note was signed first, the stamp having been affixed and cancelled after signature, the acts being practically simultaneous. Leave to sue in the High Court had been obtained under clause 12 of the Letters Patent : *Held*, that part of the cause of action had arisen in Madras. *Held*, also, that the note was stamped at the time of execution, within the meaning of s. 16 of the Stamp Act (I of 1879). SURIJ MULL *v.* HUDSON (1900)
I. L. R. 24 Mad. 259

1. ——— **s. 24**—*Conveyance—Consideration —Agreement to pay assessment until transfer is made in Collector's books—Relinquishment of title by mortgagor in favour of mortgagee.* Where under an instrument a mortgagor relinquished his title to the mortgaged property in favour of the mortgagee and also agreed to pay the Government assessment until the transfer of the land to the name of the mortgagee purchaser in the Collector's books :—*Held*, that such an instrument was a conveyance of which the amount of the consideration calculated according to s. 24 of the General Stamp Act (I of 1879) was the original mortgage amount, *plus* the amount mentioned in the instrument. *Held*, also, that the instrument was an agreement to pay assessment until the land conveyed was transferred in the Collector's books, and as such should bear the additional stamp for an agreement, namely, eight annas. SINAPAYA *v.* SHIVAPA
I. L. R. 15 Bom. 675

2. ——— **and Sch. I, Art. 16**—*Certificate of sale.* The stamp duty payable on a certificate of sale is governed, not by s. 24, but by Art. 16, Sch. I of the Stamp Act, 1879. *Semble :* That when property is merely sold subject to a mortgage, it is not sold " subject to the payment " of the mortgage-debt within the meaning of s. 24 of that Act. REFERENCE UNDER STAMP ACT, 1879
I. L. R. 5 Mad. 18

3. ——— *Stamp on sale certificate—Property sold subject to a mortgage—Interest —Transfer of Property Act (IV of 1882), sub-s. 5 (d), s. 55.* Where property is sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration-money for the purchase. The stamp duty payable on a document conveying such a property is an *ad valorem* duty on the amount of the money paid as consideration for

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STAMP ACT (I OF 1879)—*contd.*

——— **s. 24**—*contd.*

the sale. *In the matter of* ACT I OF 1879. *In the matter of a reference to the* BOARD OF REVENUE **I. L. R. 10 Calc. 92 : 13 C. L. R. 164**

4. ——— *Certificate of sale—Purchase-money.* Claims on property admitted by the parties or established by a decree of a Court should be entered in the certificate of sale and be computed as part of the purchase-money in ascertaining the amount of the stamp duty leviable on the certificate of sale. Other claims should neither be entered in the certificate of sale nor computed as part of the purchase-money. It is the duty of the purchaser to provide the stamp. *In re* RAMKRISHNA . . . **I. L. R. 9 Bom. 47**

5. ——— **and Sch. I, Arts. 16 and 21**—*Certificate of sale of property sold by public auction under order of Court—Sale subject to mortgage or lien—Mortgage debt—Interest—Consideration.* Where a certificate of sale, granted to the purchaser of property sold by public auction under an order of Court has expressly set out that such sale is made subject to the mortgage right of a third party, the principal sum (but not the interest) due at the time of the sale on such mortgage is to be deemed "part of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty" under s. 24 of the Stamp Act; so that the whole consideration in respect of which such sale is, under Arts. 16 and 21 of Sch. I of that Act, liable to stamp duty is the sum of the purchase-money and the principal money so due on the mortgage. The certificate of sale therefore, whenever it is possible, should set out the exact amount that is due, at the time of the sale, in respect of the principal sum secured by the mortgage. *Semble:* It is otherwise if the mortgage be only recited in the proclamation of sale, and not expressly set out, as an existing incumbrance on the property sold, in the certificate of sale. Arrears of interest due on the mortgage are to be excluded from such calculation, since s. 23 of the Stamp Act—which enacts that "where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein"—applies as much in this case as if the document of transfer, on which the stamp duty was to be calculated, had been the document itself which stipulated for the payment of interest. NAGINDAS JEYCHAND *v.* HALALKHORE NATHWA GHEESLA . **I. L. R. 5 Bom. 470**

6. ——— *Mortgage lien—Certificate of sale—Sale in execution of decree.* Where property is sold at a Court-sale subject to a mortgage lien, the stamp upon the certificate of sale should cover the amount for which the property was sold, as well as the amount of the mortgage lien reserved. *Nagindas Jeychand* v. *Halalkhore Nathwa Gheesla, I. L. R. 5 Bom. 470*, followed. KAISUR KHAN MURAD KHAN *v.* EBRAHIM KHAN MUSA KHAN . **I. L. R. 15 Bom. 532**

STAMP ACT (I OF 1879)—*contd.*

——— **s. 24**—*concld.*

7. ——— **and Sch. I, Art. 63**—*Sale of leasehold property—Rent reserved not liable to ad valorem duty—Stamp-duty leviable only on the actual consideration-money—Stamp Act (II of 1899), ss. 24, 25, Sch. I, Art. 63.* Certain leasehold property demised by the Secretary of State for India to the original lessee for a term of 999 years at the yearly rent of R39-11-0 was assigned to the trustees of a charity for the sum of R1,02,000, the trustees covenanting on their part to pay the rent reserved by the original lease. The deed bore a stamp of the value of R1,020, R1,02,000 having been assumed to be the consideration for the transfer. The Collector of Bombay referred to the High Court the question whether, under s. 24 of the Stamp Act (II of 1899), the payment of the rent reserved by the deed should not be taken as part of the "consideration" in respect whereof the transfer was chargeable with *ad valorem* duty. *Held*, that the *ad valorem* duty was only payable on the consideration actually mentioned in the conveyance (*viz.*, the amount of the purchase-money. REFERENCE UNDER STAMP ACT, 1899 . **I. L. R. 24 Bom. 257**

——— **s. 26.**

See MORTGAGE BOND . **8 C. W. N. 667**

1. ——— *Lease—Amount of rent for first year unascertainable—Stamp Act, 1869, s. 19.* When the amount of rent payable for the first year cannot be ascertained in order to determine the proper stamp under Sch. I, s. 19 (*b*) of the General Stamp Act, 1869, for a lease, and more rent is recovered than the stamp affixed warrants, the right to recover the rent due for the subsequent years is not affected. In such a case sufficient effect is given to s. 26 of the Stamp Act, 1879, by limiting the amount recoverable for the first year to the amount which the stamp will cover. COLLECTOR OF TANJORE *v.* RAMASAMIER **I. L. R. 3 Mad. 342**

2. ——— *Act XXXVI of 1860, s. 14—Meaning of word "claimable"—Mortgage to secure future advances.* The word "claimable" in s. 26 of Act I of 1879 means "claimable in a Court of Justice." A mortgage-bond, intended to secure future advances up to the sum of R10,000 at a time, was executed on a stamp paper of R50, and under it altogether more than R10,000 was privately realized by the mortgagee on different occasions. *Held*, that there was nothing in s. 26 of the Stamp Act of 1879 to prevent the mortgagee from suing to recover the balance of the debt due on the mortgage. HARENDRA LAL ROY CHOWDHRY *v.* TARINI CHARAN CHAKRAVARTI (1904) **I. L. R. 31 Calc. 807**

——— **s. 31.**

See DEBTOR AND CREDITOR. **I. L. R. 16 Mad. 85**

——— **s. 34.**

See PROMISSORY NOTES, FORM OF. **I. L. R. 8 Calc. 645**

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STAMP ACT (I OF 1879)—*contd.*

——— s. 34—*contd.*

1. ——— *Unstamped "promissory note" executed when Stamp Act, 1869, was in force—Admissibility of, as a "bond" on payment of penalty.* An instrument which comes within the definition of a promissory note in the General Stamp Act, 1869, and is not duly stamped according to that Act (which was in force at the date of its execution), cannot be admitted in evidence upon payment of penalty under s. 34 of the Stamp Act, 1879, on the ground that it falls within the definition of a bond in the latter Act. The levy of a penalty authorised under proviso (*1*) of s. 34 of the Stamp Act, 1879, implies a punishment for neglect in failing to affix the proper stamp at the time of execution. The word "chargeable" in the above proviso means chargeable under the Act in force at the date of the execution of the instrument. NARAYANAN CHETTI *v.* KARUPPATHAN

I. L. R. 3 Mad. 251

2. ——— *Unstamped transfer of mortgagee's interest, effect of—Re-transfer of interest—Award, effect of, on transfer—Unstamped instrument, admissibility of, in evidence—Finding of fact based on conjecture—Fraud.* On the 17th September 1866 *G* gave *Z* an usufructuary mortgage of certain immoveable property to secure the repayment of R7,101, purporting to be advanced by *Z*. As a fact, only R2,301 of that amount were actually advanced by *Z*, the balance R4,800, being advanced by *R*. In 1868 *Z* sold the mortgagee's interest in the deed of mortgage to *R* for R2,301, the transfer being by endorsement and not being stamped. In April 1869 *G* transferred a portion of the mortgaged property to *A*. In September 1869 *R* sued to have such transfer set aside, claiming in virtue of the deed of mortgage and the transfer endorsed thereon. On the 23rd September 1871 the Court of first instance refused to receive the transfer by endorsement in evidence and to proceed with the suit, because such transfer was not stamped. On the 20th April 1872 *Z* executed a stamped transfer of the mortgagee's interest in the deed of mortgage in favour of *R*. *R*, treating the order of the 23rd September 1871 as an interlocutory one, presented the instrument of the 20th April 1872 to the Court, and prayed that it would proceed with the suit. The Court proceeded with the suit, and gave *R* a decree. This decree was reversed by the Court of first appeal, on the ground that that instrument did not cure the defect of the transfer by endorsement, and that the order of the 23rd September 1871 was final. The decree of the Court of first appeal was affirmed by the High Court in June 1873. Thereupon *R* made a criminal charge against *Z* of cheating in respect of the transfer by endorsement. This charge was eventually dropped, and was followed by a reference to arbitration by *R* and *Z*. According to the agreement to refer, which was dated the 17th August 1874, the dispute between the parties was whether *R* should return the deed of mortgage to *Z*, and *Z* return the R2,301 to *R* or not. The arbitrators made an award, which was dated the 18th August 1874, which directed, *inter alia*, that *R* should return the deed of mortgage to *Z* and *Z* return the R2,301 to *R*. The deed was returned to *Z*, but the money was not returned to *R*. In 1875 *Z* applied, under Regulation XVII of 1806 to foreclose the mortgage. In 1880 the mortgage having been foreclosed, *S* as *Z's* representative sued for proprietory possession of the mortgaged property. The lower Courts held that all the Acts of *R* and *Z* subsequent to the disposal of *R's* suit of 1869 were fraudulent and collusive, and done with a view to evade the stamp law, and the person actually interested in the deed of mortgage was *R* and not *S*, and on this ground, as well as on other grounds, dismissed *S's* suit. *Per* STRAIGHT, *J.*—That the transfer by endorsement of the deed of mortgage, notwithstanding such transfer was not stamped, transferred to *R* the mortgagee's interest in the deed; that such interest could not be re-transferred to *Z* except by a formal instrument stamped according to law, inasmuch as any other mode of re-transfer would leave *Z* under the same disabilities as regards the stamp law as *R*, as any suit instituted by *Z* would, strictly speaking, be based, not on the deed of mortgage, but on the re-transfer; and that therefore, under these circumstances, and having regard to the fact that *Z* had not returned the R2,301 to *R*, *S* actually, though not ostensibly, based his suit upon a re-transfer of the mortgagee's interest in the deed of mortgage, which was not stamped, and for which he had not given any consideration, and consequently his suit was not maintainable. Also that the award could not alter the effect of the transfer by endorsement. *Per* MAHMOOD, *J.*—That the lower Courts were not justified in their findings as to the fraudulent and collusive nature of the acts of *R* and *Z* after the disposal of *R's* suit of 1869, or in finding that the person actually interested in the deed of mortgage was *R*, and not *Z*, such findings being based upon pure conjectures. That the unstamped transfer by endorsement was inadmissible to show that *Z* had transferred his interest in the deed of mortgage to *R*, whether *R* or the mortgagor wished to use it in order to show that fact, and consequently *Z* must be still regarded as the person interested in the deed, and *S* was therefore entitled to maintain the suit. SHANKAR LAL *v.* SUKHRAN . **I. L. R. 4 All. 462**

3. ——— *Promissory note—Acknowledgment.* The plaintiff sued on two documents, signed by the defendant, each bearing a one-anna stamp, in one of which a sum of R203 was stated to be "due to you, and payable on the 16th July," and in the other a sum of R515 was mentioned "for which I give you this writing, the whole amount of which will be paid up in full on the 3rd August." *Held*, that the documents were not mere acknowledgments, but promissory notes, and being payable otherwise than on demand, were not sufficiently stamped, and consequently not admissible in evidence under s. 34, Act I of 1879. MANICK CHUND *v.* JOMOONA DOSS

I. L. R. 8 Calc. 645

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STAMP ACT (I OF 1879)—*contd.*

——— s. 34—*contd.*

S.C. MANICK CHUND *v.* JOMONA DASS
7 C. L. R. 88

4. ——— *Admissibility in evidence—Evidence as to time when stamped.* When a document, which under the stamp laws requires to be stamped, is tendered in evidence, the only question for the Court is whether it bears a proper stamp at the time when it is tendered. The Court is not bound, nor is it at liberty, to allow the parties to go into evidence to show at what time the document was stamped. KALI CHURN DAS *v.* NOBO KRISTO PAL . . . . **9 C. L. R. 272**

NOOR BIBEE *v.* RUMZAN . **24 W. R. 198**

BHAURAM MADAN GOPAL *v.* RAMNARAYAN GOPAL
12 Bom. 208

5. ——— *Suit on an unstamped promissory note—Evidence Act (I of 1872), ss. 65, cl. (b), and 91.* The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for the consideration of R38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note, and the receipt of R37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note, being unstamped, could not be admitted in evidence. The plaintiff contended that the note was a bond and could be admitted on payment of the stamp duty and the penalty, under s. 34 of the Stamp Act (I of 1879), which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court :—*Held, per* JARDINE, *J.*, that the document sued on was a promissory note, and that, the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp. *Held, per* BIRDWOOD, *J.*, that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under s. 65, cl. (*b*), of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected. DAMODAR JAGANNATH *v.* ATMARAM BABAJI . **I. L. R. 12 Bom. 443**

STAMP ACT (I OF 1879)—*contd.*

——— s. 34—*contd.*

6. ——— *Suit on unstamped hundi—Admission of liability by defendant.* In a suit brought upon two hundis, which were inadmissible in evidence for want of impressed stamps, the Judge allowed the claim, holding that the defendants' admission in their written statement rendered it unnecessary to put the hundis in evidence. *Held*, reversing the decree, that a hundi is "acted upon" within the meaning of s. 34 of the Stamp Act where a decree is passed on it, whether proved or admitted, and that the Court cannot give effect to it in either case. CHENBASAPA *v.* LAKSHMAN RAMCHANDRA . . **I. L. R. 18 Bom. 369**

7. ——— *Unstamped balance of account—Evidence—Acknowledgment of liability—Limitation Act, 1877, s. 19.* Though an unstamped acknowledgment cannot be, within the meaning of s. 34 of the Stamp Act, "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold. FATECHAND HARCHAND *v.* KISAN . . . **I. L. R. 18 Bom. 614**

(*Contra*) MULJI LALA *v.* LINGU MAKAJI
I. L. R. 21 Bom. 201

8. ——— and ss. 17 and 33—*Act XXXVI of 1860, s. 13—Act X of 1862, s. 15—Unstamped document executed in 1862 out of British India—Penalty.* A document comprising an assignment of the executant's interest under a will, and also a power-of-attorney, was executed on 26th May 1862 in Australia and was received in Madras on 22nd June 1862 when the Stamp Act (X of 1862) was in force, which contained no provision for stamping such a document executed out of British India. It was sought in 1890 to use the document in Madras, but it was not stamped. *Held*, that no penalty could be levied upon it under the Stamp Act of 1879. REFERENCE UNDER STAMP ACT, s. 46
I. L. R. 14 Mad. 255

9. ——— and ss. 35 and 39—*Admission of unstamped document in evidence on payment of penalty—Necessity for production of original document.* Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under s. 34 and the following sections of Act I of 1879, it is necessary that the original instrument should be before the Court. KALLU *v.* HALKI
I. L. R. 18 All. 295

10. ——— *Penalty chargeable only on the original, unstamped, or insufficiently stamped instrument—Document tendered as secondary evidence not within the section and not admissible.* By the terms of the Indian Stamp Act, 1879, the provisions of s. 34, which apply to documents either unstamped or insufficiently stamped, have no application when the original instrument, which ought to have been properly stamped, but was not, has not been produced. The clauses of that section deal with, and exclusively refer to the

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STAMP ACT (I OF 1879)—*contd.*

s. 34—*contd.*

admission in evidence of original documents which have been either not stamped at all or have been insufficiently stamped. RAJA OF BOBBILI VENKATA SVETA CHALAPATI *v.* INUGANTI CHINA
I. L. R. 23 Mad. 49
L. R. 26 I. A. 262

. VENKATA SVETA CHALAPATI *v.* INUGANTI BHA" VAYYAMANI GARU . . **4 C. W. N. 117**

11. ——— *Notice of allotment of shares not stamped—Evidence of notice of allotment.* A notice of allotment of shares in a Company, though not stamped, is admissible in evidence to establish the fact that notice of allotment had been given. *In re Whitly Stule's Case, L. R. 49 Ch. 176,* and *Surju Narain Mukhopadhya* v. *Protap Narain Mukhopadhya, I. L. R. 26 Calc. 955, 959,* followed. *Per* STANLEY, *J.*, in Original Court and MACLEAN, *C.J.*, and MACPHERSON and HILL, *JJ.*, on appeal. MOHUN LALL *v.* SRI GUNGAJI COTTON MILLS CO. . . **4 C. W. N. 369**

12. ——— *Admission of document in evidence—Unstamped promissory note admitted as a bond on a payment of stamp duty and penalty—Subsequent rejection too late.* The plaintiff sued to recover the amount due on three khatas. The defendant objected that the khatas were not duly stamped. The Subordinate Judge held that the instruments were bonds, and as such admitted them in evidence on payment of the proper stamp duty and penalty under s. 34, proviso I, of the Stamp Act (I of 1879). At a subsequent stage of the same suit his successor in office was of opinion that the khatas in question were promissory notes; that as such they could be stamped only at the date of their execution, and that they had been illegally admitted in evidence under s. 34, proviso I. He accordingly dismissed the suit. On appeal, the District Judge agreed with the Subordinate Judge that the instruments sued on were promissory notes, but held that, after they had once been admitted in evidence on payment of the stamp duty and penalty, the question of their admissibility could not be subsequently raised in the suit under proviso III to s. 34 of the Stamp Act. He therefore reversed the decree of the Subordinate Judge, and remanded the case for trial on the merits. Against this order of remand, defendants appealed to the High Court. *Held,* that the promissory notes, having been once admitted in evidence, could not afterwards be rejected on the ground of their not being duly stamped. DEVACHAND *v.* HIRACHAND KAMARAJI . . . **I. L. R. 13 Bom. 449**

13. ——— *Inadmissibility of stamped document stamped after execution—Document not duly stamped.* A receipt (dated 1887) stamped subsequently to execution, but before production, in Court, was tendered in evidence. *Held,* that the document was inadmissible. S. 34 of Act I of 1879 requires instruments chargeable with duty to be "duly stamped," which in this case meant "stamped before or at the time of execution," as laid down by s. 16 of the Act. JETHIBAI *v.* RAMCHANDRA NAROTTAM
I. L. R. 13 Bom. 484

STAMP ACT (I OF 1879)—*contd.*

s. 34—*contd.*

14. ——— *Instrument admitted as duly stamped—Appellate Court's power to question the admission—Bom. Reg. XVIII of 1827, s. 10.* Where a Court of first instance has admitted a document in evidence as duly stamped, s. 34, *cl.* 3, of the Stamp Act (I of 1879) precludes the Appellate Court from questioning the admission of such document. If the Appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Act. S. 34 of Act I of 1879 applies to instruments whenever executed, and must therefore be held to override the special provision of s. 10 of Bombay Regulation XVIII of 1827, according to which no instrument requiring a stamp thereunder was valid unless duly stamped. GURUPADAPA BIN IRAPA *v.* NARO VITHAL KULKARNI
I. L. R. 13 Bom. 493

15. ——— *Document proposing to borrow on certain conditions—Promissory note—Proposal—Contract Act (IX of 1872), s. 4.* A letter containing a request to borrow a certain sum of money promising that the same should be repaid with interest on a certain day is not liable to stamp duty. It is not a promissory note, but a mere proposal under s. 4 of the Contract Act (IX of 1872). DHONDBAT NARHARBHAT *v.* ATMARAM MORESHVAR . . **I. L. R. 13 Bom. 669**

16. ——— *"Chargeable with duty"—Promissory note executed out of British India—Insufficient stamp—Stamp Act, ss. 5 and 18.* A suit upon a promissory note which had been executed out of British India was dismissed on the ground that the note was insufficiently stamped, and that it could not be admitted in evidence, on payment of the duty chargeable, under s. 34 of the Indian Stamp Act. On a petition being preferred for the revision of the order of dismissal:—*Held,* that s. 34 of the Stamp Act did not render the document inadmissible in evidence, that section being applicable only to an instrument which is "chargeable with duty." There is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court, where the holder of the note has not done any of the acts referred to in ss. 5 and 18 of the Act, and, in consequence, the obligation to stamp has not arisen. MAHOMED ROWTHAN *v.* MAHOMED HUSIN ROWTHAN
I. L. R. 22 Mad. 337

17. ——— *Instrument admissible in evidence on payment of duty and penalty—Promissory note—Unconditional undertaking to pay money.* A letter was written in the following terms:—"In addition to R115 already received, R385 is also required. Please send it by the bearer Streenevasan. The amount will be returned with interest at 12 per cent. without delay." *Held,* that there was no unconditional undertaking on the

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STAMP ACT (I OF 1879)—*contd.*

——— s. 34—*concld.*

face of the document to pay the money; that the undertaking was conditional on the amount being remitted as requested; and that it was not a promissory note within the meaning of that term as used in s. 34 of the Stamp Act, 1879. *Channamma* v. *Ayyanna, I. L. R. 16 Mad. 283*, dissented from. *Narayanasami Mudaliar v. Lokambalammal, I. L. R. 23 Mad. 156 n*, approved. BHARATA PISHARODI *v.* VASUDEVAN NAMBUDRI (1904)

I. L. R. 27 Mad. 1

——— s. 35.

See PAROL EVIDENCE.

I. L. R. 30 Mad. 386

1. ——— ss. 37, 40—*Arbitration—award—Evading payment of stamp duty.* SIX persons acted as arbitrators in a dispute between two of their fellow villagers, and delivered their award in writing. Subsequently the award was filed in evidence by one of the disputants in the civil suit in the Court of the Munsif of Cuttack, who, on the ground that the document bore no stamp, impounded it and forwarded it to the Collector, who ordered the writer to be prosecuted. The Deputy Magistrate to whom the case was referred, summoned the six persons who had acted as arbitrators, and fined them R25 each. On a reference to the High Court by the District Magistrate:—*Held*, that the conviction was illegal, and should be set aside. *Held*, also, that the procedure laid down in s. 37 of the Stamp Act must be strictly followed; and that, before a prosecution can be instituted under s. 40, the Collector is bound to form an opinion as to whether the offence was committed with the intention of evading payment of the proper duty. EMPRESS *v.* SODDANUND MAHANTY

I. L. R. 8 Calc. 859 : 10 C. L. R. 365

2. ——— *Duty and penalty on document insufficiently stamped, determination of.* Under the provisions of the Stamp Act, 1879, the duty chargeable on an insufficiently-stamped document must be decided with reference to the Act in force at the date of the execution of the document, but the penalty leviable is determined in all cases by s. 37 (*b*) of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879

I. L. R. 5 Mad. 394

3. ——— and ss. 33, 34, 35, 45, and 50—*Collector's decision that an instrument is chargeable with duty—Duty of Civil Court—Practice—Procedure.* The decision of the Collector under cl. (*b*) of s. 37 of the Stamp Act (I of 1879), that a particular instrument is chargeable with duty and is not duly stamped is not final and conclusive. If his decision under that clause is not obeyed, and the duty and penalty are not paid, any Civil Court before which the document may come has the duty cast upon it under s. 33 of examining it and of determining for itself whether it is duly stamped or not, and, if not, of taking the steps laid down in ss. 33, 34, and 35, that decision being subject to

STAMP ACT (I OF 1879)—*contd.*

——— s. 35—*concld.*

revision under s. 50. HARIBAI *v.* KRISHNARVA GOPAL . . . I. L. R. 22 Bom. 632

1. ——— s. 39—*Deed of release—Endorsement on conveyance—Payment of deficient duty.* A deed of release was endorsed on a deed of conveyance for R100. The conveyance bore an impressed stamp for one rupee, but the endorsement was unstamped. *Held*, that the conveyance was valid, and that the release could be validated on payment of the deficient stamp duty and the penalty under s. 39 of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46 . I. L. R. 11 Mad. 40

2. ——— *Lost document which is unstamped—Payment of penalty—Second dary evidence of lost document.* In the case of a lost document no penalty can be levied and secondary evidence admitted, for s. 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. *Kopasan* v. *Shamu, I. L. R. 7 Mad. 440*, followed. RANGA RAU *v.* BHAVAYAMMI . . I. L. R. 17 Mad. 473

——— s. 41—*Fresh suit—Costs—Civil Procedure Code, 1882, ss. 13, 43.* The plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp for such instrument. The plaintiff, with reference to s. 41 of the Stamp Act, 1879, sued the defendant to recover such amount. *Held*, that such amount could not be regarded as part of the costs in the suit in which it was paid, and a separate suit to recover it was maintainable. ISHAR DAS *v.* MASUD KHAN

I. L. R. 6 All. 70

——— s. 49—*Power of reference to High Court.* A bail-bond was executed to a District Munsif, who expressed no doubt as to the amount of duty to be paid and made no application to have the case referred. The District Judge referred the case to the High Court. *Held*, that the District Judge was not authorized to make the reference. REFERENCE UNDER STAMP ACT, s. 49

I. L. R. 11 Mad. 38

1. ——— s. 50—*Power of Appellate Court as to insufficiently-stamped documents admitted in lower Court.* Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under s. 50 of the Stamp Act. REFERENCE UNDER STAMP ACT, 1879 . I. L. R. 8 Mad. 564

2. ——— and s. 3, cl. (1)—*Unstamped document admitted by original Court on payment of duty and penalty—Power of Appellate Court to review such admission.* Where the Court of first instance has, on payment of the prescribed duty and penalty, admitted an unstamped document as evidence, under s. 3, proviso 1, of Act I of 1879, a superior Court sitting in appeal has no jurisdiction to review the lower Court's proceedings in so far as they concern such admission, except in the case

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STAMP ACT (I OF 1879)—*contd.*

——— s. 50—*concld.*

provided for by s. 50 of that Act. PUNCHANUND DASS CHOWDHRY *v.* TARAMONI CHOWDHRAIN
I. L. R. 12 Calc. 64

3. ——— *Collector, power of—Reference to High Court—Decision of Provincial Small Cause Court admitting insufficiently stamped document in evidence. Semble:* A Collector is entitled under s. 50 of the Stamp Act to refer to the High Court the decision of a Provincial Small Cause Court admitting in evidence an insufficiently stamped instrument on payment of duty and a penalty. REFERENCE UNDER STAMP ACT, s. 50
I. L. R. 15 Mad. 259

1. ——— s. 51—*Application for allowance for spoiled stamps—Power of Collector as to inquiry—Transfer of duty to Deputy Collector—Charge of false evidence—Penal Code, ss. 181, 193.* S. 51, Ch. VI of Act I of 1879, enacts that, "subject to such rules as may be made by the Governor General in Council as to the evidence which the Collector may require, allowance shall be made by the Collector for impressed stamps spoiled in the cases hereinafter mentioned, etc." According to a rule made with reference to that section, "the Collector may require every person claiming a refund under Ch. VI of the said Act, or his duly authorized agent, to make an oral deposition on oath, etc." *Held*, therefore, that the Collector himself is the officer, and no other, to whom power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications, and he cannot delegate his authority in the matter. *Held*, also, where a person had applied for a refund under Ch. VI of Act I of 1879, and the Collector made over the application for enquiry to a Deputy Collector, that the Deputy Collector was not entitled to put the witnesses produced by the applicant on their oaths, and consequently, in reference to the statements of such witnesses, no charge under s. 181 or s. 193 of the Penal Code was sustainable. EMPRESS *v.* NIAZ ALI . . . . I. L. R. 5 All. 17

2. ——— *Mortgage-deed stamped, but not sued.* A mortgage-deed, which provided for the transfer of possession of the mortgaged premises, was executed to secure the repayment of money to be advanced for the discharge of certain debts owing by the executants. The instrument was stamped, but not registered; and on its appearing that the amount of the debts in question exceeded the sum named the intended mortgagee refused to carry out the transaction, and the executants executed a deed of conditional sale of the same premises in favour of another. *Held*, that the stamp duty paid on the mortgage could be refunded under Stamp Act (I of 1879), s. 5 (*d*) (6). REFERENCE UNDER STAMP ACT. s. 46
I. L. R. 16 Mad. 459

3. ——— *Allowance for spoiled stamps—Mistake made when using stamped paper.* S. 51 (*a*) of the Stamp Act, which permits an allowance being made for spoiled stamps, applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases of the use of the paper in an ordinary way, in which a mistake has been made. NARASIMHA CHARYULU *v.* APPA RAU
I. L. R. 18 Mad. 122

4. ——— *Spoiled stamp—Accidental injury to stamp.* The purchaser at a Court-sale presented a stamped paper for the engrossment of the sale-certificate. The stamp was inadvertently punched by some officer of the Court, but the paper was used as intended and delivered to the purchaser. Subsequently a Deputy Collector, treating the certificate as unstamped, levied the stamp duty together with a penalty. *Held*, that the document was duly stamped, and that the amount levied should be refunded. REFERENCE UNDER STAMP ACT, s. 46
I. L. R. 18 Mad. 235

5. ——— and ss. 3, 31—*Allowance for spoiled stamps.* Allowance for spolied stamps may be made under s. 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s. 31. REFERENCE UNDER STAMP ACT, s. 46 . . . I. L. R. 11 Mad. 37

——— s. 61.

See ABATEMENT . I. L. R. 8 All. 18

1. ——— s. 61 and ss. 3 (*10*) and 57—*Rules of Governor-General, 3rd March 1882, 5 (e)—Construction—Stamped paper—Writing on reverse side, effect of.* In exercise of the power conferred by ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act, 1879, the Governor-General in Council made and published by a notification, dated the 3rd March 1882, certain rules, and, *inter alia*, rule 5 (*e*) which was as follows: "When a single sheet used under this rule is found insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of such instrument, provided that in every such case the side of the sheet which bears the stamp must be covered by a substantial part of the instrument before any part of the latter can be written on the plain paper joined to such sheet. Provided, further, that the part of the instrument written on the plain paper must be attested by the signatures or marks of all the persons executing the document and the witnesses to the same." *Held*, that this rule was an enabling rule, and did not make it obligatory on parties not to write on the reverse side of an impressed stamp paper, so as to make it an offence under s. 61 if they did so write. REFERENCE UNDER STAMP ACT, 1879 . . . I. L. R. 7 Mad. 176

2. ——— *Promissory note—Insufficient stamp—"Accepting."* The term "accepting" used in s. 61 of the Stamp Act, 1879,

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STAMP ACT (I OF 1879)—*contd.*

——— s. 61—*contd.*

does not mean "receiving," but "executing as acceptor." To receive a promissory note not duly stamped and put it in suit does not constitute an offence under s. 61 of the Stamp Act, 1879. QUEEN *v.* GULAM HUSSAIN . . I. L. R. 7 Mad. 71

3. ——— and s. 64—*Receipt—Acknowledgment by letter.* Where the receipt of money exceeding R20, in satisfaction of a debt, is acknowledged by letter without a receipt stamp being affixed, the writer is liable to punishment under s. 61 of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879 . I. L. R. 8 Mad. 11

4. ——— *Person receiving an under-stamped promissory note—Person executing note.* Under s. 61 of Act I of 1879, the "person accepting" a promissory note not duly stamped is the person who executes such note as acceptor, not a person who merely receives the note. The mere receiver of an unstamped or insufficiently-stamped promissory note is not as such liable to any penalty under this section either as principal or abettor. *Queen* v. *Gulam Husain, I. L. R. 7 Mad. 71; Queen* v. *Nadi Chand Poddar, 24 W. R. Cr. 1; Empress* v. *Janki, I. L. R. 7 Bom. 82;* and *Empress* v. *Gopal Das, All. Weekly Notes (1883) 145,* referred to. QUEEN-EMPRESS *v.* NIHAL CHAND I. L. R. 20 All. 440

5. ——— *Memorandum of payment—Document containing no acknowledgment of payment not a receipt—Stamp Act (I of 1879), s. 3 (17).* *A* made a payment of R22 to *B*. At *A's* request, *C* made a memorandum in writing to the following effect: "*B* has received R22," but affixed no stamp to it. He was charged and convicted, under s. 61 of the Indian Stamp Act (I of 1879), for not affixing a receipt stamp to the memorandum. *Held* (reversing the conviction), that the memorandum was not a receipt. To constitute a receipt within the meaning of s. 3 (*17*) of the Stamp Act, there must be an acknowledgment, either express or implied, of the receipt, and not a mere statement that money was received. *In re* JAMNADAS HARINARAN . . . I. L. R. 23 Bom. 54

6. ——— and ss. 37 and 40—*Offence against stamp law—Sanction to prosecute—Intention to defraud.* A Collector is not bound to hold a formal enquiry, or to record proceeding, before directing a prosecution under s. 40 of the Stamp Act, 1879, for an offence against the stamp law. The law does not require intention to be proved as part of such offence. QUEEN-EMPRESS *v.* PALANI . . . I. L. R. 7 Mad. 537

7. ——— and ss. 37, 40 and 69—*Offence under Stamp Act—Execution of unstamped document—Sanction by Collector to prosecute—Procedure—Abetment.* *A* executed to *B* on plain paper an instrument which should have been executed on a paper bearing a 4-anna stamp. *B* filed a suit against *A* in the Civil Court and produced the instrument in evidence. The Civil Court called upon *B* to pay the duty and penalty, and on *B's* refusal to pay, impounded the instrument and sent it to the Collector. The Collector, concurring with the opinion of the Civil Court, sanctioned the prosecution in the Criminal Court of both *A* and *B*, but without requiring the payment of the duty and penalty. The prosecution resulted in the conviction of *A* under s. 61 of the Stamp Act (I of 1879) and of *B* of abetment of *A's* offence. *Held,* that the convictions were illegal, inasmuch as the Collector failed to allow an opportunity of paying the duty and penalty. *Held,* further, that mere receipt of an unstamped instrument did not constitute the offence of abetment of the execution of such an instrument. EMPRESS *v.* JANKI I. L. R. 7 Bom. 82

8. ——— *Offence under Stamp Act—Omission of Treasury Officer to give certificate required by rule 5 (b) of the rules made by the Governor-General in Council under Notification No. 1288 of 3rd March 1882.* The non-compliance by the Treasury Officer or the stamp vendor with the direction to give the certificate required by rule 5 (*b*) of the rules dated 3rd March 1882 issued by the Governor-General in Council under ss. 9, 15, 17, 32, 51, and 56 of the Stamp Act is not an act for which the person purchasing the stamp from him can be punished, by the invalidation of the stamp innocently bought by him or under s. 61 of the Stamp Act. QUEEN-EMPRESS *v.* TRAILAKYA NATH BARAL . . I. L. R. 18 Calc. 39

9. ——— and Sch. II, Arts. 52 and 58—*Acknowledgment of receipt of cheque by letter not stamped.* *M* acknowledged receipt of a cheque for R100 by letter. The letter was not stamped. *Held,* that *M* was properly convicted under s. 61 of the Stamp Act, 1879. QUEEN-EMPRESS *v.* MUTTIRULANDI . . I. L. R. 11 Mad. 329

10. ——— and ss. 64 and 58—"*Signing otherwise than as a witness, etc.,*" *meaning of—Liability of agent authorized to sign on behalf of principal—Granting of unstamped receipt—Refusal to grant stamped receipt by firm—Liability of members of such firm—*"*Person,*" *meaning of—Proof of demand of receipt.* The expression "signing otherwise than as a witness, etc.," as used in s. 61 of the Stamp Act, means the writing of a person's name by himself or by his authority, with the intent of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within the description, and consequently within the purview of the section. Where, therefore, a person signed a firm's name to certain letters under the authority of the firm, the circumstance that the body of the letters were written at the dictation of the manager of the firm was *held* not to be sufficient to distinguish his case from that of any other agent. The term "person" in ss. 61 and 64 of the Stamp Act includes the members of a trading partnership. So

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STAMP ACT (I OF 1879)—*contd.*

——— s. 61—*concld.*

where certain persons, members of a firm carrying on business in Calcutta as general dealers (which firm had acknowledged the receipt of certain sums of money from one *L* and had refused to grant him a stamped receipt), were charged under s. 61 of the Stamp Act with having granted an unstamped receipt, and under s. 64 of that Act with having refused to grant a duly stamped receipt, it was *held* that their liability depended on whether they were in contemplation of law the persons who signed the letters of acknowledgment or refusal to give the receipt, and not on whether they were present at the writing of the letters, or knew of the writing of them, provided that it was established by evidence that a requisition for a receipt had been made under s. 58 of that Act. QUEEN-EMPRESS *v.* KHETTER MOHUN CHOWDHRY
I. L. R. 27 Calc. 324
4 C. W. N. 440

——— s. 63 and ss. 37 (b), 40, 61—*Prosecution for attempt to defraud Government by understating the value of property in a partition-deed.* A District Judge impounded a partition-deed produced before him and forwarded it to the Collector under s. 35 of the Stamp Act, 1879, being of opinion that the executant of the deed had committed an offence under s. 63. The Collector under s. 69 sanctioned the prosecution of the executant, who was convicted by the Magistrate of an offence under s. 63 of the Act. On appeal the Sessions Court acquitted him on the ground that the Collector had not complied with s. 37 (*b*) or s. 40 of the Act. *Held*, that the acquittal was wrong. *Empress* v. *Dwarkanath Chowdhry, I. L. R. 2 Calc. 399 ; Empress* v. *Soddanund Mahanty, I. L. R. 8 Calc. 259 ; Empress* v. *Janki, I. L. R. 7 Bom. 82,* considered. QUEEN-EMPRESS *v.* VENKATRAYADU . . I. L. R. 12 Mad. 231

——— s. 64 and s. 69—*Refusal to give receipt—Sanction of Collector necessary before prosecution—Jurisdiction, want of.* Prosecution for an offence committed in contravention of s. 64 of the Stamp Act (I of 1869) cannot be instituted unless with the previous sanction of the Collector under s. 69 of the same Act. QUEEN-EMPRESS *v.* JETHMAL . . . I. L. R. 9 Bom. 27

1. ——— s. 67—*Document executed with intent to defraud revenue.* The second clause of s. 67 of the Stamp Act, 1879, is not controlled by the first clause of the section, which refers only to bills of exchange and promissory notes, but applies to all cases in which a document is executed with intent to defraud the Government of stamp duty. REFERENCE UNDER STAMP ACT, 1879
I. L. R. 9 Mad. 138

2. ——— and s. 61—*Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under s. 61 of Stamp Act, 1879—Penal Code (Act XLV of 1860), s. 40.* Two letters were

STAMP ACT (I OF 1879)—*contd.*

——— s. 67—*concld.*

written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under s. 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty:—*Held*, that the execution of a document which on its face required to be, and was not, stamped, could not be said to be "an act, contrivance, or device not specially provided for by this Act or any other law for the time being in force;" and that punishment for the act of the executant of such a document if it were punishable at all, was provided for under s. 61 of the Stamp Act, 1879, and it could not therefore be dealt with under s. 67. Also that the act of a person receiving an unstamped document might amount to abetment of an offence, having regard to s. 61 of the Stamp Act, 1879, and to the definition of an "offence" is s. 40 of the Penal Code, and, if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of s. 67 of the Stamp Act, 1879. QUEEN-EMPRESS *v.* SOMASUNDARAM CHETTI
I. L. R. 23 Mad. 155

——— s. 68—*Court-fee stamps—Sale by unlicensed person—Stamp Act (XVIII of 1869), s. 48—Court Fees Act (VII of 1870), s. 34.* The sale of Court-fee stamps without a license was not an offence under the Stamp Act (XVIII of 1869), but is now specially made so by s. 68 of Act I of 1879. EMPRESS OF INDIA *v.* JALLU
I. L. R. 4 All. 216

——— s. 69.

See COLLECTOR . I. L. R. 2 All. 806

See COURT FEES ACT, 1870, SCH. I, ART. 8.
I. L. R. 11 Bom. 526

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.
I. L. R. 18 Bom. 614
I. L. R. 21 Bom. 201

See LIMITATION ACT, 1877, s. 19—ACKNOWLEDGMENT OF DEBTS.
I. L. R. 18 Bom. 614
I. L. R. 21 Bom. 201

——— Sch. I, Art. 1.

See STAMP ACT, 1869, SCH. II, ART. 5.

1. ——— *Acknowledgment—Hath-chitta.* Whether an account signed by a debtor in the books of his creditor amounts to an acknowledgment within the meaning of the Stamp Act (I of 1879), Sch. I, Art. 1, is a question depending

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STAMP ACT (I OF 1879)—*contd.*

——— Sch. I, Art. 1—*contd.*

in each case upon the form and intention of the entry. BINJA RAM *v.* RAJMOHUH ROY
I. L. R. 8 Calc. 282

2. ——— *Stamp duty—Hath-chitta—Evidence—Acknowledgment.* An account in a hath-chitta, showing advances of money made to, and part-payment made by, the defendant the whole amount being in the handwriting and signed by the defendant, is admissible in evidence without being stamped. *Brojender Coomar* v. *Bromomoye Chowdhrani, I. L. R. 4 Calc. 885,* followed. BROJO GOBIND SHAHA *v.* GOLUCK CHUNDER SHAHA . . **I. L. R. 9 Calc. 127**

3. ——— *Acknowledgment—Promise in writing—Contract—Contract Act (IX of 1872), s. 25, cl. 3, and s. 62, ill. (a).* A *khata,* or account stated bearing a stamp of one anna, but containing no promise in writing, *held* to be a mere acknowledgment sufficiently stamped, and not a contract within the meaning of s. 25, cl. 3, of Act IX of 1872. CHOWKSI HIMUTLAL *v.* CHOWKSI ACHRUTLAL . . **I. L. R. 8 Bom. 194**

4. ——— *Acknowledgment—Balance-sheet—Nikash.* A nikash or balance-sheet made out and signed by a gomashta of a business showing a balance due by him to the owner of the business is not an acknowledgment of a debt within the meaning of Art. 1, Sch. I of the Stamp Act, and is admissible in evidence without being stamped. *Brojo Gobind Shaha* v. *Goluck Chunder Shaha, I. L. R. 9 Calc. 127,* followed. NUND KUMAR SHAHA *v.* SHURNOMOYE DASI
I. L. R. 15 Calc. 162

5. ——— *Acknowledgment of debt—Limitation Act (XV of 1877), s. 19—Intention.* The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of Art. 1, Sch. I of the Stamp Act, 1879, is a question in each case of the intention of the writer. Hence, where such a letter, written *ante litem motam,* before limitation in respect of the debt had expired, and at a time when other evidence of the debt was subsisting, was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation under the provisions of s. 19 of the Limitation Act, 1877:—*Held,* that the said letter was not inadmissible in evidence by reason of its not having been stamped. BISHAMBAR NATH *v.* NAND KISHORE . . **I. L. R. 15 All. 56**

6. ——— and **Art. 5**—*Acknowledgment—Admissibility in evidence.* The defendant, in two letters to the plaintiff in respect of certain contracts to sell Government securities, acknowledged his inability to give delivery and after calculating the amount of the differences between the contract prices and the market prices on the dates of delivery, stated that the amount in respect of the first contract " is due to you, and payable on the 16th July," and that the amount in respect of the other contract was R515, " the whole amount of which will be paid up in full on the 3rd and 4th August." Both letters were stamped with a one-anna stamp. *Held,* that they were insufficiently stamped and inadmissible in evidence. MANICK CHUND *v.* JOMOONA DOSS
7 C. L. R. 88

S. C. MANICK CHUND *v.* JOMOONA DOSS
I. L. R. 8 Calc. 645

7. ——— *Limitation Act (XV of 1877), s. 19, Exp. 1, Sch. II, Art. 56—Acknowledgment of debt, unstamped—Tankha—Stamp duty—Evidence of debt.* The mere fact of a document being an acknowledgment of a debt, within the meaning of s. 19 of the Limitation Act, would not make it liable to a stamp duty under Sch. I, Art. 1, of Act I of 1879. There are other conditions required to be fulfilled, one of which being that it should be intended to supply evidence of a debt. *Binja Ram* v. *Rajmohun Roy, I. L. R. 8 Calc. 282; Bishambar Nath* v. *Nand Kishore, I. L. R. 15 All. 56;* and *Mulji Lala* v. *Lingu Makaji, I. L. R. 21 Bom. 201,* referred to. AMBICA DAT VYAS *v.* NITYANUND SINGH (1903)
I. L. R. 30 Calc. 687

1. ——— **Sch. I, Art. 4**—*Agreement to lease—Correspondence containing agreement to lease—Complete agreement.* Certain correspondence passed between the plaintiff and defendant relating to the lease of a flat in premises in occupation of the plaintiff, which admittedly contained an agreement for a lease for one year, with an option of renewal for another year. The terms in which the option was given were as follows: The defendant in one letter wrote: " So I expect you will give me the option of renewal for another year, respectively five months on the same terms." To which the plaintiff replied: " You may have the option of retaining it (the flat) for another year on the same terms, but not for a shorter period." In pursuance of an arrangement, the defendant had a draft lease prepared embodying the terms agreed on, which he sent to the plaintiff for approval, and which was in due course returned by him " approved." The defendant then had the lease engrossed and properly stamped, but the plaintiff eventually refused to execute it, and it was never signed by the defendant. The option of renewal was given in the unexecuted lease in the following terms: " Also with option to renew for another twelve months certain." The defendant having entered into possession and disputes having arisen, the plaintiff gave him notice to quit, and sued to eject him, alleging that at the most he was a mere monthly tenant. The defendant pleaded that under the lease he was entitled to hold for a year. The year expired before the suit came on to be heard, and the defendant, not having exercised the option to renew, vacated the premises. At the hearing the defendant, in support of his case, tendered the correspondence and the stamped unexecuted lease. It was objected that the correspondence was inadmissible in evidence because it was unstamped.

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STAMP ACT (I OF 1879)—*contd.*

——— Sch. I, Art. 4—*concld.*

and on behalf of the defendant it was argued that the stamped unexecuted lease must be treated as part of the correspondence, and as it was properly stamped, no further stamp was necessary. *Held*, that, as the correspondence contained a complete agreement independently of the draft and engrossed lease, the latter could not be treated as part of the correspondence, and that consequently the correspondence must be stamped and the penalty paid before it could be admitted in evidence. BOYD *v.* KREIG . **I. L. R. 17 Calc. 548**

2. ——— "*Agreement to lease.*" An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment after obtaining a certificate from the Court under s. 305 of the Civil Procedure Code is an "agreement to lease" under Art. 4, Sch. I of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46 . **I. L. R. 17 Mad. 280**

1. ——— Sch. I, Art. 5—*Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence.* Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped. *Held*, that the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or a memorandum of agreement. RAINIER *v.* GOULD . **I. L. R. 13 Mad. 255**

2. ——— *Agreement—Document acknowledging receipt of money for future sale of shares of a company and promising to execute a pukka document of sale.* A document whereby the party executing it purported to sell his right title, and interest in certain receipts for shares, and to execute in future a pukka document of sale thereof, and acknowledged the receipt of R10,000, *held* to be an agreement, and, as such liable to stamp duty of eight annas under Sch. I, Art. 5, of the Stamp Act (I of 1879), the property in the receipt not being intended to pass forthwith. HEPTULA SHEIKH ADAM & Co. *v.* ESAFALI ABDULALI . . . **I. L. R. 14 Bom. 316**

3. ——— *Letters submitting to arbitration.* Letters written by parties authorizing arbitrators to arbitrate between them do not require to be stamped, as forming an "agreement" within the meaning of Art. 5, Sch. I of the Stamp Act. GANGARAM KUSHABA RANGOLE *v.* NARAYAN BABAJI RANGOLE . **I. L. R. 19 Bom. 32**

4. ——— and Art. 28—*Indemnity note given to railway company by consignee—Agreement.* An indemnity note, passed to a railway company by a consignee and his surety in respect of goods delivered to the consignee, and for which he is unable to produce the railway receipt—by which note they undertake to hold the railway company, its agents, and servants, harmless and indemnified in respect of all claims to the said goods is not an "indemnity bond" falling under Art. 28, Sch. I of the Stamp Act (I of 1879), but is an agreement falling under cl. (*c*), Art. 5, Sch. I of that Act, and consequently chargeable only with a stamp duty of 8 annas. ANONYMOUS **I. L. R. 5 Bom. 478**

STAMP ACT (I OF 1879)—*contd.*

——— Sch. I, Art. 5—*contd.*

5. ——— *Document—Agreement to pay.* A document was executed in these terms: "This document, a hand-note, is executed by me for the purpose of purchasing a ghor. I take from you R7. I will pay interest on the sum at a half-anna per rupee per mensem. Having received the R7 in cash, this hand-note is executed." *Held*, that the document was not a promissory note, nor a bond, but was an agreement to pay and as such was chargeable with duty under cl. 5, Sch. I of the Stamp Act. *Ferrier* v. *Ram Kulpa Ghose*, *23 W. R. 403*, referred to. MURARI MOHUN ROY *v.* KHETTER NATH MULLICK . . **I. L. R. 15 Calc. 150**

6. ——— and Art. 44 (a)—*Agreement—Mortgage.* In a contract for work to be performed entered into by a contractor with the Executive Engineer of a district, it was stipulated that payments should be made from time to time to the contractor as the work progressed, and that the Engineer might retain 10 per cent. on the value of the work done to cover compensation for default on the part of the contractor and as security for the proper performance of the contract. *Held*, that this contract was chargeable with stamp duty as an agreement under Art. 5 (*c*) and not as a mortgage under Art. 44 (*a*) of Sch. I of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879. **I. L. R. 7 Mad. 209**

7. ——— and Art. 44—*Mortgage—"Agreement not otherwise provided for.*" A license issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months' rental as a security for the due performance of the contract. The licensee executed a muchalka, stating that he agreed to all the terms and conditions mentioned in the license. *Held*, that the muchalka ought to be stamped with an eight-anna stamp. REFERENCE UNDER STAMP ACT S. 46 . **I. L. R. 15 Mad. 134**

8. ——— and Sch. II, Art. 2 (a)—*Agreement to rent pasture ground—General Clauses Act (I of 1868), s. 2—Growing grass—Lease—Immoveable property.* By a rent-note, dated the 28th July 1885, the executant *B* agreed to take for five months from the executee *H* a certain pasture ground attached to the military cantonment at Poona. The note recited that *B* was to graze thirteen she-buffaloes, at R1-10 per head, on the pasture ground, for a consideration of R21-2-0 to be paid to *B* by two instalmen; in default of payment of one instalment, the whole amount was to become payable at once. It further recited that, in case the debt remained unpaid beyond the fixed

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STAMP ACT (I OF 1879)—*contd.*

——— Sch. I, Art. 5—*concld.*

period, *B* was to pay on the amount interest at the rate of 2 per cent. per month. The Collector of Poona was of opinion that the rent note in question was a lease and sufficiently stamped with four annas. The Inspector-General of Registration held the document to be an agreement falling under Art. 5, cl. (*c*), Sch. I of the Stamp Act, and chargeable with a stamp duty of eight annas. On reference by the Commissioner to the High Court:—*Held, per* BIRDWOOD and PARSONS, *JJ.* (NANABHAI HARIDAS, *J.*, dissenting), that the rent-note in question was an agreement, and as such chargeable with a stamp duty of eight annas under cl. (*c*) of Art. 5, Sch. I of the Stamp Act (I of 1879). *Held, per* NANABHAI HARIDAS, *J.*, that the instrument was a lease and sufficiently stamped with four annas, growing grass being immoveable property within the definition of s. 2 of the General Clauses Act (I of 1868). Should, however, growing grass be not regarded as immoveable property, the instrument was an agreement for, or relating to, the sale of goods, the price being fixed with reference to the quantity to be consumed by the cattle and, as such, was exempt from stamp duty under Sch. II, Art. (*a*), of the Stamp Act. *In re* HORMASJI IRANI
I. L. R. 13 Bom. 87

9. ——— and Sch. II, Art. 2—*—Interest in land—Agreement to sell standing trees.* A document bearing a stamp of one rupee stated, *inter alia*, "I have sold to you the standing trees of the two villages for R1,601 on condition that those young trees whose trunks do not exceed 2 feet in circumference should not be cut by you, and that I will give you written information to cut the trees of the said villages when you shall have to cut the trees and remove them within two years, etc." *Held*, that the document was sufficiently stamped. VOHRA MAHAMADALI *v.* RAMCHANDRA
I. L. R. 22 Bom. 785

——— Sch. I, Art. 8—*Articles of Association—Special resolution—Resolution superseding Articles of Association—Companies Act (VI of 1882), ss. 76, 79.* A company limited by shares and already possessing Articles of Association, proceeded to pass a special resolution in virtue of which a document was drawn up entitled "Articles of Association" in supersession of the Articles theretofore in force. The record of this special resolution was under the provisions of s. 79 of the Indian Companies Act, 1882, sent to the Registrar of Joint Stock Companies to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as Articles of Association, and was not so stamped. Hereafter a reference was made by the Board of Revenue to the High Court under the provisions of s. 46 of the Indian Stamp Act, 1879, as to whether the document in question required to be stamped. *Held*, that the Indian Companies Act did not contemplate any such thing as new Articles of Association, and that the document in question was nothing more

STAMP ACT (I OF 1879)—*contd.*

——— Sch. I, Art. 8—*concld.*

than the record of a special resolution, and as such did not require to be stamped. *In the matter of the* NEW EGERTON WOOLLEN MILLS
I. L. R. 22 All. 131

1. ——— Sch. I, Art. 11—*Bill of exchange otherwise than on demand—Impressed stamp.* A bill of exchange for R500 payable otherwise than on demand must, under Art. 11 of Sch. I of the Act, be stamped with an impressed stamp of the value of six annas. RADHAKANT SHAHA *v.* ABHOYCHURN MITTER . . . . I. L. R. 8 Calc. 721

S.C. RADHAKANT SHUBA *v.* ABHOY CHURN MITTER . . . . . 11 C. L. R. 310

2. ——— and Art. 19—*Cheque—Bill of exchange—Admissibility in evidence—Post-dated cheque—Stamp Act, 1879, s. 67—Penalty.* In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at. *Bull* v. *O'Sullivan, L. R. 6 Q. B. 209; Gatty* v. *Fry, L. R. 2 Ex. D. 265;* and *Chundra Kant Mookerjee* v. *Kartik Charan Chaile, 5 B. L. R. 103*, referred to. Where a cheque bearing a stamp of one anna was dated the 25th September, and the evidence showed it to have been actually drawn on the 8th September, and therefore to have been post-dated, it was contended that the cheque was really a bill of exchange payable 17 days after date, and therefore inadmissible in evidence as being insufficiently stamped. *Held*, in a suit to recover the amount of the cheque on its being dishonoured, that it was admissible in evidence. RAMEN CHETTY *v.* MAHOMED GHOUSE : I. L. R. 16 Calc. 432

——— Sch. I, Art. 13—*Security-bond for costs of appeal—Court Fees Act (VII of 1870), Sch. II, Art. 6. Held*, by the Full Bench, that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(*a*) an *ad valorem* stamp under the Stamp Act, Art. 13, Sch. I; (*b*) a Court-fee of eight annas under the Court Fees Act, Art. 6, Sch. II. KULWANTA *v.* MAHABIR PRASAD
I. L. R. 10 All. 16

1. ——— Sch. I, Art. 16—*Certificate of sale.* The stamp duty payable on a certificate of sale is governed not by s. 24, but by Sch. I, Art. 16, of the Stamp Act, 1879. REFERENCE FROM DISTRICT JUDGE UNDER S. 49 OF STAMP ACT
I. L. R. 5 Mad. 18

2. ——— *Certificate of sale—Purchase of equity of redemption—Duty.* Where the equity of redemption of an estate is sold in execution of a decree, the stamp duty leviable upon the certificate of sale must be calculated upon the amount of the purchase-money only. REFERENCE UNDER STAMP ACT, 1879 . I. L. R. 7 Mad. 421

3. ——— *Certificate of sale—Practice—Ad valorem stamp duty—Sale, subject*

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STAMP ACT (I OF 1879)—*contd.*

Sch. I, Art. 16—*concld.*

to mortgage lien, of property in several lots—Stamp duty payable by purchaser of one lot, how calculated. In execution of a decree, certain immoveable property was attached and sold in eight lots to different persons, subject to a mortgage. The applicant was one of the purchasers, and applied for a sale-certificate. A question arose whether, in computing stamp duty, the whole amount of the principal mortgage-debt, or only a proportionate amount of it, was to be deemed a part of the consideration. On reference to the High Court:—*Held*, that the whole amount of the principal mortgage-debt, and not merely a proportionate amount of it, was to be added to the price, and the total amount to form the consideration upon which an *ad valorem* stamp duty was to be calculated, each purchaser obtaining a separate sale-certificate. *In re the application of* VISHNU KESHAV SATHE

I. L. R. 10 Bom. 58

4. ——— *Sale-certificate—Sale subject to incumbrance.* Where property subject to an incumbrance is sold by auction in execution of a decree, the sale-certificate should be stamped according to the amount of the purchase-money, and not according to the amount of the purchase-money together with the incumbrance. JWALA PRASAD *v.* RAM NARAIN . **I. L. R. 15 All. 107**

5. ——— *Sale of property subject to mortgage—Valuation of property sold—Computation of purchase-money—Certificate of sale—Proclamation of sale—Mortgages noted in proclamation of sale—Civil Procedure Code, 1882, ss. 282 and 287.* Mortgages noted in the proclamation of sale as claims upon the property sold should not be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civil Procedure Code (Act XIV of 1882) to be charges on the property, and the Court has been fit to sell it subject to them, but they should be entered in the certificate and computed as part of the purchase-money if they have been thus admitted or established, or if they have been declared under s. 282 of the Civil Procedure Code, and the sale has been held subject to them. Claims admitted by parties or established by the decree of a Court should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an inquiry under s. 287 only, and have not been made the subject of an order under s. 287 of the Civil Procedure Code. SHANTAPPA CHEDAMBARAYA *v.* SUBRAO RAMCHANDRA YELLAPUR

I. L. R. 18 Bom. 175

1. ——— **Sch. I, Art. 21**—*Conveyance by vendors under one denomination to the same person's purchasers under another denomination.* Eight persons, the owners of a tea estate, purported to convey their rights in the estate to a company; the consideration expressed in the deed of conveyance being £43,320, payable in shares and debentures of the company taken at par. The only shareholders or debenture-holders of the company were the eight persons who purported to sell the estate to the company. *Held*, that, although the conveying parties were the shareholders of the company, there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons; and that the proper duty payable on the conveyance was therefore that mentioned in Art. 21, Sch. I of the Stamp Act. *In re* KONDOLI TEA COMPANY

I. L. R. 13 Calc. 43

STAMP ACT (I OF 1879)—*contd.*

Sch. I, Art. 21—*concld.*

2. ——— **and Art. 60, cl. (b)**—*Transfer of lease—Transfer of a share of a partnership.* Where a transaction is in substance a sale of a share in a partnership, and the transfer of a share in a lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, the transaction should be regarded not as the transfer of a lease, but as the sale of a share in a partnership, and the duty payable in respect thereof should be that falling under Sch. I, Art. 21, of Act I of 1879. *In re* MENGLAS TEA ESTATE

I. L. R. 12 Calc. 383

3. ——— *Company—Winding up—Transfer of property by old to new company—Conveyance.* An instrument, which is in terms a conveyance of property at an agreed value, is a sale of such property at that price, and is governed by Art. 21, Sch. I of the Stamp Act (I of 1879). The circumstance that the transaction is a part of a larger transaction cannot affect the character of the instrument. REFERENCE UNDER STAMP ACT, s. 46 . . . . **I. L. R. 20 Bom. 432**

4. ——— *Conveyance—Transfer of lease.* When by one and the same deed there is a conveyance of freehold lands and goodwill and a transfer of interest secured by leases, the deed should be stamped under Art. 21 of Sch. I of the Stamp Act (I of 1879) with an *ad valorem* duty on the conveyance of the freehold property, goodwill buildings, and erections, and under Art. 60 of the Schedule with a duty of R5 on the transfer of each of the interests secured by the leases. REFERENCE UNDER STAMP ACT, 1879, s. 46

I. L. R. 23 Calc. 283

5. ——— *Conveyance.* The amount payable on a conveyance under the Stamp Act, Sch. I, Art. 21, is properly calculated on the consideration set forth therein, and not on the intrinsic value of the property conveyed. REFERENCE UNDER STAMP ACT, s. 45

I. L. R. 20 Mad. 27

1. ——— **Sch. I, Art. 22**—*Civil Procedure Code (Act XIV of 1882), s. 62—Copy of a document filed with the plaint—Attestation by the Court or its officer.* Art. 22 of Sch. I of the General Stamp Act (I of 1879) does not apply to a copy contemplated by s. 62 of the Civil Procedure Code

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STAMP ACT (I OF 1879)—*concld.*

——— Sch. I, Art. 22—*contd.*

(Act XIV of 1882), the attestation of which copy by the Court or its officer being not made on the application of the owner of the copy, but solely in consequence of the express direction of the Code, with a view to its being filed for the purpose of identifying the book entry when produced at the hearing. KRISHNAJI SADASHIV RANADE *v.* DULABA
I. L. R. 15 Bom. 687

2. ——— *Copy of order of Municipal Board certified by the Secretary—Public officer—Evidence Act (I of 1872). ss. 74, 76, and 78.* *Held*, that a copy of an order passed by a Municipal Board on a petition presented to it, and certified as a true copy by the Secretary to the Board, came within Art. 22 of the first Schedule to the Indian Stamp Act, 1879, and required to be stamped. The Secretary of a Municipal Board is a "public officer" within the meaning of Art. 22 of the first Schedule to the Stamp Act, 1879, for the purposes indicated therein. REFERENCE UNDER STAMP ACT, S. 46 . . . I. L. R. 19 All. 293

——— Sch. I, Art. 25, and Art. 5—*Declaration of trust—Agreement.* An agreement was made between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement. *Held*, that the agreement was liable to stamp duty as a declaration of trust under the Indian Stamp Act, 1879, Sch. I Art. 25, and as an agreement under art. 5 (*c*). REFERENCE UNDER STAMP ACT, S. 46. . . I. L. R. 11 Mad. 216

——— Sch. I, Art. 29—*Instrument evidencing an agreement to secure repayment of loan executed at time of loan—Assignment by way of mortgage of valuable security to secure pre-existing debt.* Art. 29 of Sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan. QUEEN-EMPRESS *v.* DEBENDRA KRISHNA MITTER . I. L. R. 27 Calc. 587
4 C. W. N. 524

1. ——— Sch. I, Art. 36—*Instrument of gift—Endorsement at foot of document.* On the 3rd of April 1878, on which date the Stamp Act (XVIII of 1869) was in force, *A* passed to *B* a document on plain paper granting *B* an annuity charged on the revenues of a village. On the 24th of April 1879, the Stamp Act (I of 1879) being then in force, *A* adopted *C* as her son, and *C* three days afterwards made the following endorsement upon the document: "I consent to act according to this sanad." *Held*, that the instrument should be stamped with a single stamp as an instrument of gift, under Art. 36, Sch. I of Act I of 1879. *In re* BHAVANIBAI . I. L. R. 7 Bom. 194

STAMP ACT (I OF 1879)—*concld.*

——— Sch. I, Art. 36—*contd.*

2. ——— and Art. 25—*Declaration of trust—Gift.* Where a donee was directed in an instrument of gift of certain land to maintain the donor out of the profits of the land:—*Held*, that the instrument was liable to stamp duty as a gift, and not as a declaration of trust. REFERENCE UNDER STAMP ACT, S. 46 . I. L. R. 12 Mad. 89

——— Sch. I, Art. 37—*Partition, instrument of—Arbitration—Award.* An award directing partition of property, if signed by the parties interested by way of assent to the award, becomes thereby an instrument of partition, and should be stamped accordingly. AMARSI *v.* DAYAL
I. L. R. 9 Bom. 50

1. ——— Sch. I, Art. 38—*Deed acknowledging former adoption and investing the person adopted with powers of son.* *A*, who was a childless Hindu widow, acknowledged the fact of the due adoption of *B* by a deed which recited that she having been childless had asked the father of the executee to give the executee in adoption, and he having consented, the executee was adopted with due ceremonies on the 1st August 1887. It further recited that the original name of the executee was changed, and the executee was thenceforth to bear the changed name, and to get all the powers which usually vested in a son. The Commissioner, *C. D.*, feeling doubt as to whether it could be treated as a deed of adoption, referred it for the opinion of the High Court. *Held*, that the document was distinct from an adoption deed or authority to adopt so as to be liable to stamp duty under Act I of 1879, Art. 38, Sch. I, and that it was not liable to any stamp duty. *In the matter of* AMBAI
I. L. R. 13 Bom. 280

2. ——— *Deed confirming adoption.* A document was written on a ten-rupee stamp paper executed by the executant *M* to one *D*, whereby *M*, after reciting the fact of his having adopted *D*, constituted him the heir to his interest in the undivided family property, and declared him to be the sole owner thereof as the executant's adopted son. On the same document *C*, the mother of *D*, and his father *P* endorsed separately their consent to the adoption. *Held*, that the document was not an instrument conferring an authority to adopt, and therefore not chargeable under Art. 38 of Sch. I of Act I of 1879 or under any other article. The endorsements therefore were not chargeable with any stamp duty. *In the matter of* HANMAPA
I. L. R. 13 Bom. 281

1. ——— Sch. I, Art. 39 (b)—*Lease—Rent,* A mittadar executed a perpetual lease of certain villages for R1,954 per annum. Of this, R1,554-10-7, representing the Government peshkash, the lessor directed the lessee to pay to Government and the balance R400 to himself. The lease was written on a 20-rupee stamp paper, *Held*, that the sum of R1,954 represented the rent, and that the stamp duty was to be calculated thereupon. REFERENCE FROM BOARD OF REVENUE . I. L. R. 7 Mad. 155

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STAMP ACT (I OF 1879)—*contd.*

2. _____ Sch. I, Art. 39 (c), (d)—*Rent—Premium—Mortgage—Lease.* By a document purporting to be a lease, certain land was leased for four years at a rent of R15 per annum. Out of the total rent it was stipulated that R50 should be paid in advance and the balance R10 at the end of the term. *Held*, that the payment of R50 in advance was not payment of a premium or fine within the meaning of Art. 39 (*c*) of the Stamp Act, 1879. By a document purporting to be a rent agreement the lessee took a shop for five years, agreeing to pay R30 per annum as rent, depositing one year's rent with the lessor, which was to be credited to the rent of the last year of the term. *Held*, that the deposit of one year's rent with the lessor was not a fine or premium within the meaning of art. 39 (*c*) of the Stamp Act, 1879. By a document purporting to be an instrument of mortgage, the owner of certain land, being indebted in a certain sum, conveyed the land to his creditor for nine years in liquidation of the principal and interest of the debt. The creditor was to take the produce of the land, enjoy the profits or suffer the loss, and pay R35 per annum as rent. *Held*, further, that the document was a lease with a premium liable to duty under Art. 39 (*d*) of Sch. I of the Stamp Act, 1879. REFEREHCE UNDER STAMP ACT, 1879
I. L. R. 7 Mad. 203

3. _____ and Sch. II, Art. 13, cl. (b)—*Kabuliat or lease of immoveable property for any purpose other than that of cultivation—Stamp duty, exemption from, of such lease.* A kabuliat or lease relating to immoveable property let to a tenant for any purpose other than that of cultivation is not such a lease as is contemplated by art. 13, cl. (*b*) of the Stamp Act I of 1879 so as to be exempt from stamp duty, but is chargeable with such duty under Sch. I, Art. 39 of that Act. NARAYAN RAMCHANDRA *v.* DHONDU RAGHU
I. L. R. 10 Bom. 173

1. _____ Sch. I, Art. 44, cls. (a) and (b)—*Mortgage-deeds—Covenants for quiet enjoyment—Per Curiam.* Cl. (*a*) of Art. 44 of Sch. I of the Stamp Act, 1879, applies only to those deeds in which possession of the mortgaged property is given, or agreed to be given at the time of the execution of the deed, or, in other words, where immediate possession of the property is given, or agreed to be given, by the terms of the deed to the mortgagees. *Per* GARTH, *C.J.* The principle of the distinction between the two classes of mortgages named in Art. 44 is that, where the title to the land and the possession or immediate right to possession both pass to the mortgagee, the same duty is charged as upon a conveyance by way of sale, but when the title only passes, and possession, or the right to possession, does not, the lower duty is chargeable. *Per* MITTER, *J.* The word "given" in cl. (*a*) of Art. 44 points out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security for the

STAMP ACT (I OF 1879)—*contd.*

_____ Sch. I, Art. 44, cls. (a) and (b)—*contd.*

mortgage-money; but where the mortgagee becomes entitled to enter upon possession irrespective of the consent of the mortgagor to make over possession, cl. (*a*) will not apply. *Per* FIELD, *J.* The Stamp Act is a Revenue Act, and the rule of construction of such Acts is, that in case of a doubt, the construction most beneficial to the subject is to be adopted. The words "agreed to be given" in Art. 44, cl. (*a*), can only apply where there is an express or implied agreement to give possession; they will not apply where there is no such agreement, express or implied, but the effect of the document is such that a mortgagee has merely a right which he can enforce in a Court of law to obtain possession. ANONYMOUS
I. L. R. 10 Calc. 274

2. _____ *Construction.* A mortgage-deed, dated the 4th August 1883, stipulated that possession was to be given to the mortgagee after the 31st May 1818, if the mortgage loan was not entirely repaid by that date. On the question being referred to the High Court, whether cl. (*a*) or cl. (*b*) of Art. 44, Sch. I, Stamp Act I of 1879, applied to the case:—*Held*, that cl. (*b*) applied. The intention of cl. (*a*) is to cover cases of mortgage with possession, and the words "agreed to be given" are to be read as if the words "at the time of execution" immediately followed and qualified the word "given." Cl. (*a*) should be read as if it were worded "when possession of the property . . . . . is given by the mortgagor at the time of execution, or is agreed to be then given, and not . . . . . is then agreed to be given." HINGANGHAT MILL COMPANY *v.* REKCHAND
I. L. R. 8 Bom. 310

3. _____ *Stipulations not creating fresh obligations.* Under the ordinary law of mortgage, the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred in protecting the title. So that where a mortgage-bond contains stipulations under which the mortgagor engages to repay to the mortgagee any costs he may incur in suits brought against him by the mortgagor's co-sharers, and also any debts charged upon the mortgaged property which the mortgagee may pay, the stipulations do not create any fresh obligation, and require no additional stamp duty. DAMODAR GUNGADHUR *v.* VAMANRAV LAKSHMAN . . . **I. L. R. 9 Bom. 435**

4. _____ *Bond—Mortgage—Stamp Act, 1879, s. 3, cl. 4 (c) and 13, ss. 7, 26, Sch. I, Art. 13.* A grower of sugarcane executed a deed whereby he borrowed a sum of R25 as "earnest-money" and covenanted to deliver to the lender on a certain date 21 maunds of rab (unrefined sugar), upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows: "If the supply of the rab be less than the fixed quantity, and the money still remains due, then the said money thus due,

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STAMP ACT (I OF 1879)—*contd.*

——— Sch. I, Art. 44, cls. (a) and (b)—*—contd.*

including the profits, shall be paid at the rate of R1 per maund ; that in case of my not supplying the rab at all, or selling it at some other place, I will pay the whole amount at once including the said profits." As collateral security, he hypothecated the produce of a field of sugarcane, the value of which was not stated. *Held*, by the Full Bench, that the instrument was a " mortgage-deed " within the meaning of s. 3 (13) and Art. 44 (*b*) of Sch. I of the Stamp Act (I of 1879). *Held*, by STUART, *C.J.*, STRAIGHT, *J.* and BRODHURST, *J.*, that it was also a " bond " within the meaning of s. 3 (4) (*c*) and Art. 13 of Sch. I and with reference to the provisions of s. 7 was, chargeable with stamp duty solely as a bond under Art. 13, the contract being a single one. *Held*, by the Full Bench, that the proper stamp duty payable on the instrument was four annas. *Held* by STUART, *C.J.*, and STRAIGHT, *J.*, that in estimating the stamp duty payable on the instrument the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the rab must not be taken into account. *Reference by Board of Revenue N.-W. P. I. L. R. 2 All. 654*, doubted ; and *Gisborne Subal Bowri, I. L. R. 8 Calc. 284*, referred to by STRAIGHT, *J.* *Per* STUART, *C.J.*, that, for the purpose of estimating the stamp duty, the amount secured by the instrument was R25, the amount borrowed, plus R11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, *i.e.*, the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp duty. *Per* OLDFIELD, *J.*, that the amount secured or limited to be ultimately recoverable under the instrument was R25, the amount borrowed, plus R21 the sum recoverable at R1 per maund in the event of the borrower's non-delivery of the 21 maunds, and stamp duty was payable on this amount. *In the matter of* GAJRAJ SINGH
I. L. R. 9 All. 585

See SAMBHU CHANDRA BEPARI *v.* KRISHNA CHARAN BEPARI . . . **I. L. R. 26 Calc. 179**

5. ——— *Assignment by way of mortgage of valuable security to secure pre-existing debt—Stamp Act (I of 1879), s. 3, sub-s. (13).* Art. 29 of Sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan where an instrument was an assignment by way of mortgage of valuable securities to secure a pre-existing debt, it was *held* to come under Art. 44 of Sch. I of the Stamp Act. For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined

STAMP ACT (I OF 1879)—*contd.*

——— Sch. 1, Art. 44, cls. (a) and (b)—*—concld.*

in the Stamp Act. QUEEN-EMPRESS *v.* DEBENDRA KRISHNA MITTER . **I. L. R. 27 Calc. 587**
4 C. W. N. 524

6. ——— **and s. 3 (13), sch. I, Art. 29, and Art. 5 (c)**—*Mortgage—Assignment of growing coffee.* By an agreement made the first day of September 1884, *A*, in consideration of R1,000 to be advanced to him by *B*, assigned to *B* the whole crop of coffee then growing upon a certain estate, upon trust, *inter alia*, to secure the repayment of the sum advanced. It was stipulated that *A* should cultivate the crop till maturity and deliver it to *B*. *Held*, that this document was a mortgage liable to duty under Art. 44 (*b*) of Sch. I of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879 . . **I. L. R. 8 Mad. 104**

7. ——— **and Art. 29**—*Mortgage advance payable on demand—Power of sale in default of repayment of advance—Pledge.* In consideration of an advance of R1,450, on interest, repayable on demand, certain boat-owners assigned to *S & Co.* their paddy boats, the boat-owners retaining working and being responsible for the safety of the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to *S & Co.* and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by *S & Co.* On failure to make repayment on demand, *S & Co.* were empowered to take possession and to sell the boats. *Held*, that the document was a mortgage and not a pledge, and as such should be stamped under Art. 44 (*b*) of Sch. I of the Stamp Act of 1879. *In the matter of* KO SHWAY AUNG *v.* STRANG STEEL & Co.
I. L. R. 21 Calc. 241

8. ——— *Mortgage—Consideration.* A kanom deed is liable to a stamp duty as a mortgage only, and in calculating the consideration, the ascertained amount of compensation for improvements paid at the landlord's request by the incoming to the outgoing tenant must be included. REFERENCE UNDER STAMP ACT, s. 46
I. L. R. 22 Mad. 164

9. ——— " *Mortgage-deed.*" By a clause in a document referred to the High Court for an opinion as to the stamp duty payable thereon, the A company agreed that, on execution of the document, they would issue and hand to the B company £8,000 part of the £25,000 second debentures, and that such second debentures, together with the £20,000 first debentures already issued to the B company, and the remaining £5,000 first debentures, subject to the prior charges thereon, should be held by the B company as security for a sum of £32,009-15-10 previously mentioned in the deed. *Held*, that the clause constituted the document a " mortgage-deed " within the meaning of the Indian Stamp Act, 1879. The whole debt of £32,009-15-10 being

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STAMP ACT (I OF 1879)—*contd.*

———— Sch. I, Art. 44, cls. (a) and (b)—*—concld.*

by the said document, secured not only upon the old security of £20,000 first debentures, but also upon the £8,000 second debentures, and the remaining £5,000 of the first debenture, stamp duty was payable on the new security though a portion of the debt secured was included in the previous document on which duty had been paid ; that the document was not a mere agreement to make a transfer, but an agreement to hand over the debentures on the execution of the document, and was therefore in effect an actual transfer ; that the "mortgage-deed" was one with possession within Art. 44 (*a*) of Sch. I of the Stamp Act, 1879, by which this document was governed and that, in respect of the undertaking to make further advances, the document was liable to further duty as an agreement "not otherwise provided for." REFERENCE UNDER STAMP ACT, s. 46 . . I. L. R. 23 Mad. 207

———— Sch. I, Art. 46, and s. 34, and Sch. II, cl. 2—*Agreements for sale of goods—Broker's bought and sold notes—Note or memorandum of sale.* The plaintiffs sued to recover damages for the non-acceptance of wheat which the defendant on the 16th May 1889 by two contracts agreed to purchase. At the hearing, in order to prove the terms of the contracts, the plaintiffs tendered two notes, or memoranda of the contracts, which purported to be signed by the broker and also by the defendant. These notes were, in fact, the sold notes which the broker had given to the plaintiffs. Each of these notes had been stamped with an anna stamp, but the stamp on one of them had not been cancelled at all, and the stamp on the other was without any mark of cancellation except a small part of the first letter of the defendant's signature, consisting of a slightly curved line. On these notes being tendered in evidence, it was objected that they were inadmissible, being unstamped, having regard to ss. 11 and 34 of the Stamp Act. The Court allowed the objection, and rejected the notes. The plaintiffs then contended that the documents were only memoranda of parol contracts and might be regarded as agreements for the sale of goods, and exempt from stamp duty, under cl. 2, Sch. II, or at all events admissible on payment of a penalty—ss. 7 and 34. *Held*, that the documents in question were documents of the nature of a note or memorandum chargeable under Art. 46 of Sch. I, and were not exempt from duty under cl. 2 of Sch. II. RALLI *v.* CARAMALLI FAZAL I. L. R. 14 Bom. 102

———— Sch. I, Art. 49—*Policy of insurance—Life policy—Beng. Reg. X of 1829. Per* BROUGHTON, *J. Held*, that, inasmuch as Regulation X of 1829 was not recognized by the Supreme Court, life policies of insurance issued before 1860 did not require a stamp. RAJNARAIN BOSE *v.* UNIVERSAL LIFE ASSURANCE COMPANY I. L. R. 7 Calc. 594 : 10 C. L. R. 561

STAMP ACT (I OF 1879)—*contd.*

1. ———— Sch. I, Art. 50—*Court Fees Act, Sch. II, Art. 10 (a)—Power to vakil to obtain copies from Collector's office—Stamp.* A document authorizing a vakil to apply for copies of records from the Collector's office is properly stamped with a Court-fee stamp under Art. 10 (*a*) of Sch. II of the Court Fees Act, 1870, and does not require to be stamped as a power-of-attorney under Art. 50 (*b*) of Sch. I of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879 . I. L. R. 9 Mad. 146

2. ———— cl. (b)—*Court Fees Act, Sch. II, Art. 10 (a)—Vakalatnama—Power-of-attorney.* A document was given to *P* by thirty-six persons jointly interested in a certain sum of money authorizing him to appear before a certain officer and receive payment thereof. *Held*, that the document was a power-of-attorney, and that consequently the proper stamp duty was one rupee, leviable under the Stamp Act, 1879, Sch. I, Art. 50 (*b*). REFERENCE UNDER STAMP ACT, 1879 . I. L. R. 9 Mad. 358

3. ———— and s. 3, cl. 16, and s. 7—*Power-of-attorney—Instrument of trust.* Ten mirasidars of a village executed an instrument authorizing the person therein mentioned to recover for them from their former agent the perquisites and other communal income appertaining to their mirasi rights, to cultivate their maniems, to distribute to them proportionately to their shares the profits of certain common land, etc. *Held*, that the instrument was a power-of-attorney and should bear a stamp of R5. REFERENCE UNDER STAMP ACT, s. 46 I. L. R. 15 Mad. 386

1. ———— Sch. I, Art. 52—*Tax—Receipt for money paid as taxes—Municipality, receipt for house-tax exceeding twenty rupees.* A receipt by a Municipality acknowledging payment of house-tax exceeding twenty rupees requires a receipt stamp under Sch. I, Art. 52, of Act I of 1879. *In re* KARACHI MUNICIPALITY . . I L. R. 12 Bom. 103

2. ———— and s. 3. cl. 17—"*Sarkhat*"—*Receipt.* The defendant in a suit on a bond set up as a defence that the bond had been paid in part in sugarcane juice, and as evidence of this fact produced a document called a "sarkhat," alleged to be signed by the plaintiff acknowledging the receipt of sugarcane juice, the price of which exceeded R20. There was nothing in this document which showed that the sugarcane juice had been received in part satisfaction of the bond. *Held*, that the document was not a "receipt" within the meaning of the Stamp Act, 1879, but a memorandum of sugarcane juice supplied, and required no stamp. DEBI PRASAD *v.* RUPU . I. L. R. 6 All. 253

3. ———— *Receipt—Entry signed by creditor in debtor's book discharging debt.* An entry made by a creditor in the khatta-book of the debtor, and signed by him for the payment of a sum of money in discharge of a debt, is a "receipt" within the meaning of s. 3, cl. 17, of the Stamp Act, and as such must be stamped under Art. 52, Sch. I of that Act. QUEEN-EMPRESS *v.* JUGGERNATH I. L. R. 11 Calc. 267

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STAMP ACT (I OF 1879)—*contd.*

1. ——— **Sch. I, Art. 54**—*Release—One-anna adhesive stamp—Full stamp duty leviable.* A release chargeable with four-annas stamp duty was executed on paper bearing a one-anna adhesive receipt stamp. *Held*, that in calculating the stamp due the one-anna stamp ought not to be taken into consideration. *Reference under Stamp Act, s. 46, I. L. R. 8 Mad. 87*, followed. REFERENCE UNDER STAMP ACT, S. 50 . . **I. L. R. 15 Mad. 259**

2. ——— *Release—Partition, deed of.* A Hindu executed in favour of his father as representing the interest of the other members of his family, an instrument by which he relinquished his rights over the general property of the family in consideration of certain lands being allotted to him for life, and certain debts incurred by him being paid. The instrument further provided that the lands allotted to the executant for life should go towards the shares of his sons at any partition effected after his death. *Held*, that the instrument was not a deed of partition, but a release and should be stamped accordingly. REFERENCE UNDER STAMP ACT, S. 46 . **I. L. R. 18 Mad. 233**

1. ——— **Sch. I, Art. 57**—*Settlement—Stamp duty.* Under Art. 57 of Sch. I of the Stamp Act, 1879, stamp duty on a settlement is to be calculated on the value of the property settled as set forth in such settlement. *Held*, that these terms do not mean the value of the interest or interests created by the settlement, but refer to the value of the property settled, which, it was intended by the Legislature, should be set forth in the settlement. REFERENCE UNDER STAMP ACT, 1879 . **I. L. R. 8 Mad. 453**

2. ——— **and Art. 54 and s. 3 (19)**—*Settlement—Testamentary document—Trust-deed.* An instrument called a trust-deed by the party executing it was intended to have immediate operation. It vested the property in the trustees at once, and the provisions as to the management and the ultimate beneficial interest in the property showed that it was contemplated that its operation might extend beyond the lifetime of the owner. *Held*, that the instrument fell under the definition of a settlement in the Stamp Act (I of 1879), and should be stamped accordingly. REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY . . . **I. L. R. 20 Bom. 210**

——— **Sch. I, Art. 60**—*Transfer of estates and mining rights held under lease.* In consideration of a sum of £86,500, two coffee estates, opened out on land held under a lease for fifty years, together with the mining rights therein, also held under lease for a term of forty-eight years, were transferred by deed for the residue of those terms. *Held*, that the stamp duty payable on the transfer deed was to be regulated by the provisions of cl. 60 of Sch. I of the Stamp Act, 1879. REFERENCE FROM BOARD OF REVENUE UNDER STAMP ACT, 1879 **I. L. R. 5 Mad. 15**

——— **Sch. II, Art. 1 (b)**—*Affidavit.* *S*, being desirous of obtaining copies of certain records

STAMP ACT (I OF 1879)—*contd.*

——— **Sch. II, Art. 1 (b)**—*contd.*

in a suit in the Court of the Subordinate Judge of Sirsi, appeared before the nazir and clerk of that Court, and made an affidavit to the effect that she was the heir and legal representative of one of the defendants in that suit, and needed the copies for the purpose of producing them in a suit filed against her in the Court at Karwar. The affidavit, together with a duly stamped application, was presented by her pleader to the District Judge, who, being of opinion that the affidavit should be on a stamped paper, referred the case to the High Court. *Held*, that the affidavit was exempt from stamp duty under Sch. II, Art. 1 (*b*), of the Stamp Act (I of 1879). *In re the application of* SHESHAMMA **I. L. R. 12 Bom. 276**

1. ——— **Sch. II, Art. 2 (a)**—*Agreement for, or relating to, the sale of goods.* By an agreement in writing the vendor agreed to sell, and the purchaser to buy, certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to, and become the property of, the vendor. *Held*, that this document was exempt from duty under Sch. II, Art. 2 (*a*) of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46 **I. L. R. 10 Mad. 27**

2. ——— *Exemption—Agreement for the sale of goods.* An agreement for the sale of goods does not require stamp under the Indian Stamp Act, although it contains provisions as to the warehousing and insurance of the goods previous to delivery. KYD *v.* MAHOMED **I. L. R. 15 Mad. 150**

——— **Sch. II, Art. 11, and Sch. I, Art. 27**—*Vakil—Entry on roll of advocates—Exemption from duty.* By Art. 11 (*a*) of Sch. II of the Stamp Act, 1879 (which exempts from duty the entry of an advocate, vakil, or attorney on the roll of any High Court when he has previously been enrolled in a High Court established by Royal Charter), a vakil on the roll of the High Court, Madras, who applies to be entered on the roll of advocates, is exempted from the duty prescribed by Art. 27 of Sch. I of the said Act. *In re* PARTHASARADI **I. L. R. 8 Mad. 14**

1. ——— **Sch. II, Art. 12 (b)**—*Security bond for due accounting for "property" received by virtue of office.* The question was whether a bond executed by the sureties of an officer of Government to secure the due execution of his office and the due accounting by him of "public moneys, deposits, notes, stamp paper, postage labels, or other property" of Government committed to his charge was or was not exempted from stamp duty by the provisions of art. 12 (*b*) of Sch. II of Act I of 1879, regard being had to the words "other property." *Per* STUART, *C.J.*, that such bond was one to secure the "due execution of an office" and the "due accounting for money received by virtue thereof," and nothing more, as the words

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STAMP ACT (I OF 1879)—*contd.*

——— Sch. II, Art. 12 (b)—*concld.*

" or other property " must be taken to mean property of the same kind as previously mentioned, and therefore " money " or the like of money, and such bond was therefore exempted from stamp duty by the provisions of Art. 12 (*b*) of Sch. II of Act I of 1879. *Per* OLDFIELD, *J.*, that, inasmuch as the words in Art. 12 (*b*) of Sch. II of Act I of 1879 " or the due accounting for money received by virtue thereof " should be regarded as mere surplusage, and the " due execution of an office " and the " due accounting for money received by virtue thereof " be considered one and the same thing, and as the due accounting for property received by him by virtue of his office was the " due execution of his office " by the officer in this case, such bond was one for the "due execution of an office," and was therefore exempted from stamp duty. *Per* SPANKIE, *J.*, and STRAIGHT, *J.*, that, inasmuch as the words in Art. 12 (*b*) of Sch. II of Act I of 1879 could not be regarded as mere surplusage, and there was a distinction drawn by the Legislature between the " due execution of an office " and the " due accounting for money received by virtue thereof," such bond was not one for the " due execution of an office," and being one for the due accounting for "property," it was not one for the due accounting for " money," and therefore it was not exempted from stamp duty. REFERENCE BY BOARD OF REVENUE, N.-W. P.
I. L. R. 3 All. 788

1. **——— Sch. II, Art. 13, cl. (b)**—*Lease by a cultivator—Definite term—Annual rent.* Cl. (*b*), Art. 13 of Sch. II of Act I of 1879, exempts all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed R100. *In re* BHAVAN BADHAR . . . **I. L. R. 6 Bom. 691**

2. ——— *Lease for planting cocoanut trees—Cultivator.* A person whose occupation is that of a cultivator and who takes a lease of land for planting cocoanut trees is, in respect of that occupation, a " cultivator." A lease given by him is one exempt from stamp duty under Art. 13 (*b*) of Sch. II of the Stamp Act (I of 1879) if the annual rent reserved thereby does not exceed R100. RAMCHANDRA VASUDEVSHET *v.* BABAJI KUSAJI
I. L. R. 15 Bom. 73

3. ——— **and cl. (c)**—*Lease granted to a cultivator—Kabuliat—Exemption from stamp duty.* By the term " cultivator " in Art. 13, Sch. II of the Stamp Act, 1879, only those persons are connoted who actually cultivate the soil themselves or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant, not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease. *Held*, therefore, where the land, the subject of a kabuliat (counterpart of a lease), was for a large part not cultivable or susceptible of being treated as a " cultivator's " holding in any legitimate sense of that word, that such kabuliat was not exempted from stamp duty under Art. 13 (*c*), Sch. II of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879. *In the matter of* LACHMAN PRASAD . . . **I. L. R. 5 All. 360**

STAMP ACT (I OF 1879)—*concld.*

——— Sch. II, Art. 13 cl. (c)—*concld.*

4. ——— **cl. (c)**—*Counterpart of lease of salt-pans.* A counterpart of a lease of salt-pans held not to be exempt from stamp duty as it did not purport to be a counterpart of a lease granted to a cultivator. MANJUNATH MANGESHAYA BAINDUR *v.* MANGESH SHESHAGIRIAPA GOKARNKAR
I. L. R. 18 Bom. 546

1. ——— **Sch. II, Art. 15 (a)**—*Receipt—Endorsement of payment of mortgage-deed.* An endorsement on a mortgage acknowledging the receipt of the sum thereby secured is exempt from stamp duty under Sch. II, Art. 15 (*a*), of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46. . . . . **I. L. R. 10 Mad. 64**

2. ——— *Receipt given by Secretary of club to a member for club bill.* Where a receipt in writing is given by the Secretary or other manager of a club to a member acknowledging a payment above R20 on account of a club bill, it is liable to stamp duty. REFERENCE UNDER STAMP ACT, s. 46 . . **I. L. R. 10 Mad. 85**

3. ——— **and s. 3, cl. 17**—*Receipt—Barrister's fee—Consideration—Honorarium not merces.* A receipt given by a Barrister for a fee is exempted from stamp duty by Art. 15 (*b*) of Sch. II of the Stamp Act, 1879. REFERENCE UNDER STAMP ACT, 1879 . . **I. L. R. 9 Mad. 140**

4. ——— *Payment of money without consideration—Receipt for Council's fees.* A receipt given by Council for a sum above R20 paid to him as a fee for professional services is exempt from stamp duty. REFERENCE FROM THE BOARD OF REVENUE, N.-W. P. AND OUDH
I. L. R. 16 All. 132

STAMP ACT (II OF 1899).

See STAMP ACT, 1879, s. 24.
I. L. R. 24 Bom. 257

See STAMP DUTY.

See STAMP DUTY—HATCHITTA
11 C. W. N. 1122

——— *Bill of Exchang—Sufficiency of stamp—Construction of instrument.* In determining the question whether a particular instrument is sufficiently stamped, the Court should only look at the instrument as it stands. *Ramen Chetty* v. *Mahomed Ghouse, I. L. R. 16 Calc. 432*, and *Royal Bank of Scotland* v. *Tottenham, [1894] 2 Q. B. 715*, followed. SAKHARAM SHANKAR *v.* RAMCHANDRA BABU MOHIRE (1902)
I. L. R. 27 Bom. 278

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STAMP ACT (II OF 1899)—*contd.*

1. ——— s. 2 (*1*) (b)—*Promissory Note.* The defendant passed to the plaintiff a document to this effect: "I have this day taken from you in cash R48 (forty-eight). "I have received this amount. I shall repay this money without taking any objection, when you should demand [it]." The document was attested by two witnesses. It bore a one-anna adhesive stamp. *Held*, on a construction of the document, that it was a bond within the meaning of s. 2 (5) (*b*) of the Indian Stamp Act (II of 1899); since the document was attested and was not payable to order or bearer, and the executant obliged himself to pay the money to another. VENKU *v.* SITARAM (1905) . **I. L. R. 29 Bom. 82**

2. ——— *Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document.* The transanctions comprised in a document consisted of a transfer of a mortgage secured on a cotton mill and an agreement that the transferee should lend money at the request of the transferor to the mortgaged mill for making improvements, additions and repairs and for the working of the mill. A question having arisen as to what was the proper stamp duty payable on the document. *Held*, that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to R5-8-0 in all. An agreement to lend money does not create an obligation to pay money within cl. (5) (*b*) of s. 2 of the Indian Stamp Act (II of 1899). An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages. HITWARDHAK COTTON MILLS CO. *v.* SORABJI (1909) . **I. L. R. 32 Bom. 426**

1. ——— s. 2, cl. (15)—*Partition—Undivided brothers—Documents purporting to be lists of properties—Each document signed by the brothers excepting the one retaining it—Each document formed the title of the brother retaining it with respect to his share—Instrument of partition—Stamp.* Four undivided brothers made four lists of the family property. Each list was signed by three brothers and not by the fourth, who ratained it. A question having arisen whether the lists constituted a partition between the brothers and required to be stamped as such under the Stamp Act (II of 1899): *Held*, that the four documents formed, when read together, an instrument of partition within the meaning of s. 2, cl. 15, of the Stamp Act II of (1899). Each document formed the title of the brother retaining it against the other three brothers with regard to the property, which came to his share when the partition was effected. GANPAT *v.* SUPDU (1908) . . **I. L. R. 32 Bom. 509**

2. ——— s. 2 (15)—*Civil Procedure Code (Act XIV of 1882), s. 396—Decree for partition—Commissioner's report—Decree in accordance—Final order—Instrument of partition—Stamp.* A decree

STAMP ACT (II OF 1899)—*contd.*

——— s. 2—*concld.*

for partition passed in accordance with a Commissioner's report under s. 396 of the Civil Procedure Code (Act XIV of 1882), is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition under s. 2 (15) of the Indian Stamp Act (II of 1899). BALARAM *v.* RAMKRISHNA (1905) **I. L. R. 29 Bom. 366**

3. ——— *Instrument of partition—Award—An award by an arbitrator directing a partition.* An award began by saying, "We decide as below. The parties should act accordingly." It went on, the defendant "should take into his possession as below after passing a legal release." It added other directions with regard to the action of the defendant, and provided "in connection with whatever is settled to be given to the 'defendant' and to be taken by him, we direct that the 'defendant' should take into his possession the properties and receive and pay money stated above after passing a release on sufficient stamp and getting it registered." *Held*, that the award came within the meaning of the words "an award by an arbitrator directing a partition" within the meaning of s. 2, cl. 15, of the Indian Stamp Act (II of 1899). *Per* BEAMAN, *J.*—The terms of s. 2, cl. 15, of the Indian Stamp Act (II of 1899) provide for all the cases, for parties having divided or agreed to divide, for arbitrators, to whom reference has been made, directing a partition, and last for the Courts effecting a partition. KALIDAS *v.* TRIBHUVANDAS (1906) **I. L. R. 31 Bom. 68**

——— s. 2 (15), Sch. I, Art. 45.

See PARTIES, ADDITION OF.

I. L. R. 32 Calc. 483

——— ss. 2 and 7, and Sch. I, Art. 47, cl. A.

See BILL OF LADING.

I. L. R. 30 Calc. 565

——— s. 5—*Agreement with numerous landholders for mining rights—Community of interest—Stamp.* A Company, having obtained from the Secretary of State for India the right to search for and work minerals in a certain district, prepared an indenture with the object that it should be executed by numerous persons who were landholders and owners of surface and mining rights over the lands comprised in that district. By the indenture, each intended executant, for a consideration of one rupee and a royalty, granted to the company a license to prospect and work upon a piece of land belonging to him, and covenanted to sell or lease the mining rights over it, if required. The executant further covenanted to indemnify the Company from claims that might be made by other persons, and undertook not to sell the mining rights to any other person for fifty years. *Held*, that the instrument was chargeable with the aggregate amount of the duties with which separate

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STAMP ACT (II OF 1899)—*contd.*

——— **s. 5**—*concld.*

instruments relating to the same matter would be chargeable. Upon the face of it, the instrument dealt with several distinct matters, namely, with agreements with several persons with regard to their separate property; and the proper stamp to be affixed was an eight-anna stamp, or as many such stamps as there were separate landholders who were made parties to the agreement. *Held*, also, that the instrument did not contain distinct agreements with any one *raiyat*. REFERENCE UNDER STAMP ACT, s. 57 (1900) . **I. L. R. 24 Mad. 176**

——— **s. 5 and Sch. I, Art. 35**—*Lease for three years, containing covenant by lessor to renew, at option of lessee, for a further period of one or two years from the expiration of the original term—Stamp duty—Not an instrument comprising or relating to several distinct matters.* A lease for three years at a specified rent, containing a covenant on the part of the lessor to renew it, at the option of the lessee, for a further period of one or two years from the expiration of the original term, is not an instrument comprising or relating to several distinct matters, within the meaning of s. 5 of the Stamp Act, 1899. Such an instrument contains but one contract, namely, a demise. The option to renew is ancillary to, and forms part of, the consideration for entering into the lease. REFERENCE UNDER STAMP ACT, s. 57 (1901) . . . **I. L. R. 25 Mad. 3**

——— **ss. 5, 6.**

See ARBITRATON . **13 C. W. N. 63**

——— **s. 7.**

See ante, SS. 2 AND 7.

——— **s. 12**—*Stamp—Promissory note—Stamp not cancelled—Evidence of consideration for debt aliunde admissible.* Plaintiff sued for the recovery of a loan secured by a promissory note. When the promissory note was produced in Court it was found that the stamp on it had not been cancelled, and it was therefore treated as an unstamped document and the Court refused to allow other evidence to be given of the debt. *Held*, that evidence of the debt was admissible *aliunde*. When a cause of action for money is once complete in itself, whether for goods sold or money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. *Sheikh Akbar* v. *Sheikh Khan*, *I. L. R. 7 Calc. 256*, followed. BANARSI PRASAD *v.* FAZAL AHMED (1905) . **I. L. R. 28 All. 298**

——— **s. 23. Sch. I, Arts. 1, 5, cl. (*b*)**—*Stamp Act (II of 1899), Sch. I, Art. 5, cl. (b) Art 1 and s. 23—Hatchitta containing stipulation to pay interest—Acknowledgment or agreement—Stamp duty.* *Held*, that the document sued upon was not a mere acknowledgment of a debt, inasmuch as it contained a stipulation that the amount should bear interest at a certain rate, and should therefore have been stamped as an agreement or memorandum of agreement with a stamp of 8 annas under cl. (*b*) of Art. 5 of Sch. I of the Stamp Act. *Luxumi Bai* v. *Ganesh Raghu Nath*, *I. L. R. 25 Bom. 373*, relied on. MULCHAND LALA *v.* KASHIBULLAH BISWAS (1907) . . . **11 C. W. N. 1120**

STAMP ACT (II OF 1899)—*contd.*

——— **s. 23, Sch. I, Art. 1, 5, cl. (b)**—*—concld.*

——— **s. 24**—*Mortgage-deed—Exemption from duty—Statute—Construction—Exemption.* The proviso to s. 24 of the Stamp Act (II of 1899) contemplates that to entitle the mortgage to a deduction thereunder, the property transferred should be identical with that mortgaged and should not merely form a portion thereof. An enactment imposing a burden requires a strict construction in favour of the subject; but an exemption must be strictly construed in favour of the State. *In re* NIRABAI (1905) . . **I. L. R. 29 Bom. 203**

——— **s. 24 and Sch. I, Art. 23**—*Conveyance—Havala—Letter by a debtor, authorising payment to his creditor of money due to him (the debtor) by a third person.* The defendant authorized the plaintiff, his creditor, to receive a sum of money on his behalf due to him by the Panjrapol authorities at Bhiwandi, by a letter which ran as follows:—"To The Daroga of the Panjrapol, Bhiwandi. I, Gau bin Halia of Khoni, beg to apply that I have completely fulfilled the agreement to supply fodder for *Samvat* year 1956, and that the sum of R22, due to me on account, should be made over, on my behalf, to Shet Mangaldas Bhanji. He will sign on my behalf, and I consent to his doing so. This application for the *havala* is given in writing. It is requested you will accept it.—6th March, 1900. (Signed) GAU HALIA." This letter was written on an unstamped paper. On a reference by the Subordinate Judge, to ascertain the requisite stamp upon it: *Held*, that, as the document in question effected a transfer of property by defendant to his creditor (plaintiff) in consideration of a debt due to the latter, it fell within the definition of "conveyance" in the Indian Stamp Act (II of 1899), and should be stamped as such. NANDUBAI AYAL MANGALDAS BHANJI *v.* GAU BIN HALIA BAGAL (1902). **I. L. R. 27 Bom. 150**

——— **s. 26, Sch, I, Art 57 (b)**—*Security for fulfilment of duties as cashier—Duty payable.* In 1895, first defendant (for himself and on behalf of his sons) executed a mortgage in favour of Ragava Chetty, who in 1896 assigned it to McDowell and Company. In 1899 first defendant (for himself and on behalf of his sons), McDowell and Company, and the present plaintiffs entered into another agreement whereby the former mortgage was transferred by McDowell and Company to the plaintiffs, a company with limited liability and the instrument also related to the

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STAMP ACT (II OF 1899)—*concld.*

——— **s. 26 Sch. I, Art. 57 (b)**—*contd.*

accountability of the first defendant, who was their cashier, to the plaintiffs, and constituted a mortgage executed as security for the due fulfilment of his duties as cashier, and for the repayment of any sum that first defendant might be found liable for, as cashier, to an extent not exceednig R6,000. At the date of suit, first defendant was liable to plaintiffs in a sum of over R8,000, which plaintiffs now claim. *Held*, that s. 26 of the Stamp Act of 1899 had no application to this case, the transfer of the mortgage being liable to a fixed duty under Art. 62 (*c*) of Sch. I of the Act, and the duty payable in respect of the other portion of the instrument being also a fixed sum under Art. 57 (*b*). Though the latter instrument contained a promise by first defendant to pay plaintiffs the amount payable by him under the previous mortgage, this was not a fresh contract, entered into for consideration, but must be understood to operate only as an admission that what McDowell and Company had purported to transfer was a subsisting debt due by first defendant. As the sustenance of the present claim did not involve giving effect to the promise in the later document, the claim was unaffected by it even if it could have been treated as one requiring the payment of an *ad valorem* duty. McDowell & Co. *v.* Ragava Chetty (1904).

I. L. R. 27 Mad. 71

——— **ss. 32 and 57**—*Reference to High Court—Determination by Collector as to duty leviable, final—"Case"—Jurisdiction of High Court.* An adjudication by a Collector, under the powers conferred on him by s. 31 of the Stamp Act, 1899 as to the duty with which an instrument is chargeable, is, by s. 32 of that Act, final, and such a case cannot be referred by the Revenue authorities to the High Court, under s. 57 of the Stamp Act, for an adjudication. Reference under Stamp Act, s. 57 (1901)

I. L. R. 25 Mad. 751

——— **s. 33**—*Seizure of documents under search-warrant—Document that "comes" before a Magistrate.* Complaint having been made against a person for having committed offences under ss. 64 (*c*) and 68 (*c*) of the Stamp Act, 1899, the Magistrate issued a search-warrant, under which certain documents were seized and impounded under s. 33 (*2*) of the Act. On its being contended that his action in impounding them was illegal, because the documents did not come before him in the performance of his functions, within the meaning of s. 33 (1): *Held*, that the word "comes" is sufficiently wide to include the production of documents under a search warrant. King-Emperor *v*, Balu Kuppayyan (1901) . . . **I. L. R. 25 Mad. 525**

——— **s. 35.**

See Arbitration . **13 C. W. N. 63**

——— **ss. 35 and 42**—*Stamp—Penalty—Unstamped receipt.* In applying proviso (*b*) to s. 35 of Act II of 1899, the Court should not levy the duty of one anna as well as the penalty of one rupee; and, when a receipt is admitted in evidence under the proviso above referred to, it is not necessary that the receipt should be endorsed in the manner provided for in s. 42. Reference under s. 57 of Act II of 1899 (F.B. 1902)

I. L. R. 24 All. 374

STAMP ACT (II OF 1899)—*contd.*

——— **s. 35**—*concld.*

——— **s. 37.**

See post, Sch. I, Art. 1.

——— **ss. 40, 44, 48 and 55**—*et seq.—Stamp—Improperly stamped document tendered in evidence—Stamp-duty from whom recoverable.* If a plaintiff produces in Court in support of his claim an unstamped or improperly stamped document, he primarily is the person from whom the requisite stamp duty and penalty may be recovered under s. 40 of the Stamp Act II of 1899. Secretary of State for India *v.* Basharatullah (1908)

I. L. R. 30 All. 271

——— **s. 42.**

See ante, ss. 35 and 42.

——— **s. 52 (*a*), Sch. I, Art. 30, exemp.**

See Stamp Duty.

I. L. R. 36 Calc. 645

——— **s. 57.**

See ante, ss. 32 and 57.

——— *Certificate by Deputy Collector under s. 40(1) (a), exempting document from stamp duty—Reference by Board of Revenue to High Court—Jurisdiction of High Court to decide the question.* A Sub-Registrar, acting under s. 33 of the Stamp Act, 1899, impounded two documents which had been produced before him for registration, and, under s. 38 (2), forwarded them to the Deputy Collector, who, under s. 40 (1) (*a*), certified that they were exempt from stamp duty. The Inspector-General of Registration disagreed with the opinion formed by the Deputy Collector, and reported the matter to the Board of Revenue for orders. The Board of Revenue referred the question as to the stamp duty, if any, payable on the documents to the High Court, under s. 57 of the Act: *Held* (the Chief Justice dissenting), that the High Court had no jurisdiction to decide the question. Reference under Stamp Act, s. 57 (1901) . . . **I. L. R. 25 Mad. 752**

——— **s. 62, cl. (b)**—*Receipt not duly stamped granted by a firm—Master of the firm, if liable when receipt not granted in his presence or under his authority.* Where a bill of money due was drawn up by a gomastha or servant of a firm and presented for payment to the person from whom the money was due and a receipt not duly stamped was granted evidencing payment of the money to the firm and the accused, who was the sole surviving member of the firm, admitted receipt of the money paid, but there was no proof, either that the receipt was written or granted by the gomastha in the presence or under the authority of the accused. *Held*, that the accused could not be rightly convicted of an

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STAMP ACT (II OF 1899)—*contd.*

——— **s. 62**—*concld.*

offence under cl. (*b*) of s. 62 of the Stamp Act. GOLAM HOSSAIN ARIFF *v.* EMPEROR (1904)
8 C. W. N. 378

——— **s. 69**—*Court Fees Act (Act VII of 1870), as amended by Act XII of 1891), s. 34—Sale by thief of stolen stamps—Offence.* A person who had been convicted of stealing two stamps was charged, under s. 69 of the Stamp Act, 1899, with having sold them, he not being a licensed vendor of stamps: *Held*, that the words "sells or offers for sale," which occur in s. 69 of the Stamp Act and in s. 34 of the Court Fees Act, include the case of a thief who exchanges a stolen stamp for a sum of money, even though the thief cannot give a legal title by the transaction. QUEEN-EMPRESS *v.* VIRASAMI (1900) . . **I. L. R. 24 Mad. 319**

SCHEDULE I.

1. ——— **Art. 1**—*Act II of 1899 (Indian Stamp Act), s. 37, and Sch. I, Art. 1—Notification (Government of India) No. 786 S. R., dated the 17th February, 1899, Rule 16—Acknowledgment stamped with a postage stamp instead of a receipt stamp—Such stamp not "a stamp of sufficient amount but improper description."* S. 37 of the Indian Stamp Act, 1899, as also Rule 16 of the Rules of the 17th February, 1899, passed by the Governor-General in Council under the powers conferred by the Act does not include within the words "a stamp of an improper description" a description of stamp appropriate to purposes altogether outside the Stamp Act, but is confined to a stamp which is used for the purpose of denoting the stamp duty chargeable on an instrument, but which is improper in a particular case, having regard to the Act and the Rules. Hence where an acknowledgment of a debt of the kind described in Art. I of the first Schedule to the Act was stamped by the debtor with a one-anna postage stamp, instead of with a one-anna receipt stamp, it was *held* that the acknowledgment must be treated as if it had not been stamped at all. REFERENCE UNDER S. 57 OF ACT II OF 1899 (F.B. 1901)
I. L. R. 23 All. 213

2. ——— *Construction of document—Promissory note—Acknowledgment.* Three persons borrowed money from a fourth, and at the time a memorandum signed by the borrowers was drawn up in the following terms:—"Account (*lekha*) of Bhawani Din Kalwar, Katwari Kalwar and Bindesri Kalwar, 8th February 1901, interest 1 per cent. per mensem, payable 3rd May 1901, R500 borrowed from Udit Upadhya for a sugar factory." The document contained no promise to repay the money. *Held*, that this was a mere memorandum, which might perhaps amount to an acknowledgment such as would require a 1-anna stamp, which it bore, but was certainly neither a promissory note nor an acknowledgment coupled with a promise to repay, which would require a stamp of higher value, and would not exclude parol evidence of the contract. UDIT UPADHYA *v.* BHAWANI DIN (1905) . **I. L. R. 27 All. 84**

STAMP ACT (II OF 1899)—*contd.*

SCHEDULE I—*concld.*

——— **Art. 1**—*contd.*

3. ——— *Stamp—Construction of document—Memorandum of account—Acknowledgment of debt—Admissibility of evidence.* The plaintiff sued for the recovery of certain sums of money lent by her deceased husband to the defendants, a firm of bankers, and she produced in support of her claim two documents described in the lower Courts as *sarkhats*. These were documents in the form of extracts from bankers' books showing a credit and debit side and in one case a balance, struck, but they were not signed by the parties or either of them, and they contained no acknowledgment of or promise to pay a debt. They were not stamped. *Held*, that these papers were merely memoranda, which might be given in evidence for what they were worth, but did not require to be stamped. *Udit Upadhya* v. *Bhawani Din, I. L. R. 27 All. 84*, referred to. DULMHA KUNWAR *v.* MAHADEO PRASAD (1906) . **I. L. R. 28 All. 436**

4. ——— **Arts. 1 and 5**—*Acknowledgment—Stamp—Agreement.* Plaintiff sued upon an acknowledgment passed by the defendant to the following effect:—"This day rupees two hundred and forty-one I received. The interest thereon is by agreement fixed to be at the rate of *R1 per cent.* per month. This is the account in respect of the name." The acknowledgment bore an anna stamp. *Held*, that the above acknowledgment was an agreement, and, as such, required an eight-anna stamp. LAXUMIBAI *v.* GANESH RAGHUNATH (1900).
I. L. R. 25 Bom. 373

——— **Art. 5**—*Cl. (b)—Agreements to deliver goods in exchange for goods—Price.* Agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under Art. 5, Sch. I, of the Indian Stamp Act (II of 1899), and are liable to stamp duty of eight annas each, as agreements "not otherwise provided for." SAMARATMAL UTTAMCHAND *v.* GOVIND (1901)
I. L. R. 25 Bom. 696

——— **Art. 23.**

See ante, S. 24 AND SCH. I, ART. 28.
See post, ARTS. 55, 23 AND 62 (*e*).

——— *Pressing factory—Partnership—Transfer of a share in consideration of a certain sum—Document—Release—Conveyance on sal of property.* Where by a document, the executing party, purporting to be entitled to a share in a going pressing factory, transfers absolutely the whole of that share to the other person interested in the factory in consideration of a certain sum, the document is a conveyance on sale of property. HIRALAL NAVALRAM, *In the matter of.* (1908)
I. L. R. 32 Bom. 505

——— **Art. 24**—*Copy—Extract—Account books—Civil Procedure Code (Act XIV of 1882), ss. 141A, 142A.* A copy or extract from an entry in an account book, filed under the provisions of ss. 141A and 142A of the Civil Procedure Code,

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STAMP ACT (II OF 1899)—*contd.*

SCHEDULE I—*contd.*

——— **Art. 24—*concld.***

requires no stamp. KASTUR DANAJI MARWADI *v.* FAKIRIA HALIA PATIL (1902).
I. L. R. 26 Bom. 522

——— **Arts. 32 and 40—*Mortgage—Further charge—Stamp.*** Certain property was mortgaged, with possession, for R180, by a deed of mortgage dated 23rd May, 1895. The deed was on a stamp paper of R2 (two). On 23rd August 1899, the same property was re-mortgaged to the same mortgagee for R250, made up of R180, the consideration for the former deed, and another sum of R70 due to the mortgagee. This second deed was written on a stamp paper of R1. *Held*, that the second deed was not intended to operate merely as a further charge, but as a new mortgage in which the previous one merged, and that it should therefore be stamped as a mortgage-bond, with possession, for R250. *In re* MEGHA (1900)
I. L. R. 25 Bom. 370

——— **Art. 35.**

See ante, s. 5 AND SCH. I, ART. 85.

——— **Art. 40.**

See ante, ARTS. 32 AND 40.

——— **Art. 43.**

See ARBITRATION . **13 C. W. N. 63**

——— **Art. 47, cl. A.**

See ante, SS. 2 AND 7 AND SCH. I, ART. 47, CL. A.

——— **Art. 47, cl. D—*Certificate of membership—Policy of life insurance.*** The certificate of membership of a Provident Society was to the following effect:—"You have, on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of this society at the age of "The name of Mr. , residing at , has been registered as that of the person to whom the amount due under the rules of this society after your death should be paid." *Held*, that the above certificate was a policy of life insurance, within the meaning or Art. 47, cl. D, of Act II of 1899, and as such liable to pay *ad valorem* duty. *In re* THE HIMAT PROVIDENT SOCIETY, LIMITED (1900)
I. L. R. 25 Bom. 376

——— **Art. 53 (c)—** *Stamp—Receipt for rent—Receipt for money paid out of Court in satisfaction of a decree for rent.* *Held*, that, although a receipt for rent of an agricultural holding is exempt from payment of stamp duty under Art. 53 (*c*) of the first Schedule to the Indian Stamp Act, 1899, a receipt for payment out of Court of money due under a decree for such rent is not so exempt. EMPEROR *v.* DUNGAR SINGH (1908)
I. L. R. 31 All. 36

STAMP ACT (II OF 1899)—*concld.*

SCHEDULE I—*concld.*

——— **Arts. 55, 23, and 62 (e)—*Stamp—Conveyance—Release—Document executed by a benami purchaser professing to relinquish in favour of the real purchaser any claims which he might have in virtue of the purchase.*** *Held*, that a document, by means of which the certified purchaser of property sold by auction in execution of a decree purported to relinquish, in favour of a person whom he alleged to be the real purchaser of the property, any claims which he might have in respect of the property by reason of his being the certified purchaser thereof, was to be stamped as a release, according to Art. 55 of the first Schedule to the Indian Stamp Act, 1899. REFERENCE UNDER S. 57 OF ACT II OF 1899 (F.B. 1902) . . **I. L. R. 24 All. 372**

——— **Art. 62.**

See ante, ARTS, 55, 23 AND 62 (*e*).

STAMP DUTY.

See HATCHITTA . **11 C. W. N. 1122**

See STAMP.

See STAMP ACTS.

See STAMP DUTY, REFUND OF.

——— **levy of.**

See APPELLATE COURTS—EXERCISE OF POWERS IN VARIOUS CASES SPECIAL CASES . **I. L. R. 15 Mad. 29**

——— **payment of.**

See PAUPER SUIT—APPEALS.
I. L. R. 1 Bom. 75
I. L. R. 8 Mad. 214
I. L. R. 11 Calc. 735

——— **right to recover.**

See JURISDICTION—CAUSES OF JURISDICTION—CAUSE OF ACTION —AGREEMENT . **I. L. R. 21 Bom. 126**

See PAUPER SUIT—SUITS.
2 B. L. R. Ap. 22

See SET-OFF—GENERAL CASES.
I. L. R. 21 Bom. 126

1. ——— **Agreement—Memorandum of agreement—*Stamp Act (II of 1899), Sch. I, 5, cl (b)—Amount—Stipulation to pay interest—Acknowledgment of debt.*** An account written on a sheet of paper signed by the debtor and addressed to the creditor, and also containing a stipulation to pay interest, is not a mere acknowledgment of a debt on which a stamp-duty of one anna is leviable under Art. I, Sch. I of the Indian Stamp Act, but an agreement or memorandum of an agreement, which requires a stamp of 8 annas, under cl. (*b*) of Art. 5, Sch. I of the Indian Stamp Act. *Laxumi Bai* v. *Ganesh Raghunath, I. L. R. 25 Bom. 373*, followed. MULCHAND LALA *v.* KASHIBULLAV BISWAS (1907)
I. L. R. 35 Calc. 111

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STAMP DUTY—*concld.*

2. ——— **Relinquishment of claim by reversioner**—*Release.* The relinquishment of his claim by a reversioner is a release and must be stamped accordingly. KRISHNAJI NARAYAN *v.* BALKRISHNA VENKATESH (1909)
. . **I. L. R. 33 Bom. 657**

STAMP DUTY, REFUND OF.

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE.
1 Ind. Jur. O. S. 57 : 1 Hyde 149
Marsh. 274
1 Mad. 127
12 W. R. 376

See STAMP ACT, 1879, s. 51.
I. L. R. 16 Mad. 459
I. L. R. 18 Mad. 235

See STAMP DUTY.

1. ——— **Remanded case.** The stamp duty is refundable, and should not be charged to the respondent, in a case remanded. MASSEYK *v.* JUGOBUNDHOO DUTT . . **1 W. R. Mis. 12**

2. ——— *Held*, by the majority of the Court (LOCH, *J.*, dissenting, and CAMPBELL, *J.*, doubting), that, where an appeal is remanded in part, the appellant is entitled to a return of a proportionate part of the stamp duty paid by him. *In the matter of the petition of* DOORGA DASS DUTT
B. L. R. Sup. Vol. 511 : 6 W. R. Mis. 65
1 Ind. Jur. N. S. 401

In re PROSUNNO CHUNDER ROY CHOWDRY
11 B. L. R. 372 note

S.C. PROSUNNO CHUNDER ROY CHOWDHRY *v.* NUBO KRISTO CHATTERJEE . **18 W. R. 434**

3. ——— **Compromise pending appeal.** No refund of stamp duty can be allowed when a suit is compromised pending the hearing of an appeal preferred. LAND MORTGAGE BANK OF INDIA *v.* MEHTUS . . **4 B. L. R. Ap. 96**

In re ABDUL HAMED CHOWDRY
4 B. L. R. Ap. 96 note

4. ——— **Refund of excess of stamp duty**—*Court Fees Act (VII of 1870), ss. 13, 14, and 15.* The plaintiff brought a suit for declaration of his maliki right over a certain patni tenure, and he alleged that the defendants had executed a hiba in his favour in consideration of a diamond ring worth R30,000. He valued his suit at R5,600, being twenty times the malikana of R280, to which the petitioner alleged he was entitled. The Subordinate Judge held that the plaintiff was bound to value his suit at R30,000, the consideration mentioned in the hibanama. The plaintiff paid the deficiency, and his suit was ultimately dismissed. The plaintiff appealed to the High Court, and valued his appeal at R5,600, which valuation was accepted by the High Court. On an application by the plaintiff for a certificate authorizing him to receive back from the Collector the excess of stamp duty paid by him :—*Held*, that the Court had no power to grant it, its power being limited to cases specified in ss. 13, 14, and 15 of the Court Fees Act ; but that there is nothing in the law preventing the Government from refunding any amount which they may think the plaintiff was improperly ordered to pay. *In the matter of the petition of* ZOYNOODDEEN HOSSEIN KHAN . . . . . **11 B. L. R. 370**

S.C. ZOYNOODDEEN HOSSEIN KHAN *v.* SECRETARY TO THE BOARD OF REVENUE
20 W. R. 106

STAMP DUTY, REFUND OF—*concld.*

5. ——— **Failure of portion of appeal.** Where an appeal to the High Court in a case involving property not exceeding R3,000 in value was filed, under Act X of 1862, on a stamp paper worth R100, and the result was a remand in respect to a portion of the property of which the value was R1,756, it was *held* that, as the appellant was successful in his appeal in respect of property representing a value which must of itself have required a stamp duty of R100, that portion of his appeal in which he failed did not necessitate the payment of any further stamp duty ; consequently the appellant was entitled to a refund of the stamp duty in full. BHIKOO MOLLAH *v.* RASH MONEE DOSSEE
9 W. R. 357

6. ——— **Compromise of appeal before hearing.** Where an appeal had been compromised before a Bench of the Sudder Court, and in the presence of the parties, before it had been entered in the cause list hung up in the Court-room :—*Held*, that appellant was entitled to a refund of the full amount of stamp duty paid by him. *In the matter of* GUJENDRO NARAIN ROY
11 W. R. 158

7. ——— **Attorney—Entry on Roll of advocates**—*Refund of Stamp duty—Stamp Act (II of 1899), s. 52 (a), Sch. I, Art 30, Exemption.* *B*, who had been enrolled as an attorney of the High Court of Calcutta and paid the requisite stamp duty of R250, was subsequently enrolled as an advocate of the same Court and paid a stamp duty of R500. On an application by *B* for a refund of the latter stamp duty, by virtue of the Exemption to Article 30, Schedule I of the Indian Stamp Act of 1899 :—*Held*, that exemption could be claimed and that the stamp duty of R500 should be refunded. *In re* R. BAXTER (1909)
I. L. R. 36 Calc. 645

STARE DECISIS.

——— *Its value in the department of procedure.* The principle of *stare decisis* is of undoubted value in its bearing on the law of property, but the doctrine is not of the same importance in the department of procedure when the practice of one Court is to be brought into conformity with the settled practice of other Courts and the plain terms of the Code. MANILAL HARGOVANDAS *v.* VANMALIDAS AMRATLAL (1905)
I. L. R. 29 Bom. 621

STATEMENT IN PREVIOUS DEPOSITION.

See EVIDENCE ACT (I OF 1872), S. 32.
12 C. W. N. 266

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STATEMENTS MADE OUT OF COURT.

See MAGISTRATE, JURISDICTION OF—GENERAL JURISDICTION.
I. L. R. 14 Bom. 572

——— statements recorded by Police in Special Diary—

See WITNESS.
I. L. R. 36 Calc. 560

STATUTE.

See OUDH ESTATES ACT.
8 C. W. N. 699
L. R. 31 I. A. 132

See OUDH RENT ACT.
I. L. R. 26 All. 299
8 C. W. N. 521
L. R. 31 I. A. 116

See PROBATE AND ADMINISTRATION ACT.
8 C. W. N. 578

See STATUTES, CONSTRUCTION OF.

——— promulgation of—

See ONUS OF PROOF—MORTGAGE.
B. L. R. Sup. Vol. 415

——— repeal of, effect of—

See APPEAL—RIGHT OF APPEAL, EFFECT OF REPEAL ON.

See CIVIL PROCEDURE CODE, 1882, s. 3.

See EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION.

See LIMITATION—STATUTES OF LIMITATION—LIMITATION ACT, 1871.
I. L. R. 1 Bom. 287

See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—MADRAS ACT III OF 1865.
I. L. R. 1 Mad. 223

See OFFENCE BEFORE PENAL CODE CAME INTO OPERATION. I. L. R. 1 All. 599
I. L. R. 2 Calc. 225

——— 5 and 6 Edw. III, c. 16—

See SALARY . . 3 Moo. I. A. 435

——— 32 Hen. VIII, c. 34—

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.
I. L. R. 14 Calc. 176

——— 13 Eliz., c. 5—

See DEBTOR AND CREDITOR.
1 Hyde 178
2 Ind. Jur. O. S. 7
1 W. R. 41
I. L. R. 10 Calc. 616
L. R. 11 I. A. 10
I. L. R. 11 Bom. 666
I. L. R. 13 Bom. 434

See INSOLVENCY ACT, s. 26.
I. L. R. 3 Calc. 434

STATUTE—*contd.*

——— 13 Eliz., c. 5—*concld.*

See TRANSFER OF PROPERTY ACT, s. 53.
I. L. R. 22 Calc. 185
I. L. R. 23 Mad. 184
I. L. R. 25 Bom. 202
I. L. R. 27 Bom. 146

——— Doctrine of fraudulent conveyance void against creditors. The doctrine of a fraudulent conveyance being void as against creditors *held* to be a principle of Hindu as it is of English law under 13 Elizabeth, c. 5. SHAMKISSORE SHAW *v.* COWIE . 2 Ind. Jur. O. S. 7

See SOODHEEKEENA CHOWDHRAIN *v.* GOPEE MOHUN SEIN . . . . 1 W. R. 41

——— 27 Eliz., c. 4—

See DEBTOR AND CREDITOR 1 W. R. 41

See TRANSFER OF PROPERTY ACT, s. 53.
I. L. R. 22 Calc. 185
I. L. R. 25 Bom. 202

See VOLUNTARY CONVEYANCE.
22 W. R. 60

——— 43 Eliz., c. 4—

See BOMBAY MUNICIPAL ACT, 1888, ss. 143, 144 . I. L. R. 16 Bom. 217

See WILL—CONSTRUCTION.
14 B. L. R. 442

——— 3 Jac. I, c. 7—

Stat. 3 Jac. I, c. 7, has not been extended to India. WILKINSON *v.* ABBAS SIRKAR
3 B. L. R. O. C. 96

——— 21 Jac. I, c. 16—

See ENGLISH LAW—LIMITATION.
5 Moo. I. A. 43; 234

See LIMITATION—STATUTES OF LIMITATION—STAT. 21 JAC. I, c. 16.
5 Moo. I. A. 43

See STATUTES, CONSTRUCTION OF.
5 Moo. I. A. 23 4

——— 29 Car. II, c. 3—

See GUARANTEE . 5 B. L. R. 639

See STATUTE OF FRAUDS.

——— 29 Car. II, c. 7—

See LORD'S DAY ACT.

——— 31 Car. II, c. 2—

See FOREIGNERS . I. L. R. 18 Bom. 636

See HABEAS CORPUS . 6 B. L. R. 392

——— 2 & 3 Anne, c. 4, s. 1—

See VENDOR AND PURCHASER—NOTICE.
I. L. R. 6 Bom. 168

——— 6 Anne, c. 2, s. 4 (Ireland)—

See VENDOR AND PURCHASER—NOTICE.
I. L. R. 6 Bom. 168

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STATUTE—*contd.*

——— 6 Anne, c. 35, s. 1—

See VENDOR AND PURCHASER—NOTICE.
I. L. R. 6 Bom. 168

——— 7 Anne, c. 20—

See VENDOR AND PURCHASER—NOTICE.
I. L. R. 6 Bom. 168

——— 8 Anne, c. 14—

See LANDLORD AND TENANT—PAYMENT OF RENT—GENERALLY.
3 B. L. R. O. C. 56

——— 7 Will. III, c. 3, s. 2—

See WAGING WAR AGAINST THE QUEEN.
7 B. L. R. 63

——— 7 Geo. I, c. 21, s. 5—

See BOTTOMRY BOND . 5 Bom. O. C. 64

——— 8 Geo. II, c. 6, s. 1—

See VENDOR AND PURCHASER—NOTICE.
I. L. R. 6 Bom. 168

——— 14 Geo. III, c. 48—

See CONTRACT—WAGERING CONTRACTS.
I. L. R. 23 Bom. 191

——— 21 Geo. III, c. 70, s. 5—

See HIGH COURT, JURISDICTION OF—MADRAS—CIVIL . I. L. R. 8 Mad. 24

——— s. 8—

See MANDAMUS . 11 B. L. R. 250

See RIGHT OF SUIT—ACTS DONE IN EXERCISE OF SOVEREIGN POWERS.
I. L. R. 1 Calc. 11

——— s. 17—

See CONTRACT ACT, s. 27, 14 B. L. R. 76

See GUARANTEE . 5 B. L. R. 639

See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE AND COMPENSATION FOR IMPROVEMENTS.
I. L. R. 8 Calc. 582
I. L. R. 5 Calc. 688

See LANDLORD AND TENANT—CONTRACT OF TENANCY, LAW GOVERNING.
I. L. R. 5 Calc. 688

See STATUTE OF FRAUDS.
5 B. L. R. 639 ; 643

——— *Construction of section—"Inheritance and Succession." Per* PONTIFEX, *J.*—The true construction of s. 17 of 21 George III, c. 70, must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. SARKIES *v.* PROSONOMOYEE DOSSEE
I. L. R. 6 Calc. 794 : 8 C. L. R. 76

STATUTE—*contd.*

——— 21 Geo. III, c. 70—*concld.*

——— s. 21—

See PRIVY COUNCIL, PRACTICE OF—VALUATION OF APPEAL . 5 W. R. P. C. 34
1 Moo. I. A. 363

——— s. 24—

See JUDICIAL OFFICERS, LIABILITY OF.
2 Moo. I. A. 293

——— 37 Geo. III, c. 142, s. 10—

See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.
7 Bom. Cr. 6

——— 39 & 40 Geo. III, c. 70, s. 3—

See HIGH COURT, JURISDICTION OF—MADRAS—CIVIL . I. L. R. 8 Mad. 24

——— 49 Geo. III, c. 126—

See SALARY . 3 Moo. I. A. 435

——— 52 Geo. III, c. 101 (Lord Romilly's Act)—

See RIGHT OF SUIT—CHARITIES AND TRUSTS . I. L. R. 17 Mad. 462
I. L. R. 24 Calc. 418

——— 53 Geo. III, c. 155, ss. 99 and 100—

See JURISDICTION OF CIVIL COURT—REVENUE . . I. L. R. 1 Mad. 89

——— s. 105—

See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.
7 Bom. Cr. 6

See MAGISTRATE, JURISDICTION OF—GENERAL JURISDICTION.
6. Bom. Cr. 14

——— s. 111—

See ADVOCATE GENERAL.
4 Moo. I. A. 190

——— 56 Geo. III, c. 100—

See HABEAS CORPUS.
5 B. L. R. 418 ; 557

——— 4 Geo. IV, c. 34, s. 3—

See ACT XIII OF 1859.
I. L. R. 21 Calc. 262

——— 4 Geo. IV, c. 71, s. 17—

See HIGH COURT, JURISDICTION OF—MADRAS—CIVIL . I. L. R. 8 Mad. 24

——— 4 Geo. IV, c. 81—

See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.
13 B. L. R 474

——— 6 Geo. IV, c. 16—

See ENGLISH LAW—BANKRUPTCY.
2 Moo. I. A. 263

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6 Geo. IV, c. 85—
See SALARY . . 3 Moo. I. A. 435

9 Geo. IV, c. 33 (Fergusson's Act)—
See LAND TENURE IH BOMBAY. 4 Bom. O. C. 1

9 Geo. IV, c. 73, s. 36—
See INSOLVENCY ACT, 9 GEO. IV, c. 73. 1 Moo. I. A. 87

2 & 3 Will. IV, c. 34—
See SUPREME COURT, MADRAS. 3 Moo. I. A. 329

2 & 3 Will. IV, c. 51—
See PRACTICE—CIVIL CASES—ADMIRALTY COURT . . I. L. R. 22 Calc. 511

2 & 3 Will. IV, c. 71—
See PRESCRIPTION—EASEMENTS—LIGHT AND AIR . 3 B. L. R. O. C. 18
6 B. L. R. 85 : s. c., on appeal 12 B. L. R. 406
L. R. I. A. Sup. Vol. 175
15 B. L. R. 361
I. L. R. 14 Calc. 839

2 & 3 Will. IV, c. 114—
See ENGLISH LAW—BANKRUPTCY. 2 Moo. I. A. 263

3 & 4 Will. IV, c. 41—
See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—APPEALABLE ORDERS . 5 Moo. I. A. 499
See PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL.
1 Ind. Jur. O. S. 117 : 8 Moo. I. A. 270

3 & 4 Will. IV, c. 42—
See OUDH RENT ACT, s. 141. I. L. R. 26 All. 297

3 & 4 Will. IV, c. 42, s. 28—
See INTEREST—CASES UNDER ACT XXXII OF 1839 . . 6 Moo. I. A. 232

3 & 4 Will. IV, c. 85, s. 43—
See CESSION OF BRITISH TERRITORY IN INDIA . I. L. R. 1 Bom. 367
L. R. 3 I. A. 102
10 Bom. 37

3 & 4 Will. IV, c. 123—
See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS. 7 Bom. Cr. 6

5 & 6 Will. IV, c. 54—
See MARRIAGE . . 2 Hyde 65

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7 Will. IV, and 1 Vict., c. 85, s. 2—
See OFFENCE ON THE HIGH SEAS. 1 B. L. R. O. Cr. 1

1 Vict., c. 26, s. 9—
See WILL—ATTESTATION. 13 B. L. R. 392

2 & 3 Vict., c. 39—
See CUSTODY OF CHILDREN. 1 Hyde 99

3 & 4 Vict., c. 56—
See SHIP, REGISTERING OF. 4 Moo. I. A. 179

3 & 4 Vict., c. 65—
See JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY JURISDICTION.
5 Bom. O. C. 64
10 Bom. 110

5 & 6 Vict., c. 39, ss. 1 and 3—
See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS . 1 Ind. Jur. O. S. 17
1 W. R. P. C. 43 : 9 Moo. I. A. 140

5 & 6 Vict., c. 45—
See COPYRIGHT . I. L. R. 17 Calc. 951
I. L. R. 19 Bom. 557

5 & 6 Vict., c. 100—
See COPYRIGHT . 8 B. L. R. 298

5 & 6 Vict., c. 122—
See INSOLVENCY ACT, s. 60 . 2 Hyde 1

6 & 7 Vict., c. 65—
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6 & 7 Vict., c. 94—
See CONSULAR COURT. I. L. R. 3 Bom. 58

7 & 8 Vict., c. 69—
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8 Vict, c. 18 (Lands Clauses Consolidation Act), s. 63—
See LAND ACQUISITION ACT, 1894, s. 23. I. L. R. 25 Calc. 346

8 & 9 Vict., c. 109—
See CONTRACT—WAGERING CONTRACTS.
4 Moo. I. A. 339
I. L. R. 23 Bom. 191
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——— 11 & 12 Vict., c. 21—

See INSOLVENCY.

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——— 12 & 13 Vict., c. 83 (Local and Personal)—

See RAILWAY COMPANY.
I. L. R. 15 Bom. 537
I. L. R. 16 Bom. 434

——— 12 & 13 Vict., c. 96—

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION.
8 Bom. Cr. 63
I. L. R. 5 Mad. 23

See OFFENCE ON THE HIGH SEAS.
8 Bom. Cr. 63

——— 12 & 13 Vict., c. 106, s. 65—

See INSOLVENCY ACT, s. 60.
I. L. R. 21 Calc. 1018

——— 13 & 14 Vict., c. 104—

See COPYRIGHT . 8 B. L. R. 298

——— 14 & 15 Vict., c. 19, s. 5—

See OFFENCE ON THE HIGH SEAS.
1 B. L. R. O. Cr. 1

——— 15 & 16 Vict., c. 82, s. 41—

See PATENT . I. L. R. 9 All. 191
I. R. 13 I. A. 134

——— 16 & 17 Vict., c. 95—

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See MERCHANT SEAMEN'S ACT, 1859.
I. L. R. 12 Calc. 43

See MERCHANT SHIPPING ACT, 1854.
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1 Ind. Jur. N. S. 95, 371
8 Mad. 85

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I. L. R. 21 Calc. 782

——— 17 & 18 Vict., c. 125—

See CONTRACT ACT, s. 28.
I. L. R. 1 Calc. 42 ; 466

See WITNESS—CIVIL CASES—SWEARING OR AFFIRMATION OF WITNESSES.
2 Mad. 246

——— 18 & 19 Vict., c. 91, s. 21—

See OFFENCE ON HIGH SEAS.
I. L. R. 21 Calc. 782

——— 20 & 21 Vict., c. 55, s. 28—

See DIVORCE ACT (IV OF 1869), ss. 7, 11, AND 45 . . . 7 C. W N. 504

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——— 20 & 21 Vict., c. 66, s. 67—

See MILITARY COURTS OF REQUEST.
1 Mad. 443

——— 20 & 21 Vict., c. 85—

See DIVORCE ACT, s. 22 *et seqq.*
I. L. R. 26 All. 553

——— 21 & 22 Vict, c. 27 (Lord Cairns' Act)—

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY . I. L. R. 13 Bom. 252

——— 21 & 22 Vict., c. 70—

See COPYRIGHT . 8 B. L. R. 298

——— 21 & 22 Vict., c. 106—

See CROWN LANDS.
I. L. R. 26 Mad. 268

See DOMICILE . I. L. R. 4 Calc. 106

See JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.
1 Hyde 37

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—THEFT.
I. L. R. 10 Bom. 186

See PARTIES—PARTIES TO SUITS—GOVERNMENT . I. L. R. 14 Calc. 256

See RIGHT OF SUIT—ACTS DONE IN EXERCISE OF SOVEREIGN POWERS.
I. L. R. 1 Calc. 11

See TERRITORY, TRANSFER OF.
2 Bom. 112 : 2nd Ed. 106

——— ss. 41, 42 and 65—*Construction—Suit to recover damages—"Liabilities lawfully contracted and incurred"—Secretary of State in Council.* The term "Government of India" in s. 42 of the Statute points to its bearing the meaning not of the Governor General in Council, but of the superintendence, direction and control of the country. The words of ss. 42 and 65 are capable of the construction that the reference in them to the East India Company is in case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions, which can bring it into being, and in the later section to indicate the mode in which the liability may be enforced, and not the circumstances under which it may be incurred. SHIVABHAJAN *v.* THE SECRETARY OF STATE FOR INDIA (1904) . . . I. L. R. 28 Bom. 314

——— 21 & 22 Vict., c. 126—

See ARREST—CIVIL ARREST 1 Hyde 253

——— 22 & 23 Vict., c. 41—

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——— 23 & 24 Vict., c. 88—

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8 Bom. Cr. 63

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8 Bom. Cr. 63

——— 24 Vict., c. 10—

See JURISDICTION—ADMIRALTY JURISDICTION.

——— 24 & 25 Vict., c. 67—

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—SUBSTANTIAL QUESTION OF LAW.
I. L. R. 1 Calc. 431

See BOMBAY CITY IMPROVEMENT ACT.
I. L. R. 27 Bom. 424

See CESSION OF BRITISH TERRITORY IN INDIA . . I. L. R. 1 Bom. 367
L. R. 3 I. A. 102
10 Bom. 37

See DIVORCE ACT, s. 2.
I. L. R. 10 Bom. 422

See FOREIGNERS.
I. L. R. 18 Bom. 636

See HIGH COURT, JURISDICTION OF—N. W. P.—CIVIL I. L. R. 11 All. 490

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See RULES OF HIGH COURT, MADRAS.
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See TRANSFER OF CRIMINAL CASE—GROUND FOR TRANSFER.
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——— 24 & 25 Vict. c. 104—*contd.*

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——— 24 & 25 Vict. c. 104—*concld.*

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See REVISION, CRIMINAL CASES—GENERAL RULES FOR EXERCISE OF POWER. I. L. R. 24 All. 315

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——— s. 18—

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——— 24 & 25 Vict., c. 154

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——— 26 Vict., c. 24—

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——— 28 & 29 Vict., c. 15, ss. 3 and 6—

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——— 30 & 31 Vict., c. 13, s. 99—

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See HIGH COURT, JURISDICTION OF—N.-W. P.—CIVIL. I. L. R. 11 All. 490

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——— 33 & 34 Vict., c. 59—

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See OFFENCE ON THE HIGH SEAS. I. L. R. 14 Bom. 227 I. L. R. 21 Calc. 782

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See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION—OFFENCE COMMITTED ON THE HIGH SEAS. I. L. R. 25 Bom. 636

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See ARMY DISCIPLINE ACT. 7 C. L. R. 336

——— 43 & 44 Vict., c. 16, s. 10—

See MERCHANT SEAMEN'S ACT, 1859. I. L. R. 12 Calc. 438

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See VENDOR AND PURCHASER—BREACH OF COVENANT . I. L. R. 25 Calc. 298

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——— **44 & 45 Vict., c. 58**—

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See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—ARMY ACT.
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See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—ARMY ACT.
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——— **55 & 56 Vict., c. 14**—

——— **s. 5**—

See BOMBAY CITY IMPROVEMENT ACT.
I. L. R. 27 Bom. 424

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See ARMY (ANNUAL) ACT, 1895.

STATUTE OF DISTRIBUTION.

See PARSIS . **I. L. R. 2 Bom. 75**

STATUTE OF FRAUDS (29 Car. II, c. 3).

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . **9 B. L. R. 245**

——— **sufficiency of signature under**—

See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY PARTY.
8 B. L. R. 305

1. ——— *Application of, to Parsis.* The Statute of Frauds (29 Car. II, c. 3), except so far as it has been repealed, applies to Parsis in India. BAI MANECKBAI *v.* BAI MERBAI
I. L. R. 6 Bom. 363

2. ——— *Application of—Mahomedans.* The Statute of Frauds is to some extent in force in the Island of Bombay. The 4th section is not applicable to Mahomedans. MANIKJI MEHERVANJI *v.* RAHIMTULLA ALUBHAI
1 Bom. Ap. 1

3. ——— *Application of, to the High Court, Original Civil Side. Quœre:* Does the Statute of Frauds form any part of the procedure of the High Court in its original jurisdiction ? RAM SAGUR DUTT *v.* NOBOGOPAUL MOOKERJEE . . . **Bourke O. C. 367**

4. ——— **s. 4**—*Application of European defendant.* The 4th section of the Statute of Frauds applies to cases in the mofussil in which the defendant alone is a British-born subject. MUTTYA PILLAI *v.* WESTERN . **1 Mad. 27**

5. ——— *21 Geo. III, c. 70. s. 17—Hindu defendant.* The 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu. NEKRAM JEMADAR *v.* ISWARIPRASAD PACHURI
5 B. L. R. 643 : 14 W. R. 305

6. ——— *Hindu and Mahomedan defendants.* Where a contract is proved to have been entered into, but no memorandum thereof in writing has been signed by the parties, a Hindu defendant is not entitled to plead the Statute of Frauds, that statute not being applicable to Hindu (or *semble*—Mahomedan) defendants. BORRODAILE *v.* CHAINSOOK BUXYRAM
1 Ind. Jur. O. S. 70 : 1 Hyde 51

7. ——— *21 Geo. III, c. 70. s. 17—Contract of guarantee.* A contract of guarantee is a " matter of contract and dealing " within the terms of s. 4 of 21 Geo. III, c. 70, and therefore such a contract made by a Hindu is not affected by s. 4 of the Statute of Frauds. JAGADAMBA DASI v. GROB . . **5 B. L. R. 639**

——— **s. 7**—

See CHARITABLE TRUSTS.
I. L. R. 33 Bom. 509

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See CONSTRUCTION OF STATUTES.

See BENGAL MUNICIPAL ACT, 1884, s. 339.
I. L. R. 17 Calc. 329

See BENGAL TENANCY ACT, 1885, ss. 15 AND 16 . **I. L. R. 22 Calc. 337**

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I. L. R. 17 Bom. 154

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See BOMBAY MUNICIPAL ACT, 1888, s. 248 . **I. L. R. 20 Bom. 617**

See BOMBAY REVENUE JURISDICTION ACT, s. 11 . **I. L. R. 20 Bom. 803**
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See CERTIFICATE OF ADMINISTRATION—CERTIFICATE UNDER BOMBAY REGULATION VIII OF 1872, ETC.
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See DEKKHAN AGRICULTURISTS' RELIEF ACT, S. 56 . I. L. R. 14 Bom. 516

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See LIMITATION—STATUTES OF LIMITATION—GENERALLY.
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See LIMITATION ACT, 1877, S. 1.
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See MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES.
I. L. R. 18 Bom. 380

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I. L. R. 1 Bom. 523 ; 531
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3 Moo. I. A. 468 ; 488
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10 C. W. N. 626

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I. L. R. 19 Mad. 382

——— Codes—

See BENGAL TENANCY ACT (VIII OF 1885), S. 5 (5) . 6 C. W. N. 825

——— distinction between enactments affecting vested rights and those regulating procedure—

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——— issue of orders before commencement of Statute—

See BENGAL IRRIGATION ACT, SS. 1, 6.
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I. L. R. 28 Calc. 485

1. ——— **Mode of construction.** The meaning of an Act is to be gathered solely by reference to the Act itself. MUDDOOSOODEN DEY *v.* BAMACHURN MOOKERJEE . . 1 Hyde 100

2. ——— In interpreting statutes the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway Company* v. *North British Railway Company, L. R. 6 Ap. Cas. 114*, referred to. QUEEN-EMPRESS *v.* HORI
I. L. R. 21 All. 391

3. ——— *Duty of Court.* Where the terms of an act are clear and plain, it is the duty of the Court to give effect to it as it stands. GUREEBULLAH SIRKAR *v.* MOHUN LALL SHAHA
I. L. R. 7 Calc. 127 : 8 C. L. R. 409

4. ——— *Preamble.* A rule of construction is that the enacting words of a statute may be carried beyond the preamble, if words be found in the former strong enough for the purpose. CHINNA AIYAN *v.* MAHOMED FAKRUDIN SAIB . . . . 2 Mad. 322

5. ——— *Act XIII of 1859, Preamble, and s. 2.* Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down. QUEEN-EMPRESS *v.* INDARJIT . . . . I. L. R. 11 All. 262

6. ——— *Pre-existing state of law.* The pre-existing state of the law, as recognized by the tribunals, is one of the chief means of interpreting laws of procedure. PRABHAKARBHAT *v.* VISHWAMBHAR . I. L. R. 8 Bom. 313

7. ——— *Reasons for enacting law—Motives of parties.* If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. JODOONATH BOSE *v.* SHUMSOONNISSA BEGUM. BUZLOOR RUHEEM *v.* SHUMSOONNISSA BEGUM
8 W. R. P. C. 3 : 11 Moo. I. A. 551

8. ——— *Intention of Legislature in framing Act.* It is not for a Civil Court to speculate upon what was in the mind of the Legislature in passing a law, but the Court must

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be bound by the words of the law judicially construed. MOHESH CHUNDER DOSS *v.* MADHUB CHUNDER SARDAR . . . **13 W. R. 85**

9. ——— *Madras Municipal Act (I of 1884)—Inaccuracy in Act.* Where in an Act of the Legislature the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate the inaccuracy, and to execute the true intention of the Legislature. JENNINGS *v.* PRESIDENT, MUNICIPAL COMMISSION, MADRAS **I. L. R. 11 Mad. 253**

10. ——— *"Objects and reasons" of Act—Forms in which Bill came before Council.* For the purpose of ascertaining the intention of the Legislature in passing an Act, where that intention, so far as can be gathered from the Act itself, appears doubtful, the "objects and reasons" may be referred to. It is not, however, permissible to refer, for this purpose, to the various forms in which the Bill was brought before the Legislature. MOOSA *v.* ESSA **I. L. R. 8 Bom. 241**

11. ——— *Specific Relief Act (I of 1877), s. 9—Objects and reasons for Bill—Intention of Legislature. Quære:* Whether in construing an Act the "objects and reasons" for the Bill before it was passed as indicating the intention of the Legislature, can be referred to. *Moosa* v. *Essa, I. L. R. 8 Bom. 241,* referred to. FADU JHALA *v.* GOUR MOHUN JHALA **I. L. R. 19 Calc. 544**

12. ——— *Reference to objects and reasons and to report of Select Committee.* In construing a statute the Court cannot refer to the statement of objects and reasons attached to a Bill or to the report of a Select Committee, or to the debates of the Legislature, but can only look to the statute itself. *Queen-Empress* v. *Kartick Chunder Das, I. L. R. 14 Calc. 721,* and *Romesh Chunder Sannyal* v. *Hiru Mondul, I. L. R. 17 Calc. 852,* dissented from on this point. KADIR BAKHSH *v.* BHAWANI PRASAD . **I. L. R. 14 All. 145**

13. ——— *Penal Code, s. 295, construction of—Reference to report of Indian Law Commissioners and of Select Committee.* For the purpose of construing a section of an Act and ascertaining the intention of the Legislature, the report of the Indian Law Commissioners or a Select Committee appointed to consider the Bill may be referred to. *Queen-Empress* v. *Kartick Chunder Das, I. L. R. 14 Calc. 721,* followed. ROMESH CHUNDER SANNYAL *v.* HIRU MONDAL **I. L. R. 17 Calc. 852**

RAMCHANDRA JOISHI *v.* HAZI KASSIM **I. L. R. 16 Mad. 207**

14. ——— *Administrator-General's Act (II of 1874)—History of passing of Act—Objects and reasons for Act and Report of Select Committee on Bill.* The course of legislation with reference to the creation of the office of Administrator-General and to his duties and powers reviewed and considered in construing Act II of

STATUTES, CONSTRUCTION OF—*contd.*

1874. *Per* TREVELYAN, *J.*—The history of the passing of an Act and the intention of the Legislature in introducing it, though not admissible in England to explain a statute, have been in this country taken into consideration in construing Acts of the Legislature. *Per* PRINSEP, *J.*—The objects and reasons given by the Legislature on the introduction of a Bill, and the Report of the Select Committee on it, may be referred to in construing any Act to show the intention of the Legislature in passing it. *Queen-Empress* v. *Kartick Chunder Das, I. L. R. 14 Calc. 721,* referred to. ADMINISTRATOR-GENERAL OF BENGAL *v.* PREM LALL MULLICK . . . **I. L. R. 21 Calc. 732**

Held, by the Privy Council on appeal, that it is not required that in a consolidating statute each enactment, when traced to its source, must be construed according to the state of things which existed at a prior time when it first became law; the object being that the statutory law bearing on the subject should be collected and made applicable to the existing circumstances; nor can a positive enactment be annulled by indications of intention, at a prior time, gathered from previous legislation on the matter. Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Indian, as well as British, statutes. ADMINISTRATOR-GENERAL OF BENGAL *v.* PREMLAL MULLICK **I. L. R. 22 Calc. 788**
L. R. 22 I. A. 107

15. ——— *Proceedings of Legislature. Per* PIGOT, *J.* Proceedings of the Legislature cannot be referred to as legitimate aids to the construction of an Act. *Administrator-General of Bengal* v. *Premlal Mullick, I. L. R. 22 Calc. 788 : L. R. 22 I. A. 107,* followed. QUEEN-EMPRESS *v.* SRI CHURN CHUNGO **I. L. R. 22 Calc. 1017**

QUEEN-EMPRESS *v.* BAL GANGADHAR TILAK **I. L. R. 22 Bom. 112**

16. ——— *Khoti Settlement Act (Bom. Act I of 1880)—Reference to Debate on Bill in Legislative Council.* For the purpose of construing an Act the debate upon the Bill when before the Legislative Council is not to be referred to. GOPAL KRISHNA PARACHURE *v.* SAKHOJIRAV **I. L. R. 18 Bom. 133**

17. ——— *Marginal notes to sections of Act.* Marginal notes are no part of an enactment. DUKHI MOLLAH *v.* HALWAY **I. L. R. 23 Calc. 55**

18. ——— *Marginal notes to sections of Act.* Marginal notes to sections of an Act do not form part of the Act. *Sutton* v. *Sutton, L. R. 22 Ch. D. 511,* and *Dukhi Mollah* v. *Halway, I. L. R. 23 Calc. 55,* followed. PUNARDEO NARAIN SINGH *v.* RAM SARUP ROY **I. L. R. 25 Calc. 858**
2 C. W. N. 577

19. ——— *Codifying, object of.* The object of codifying a particular branch

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STATUTES, CONSTRUCTION OF—*contd.*

of the law is that on any point specifically dealt with the law should thenceforth be ascertained by interpreting the language used in that enactment instead of, as before, searching in the authorities to discover what may be the law, as laid down in prior decisions. The language of such an enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before. *Bank of England* v. *Vagliano*, *[1891] A. C. 107*, referred to. NORENDRO NATH SIRAR *v.* KAMALABASINI DASI
I. L. R. 23 Calc. 563
L. R. 23 I. A. 18

20. ——— *Chutia Nagpore Encumbered Estates Acts (VI of 1876 and V of 1884)—Deo Estates Act (IX of 1886)—Marginal Notes to Acts.* The State publication of the Indian Acts being framed with marginal notes, such notes may be used for the purpose of interpreting an Act. KAMESHAR PRASAD *v.* BHIKHAN NARAIN SINGH. BHIKHAN NARAIN SINGH *v.* KAMESHAR PRASAD . . . **I. L. R. 20 Calc. 609**

21. ——— *Statutes of limitation.* Statutes of limitation being in limitation of common right are not to be extended by construction to cases not clearly included within their terms. PARASHRAM JETHMAL *v.* RAKHMA
I. L. R. 15 Bom. 299

22. ——— *Practice in contravention of the law—Hardship.* A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in a manner contrary to its plain wording. Nor can the principles of construction to be applied to an Act be influenced by extraneous considerations, such as questions of hardship. BALKARAN RAI *v.* GOBIND NATH TEWARI . . . . **I. L. R. 12 All. 129**

23. ——— *Distinction between affirmative commands and negative prohibition—Irregularities and illegalities.* As a principle of the interpretation of statutes, a distinction must be drawn between cases in which a Court or an official omits to do something which a statute enacts shall be done and cases in which a Court or an official does something which a statute enacts shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and therefore without jurisdiction. RAMESHUR SINGH *v.* SHEODIN SINGH . . . **I. L. R. 12 All. 510**

24. ——— *Stamp duty, charge of.* If the express words of an Act do not warrant or necessitate a demand of duty or charge, it is not competent to a Court of law to extend such enactment or to give to the words a meaning beyond their strict and literal signification, so as to include any case which may reasonably come within the spirit of the enactment. *In the matter of the* PORT CANNING LAND COMPANY . **16 W. R. 208**

STATUTES, CONSTRUCTION OF—*contd.*

25. ——— *Special and general procedure.* Inconvenience pointed out of introducing into Acts relating and intituled as relating to special jurisdiction only provisions affecting civil procedure generally. JUDOW MULJI *v.* CHHAGAN RAICHAND . **I. L. R. 5 All. 306**

26. ——— **Retrospective effect of Act**—Statutes are *primâ facie* deemed to be prospective only. "*Nova constitutio futuris formam imponere debet non præteritis.*" *Moon* v. *Durden, 2 Exch. 22*, approved of. DOOLUBDASS PETTAMBERDASS *v.* RAMLOLL THACKOORSEYDASS
5 Moo. I. A. 109

CHUTTERDHAREE MISSER *v.* NURSINGH DUTT SOOKOOL . . . . . **3 Agra 371**
Agra F. B. Ed. 1874, 163

27. ——— *Alteration in procedure—Retrospective effect of Act.* Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings. HAJRAT AKRAMNISSA BEGAM *v.* VALIULNISSA BEGAM
I. L. R. 18 Bom. 429

BALKRISHNA PANDHARINATH *v.* BAPU YESAJI
I. L. R. 19 Bom. 204

28. ——— *Acts relating to procedure—Retrospective operation of Act—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 73—Dekkhan Agriculturists' Relief (Amendment) Act (VI of 1895).* In this suit the Subordinate Judge of Karmala held that the defendant was an agriculturist, and that therefore the suit could not be maintained without a certificate under s. 47 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Under s. 73 of that Act the finding of the Subordinate Judge upon the point was final. The plaintiff appealed, the appeal including other points of objection to the decree as well as that with regard to the status of the defendant. Pending his appeal, Act VI of 1895 was passed, which repealed s. 73. At the hearing of the appeal the Judge considered the question of the statutes of the defendant, and held that he was not an agriculturist, overruling the decision of the Subordinate Judge upon that point. *Held*, that the Judge in appeal was right in entertaining the question. The provisions of Act VI of 1895 altered the procedure, and were therefore applicable to proceedings already commenced at the time of their enactment. *Held*, also, that, even if the General Clauses Act (I of 1868), s. 6, applied to acts not conferring rights, but simply concerning judicial procedure, it could not affect the present case, as the repeal is not one of Act itself, but only of a section in the same relating to procedure. GANGARAM *v.* PUNAMCHAND NATHURAM
I. L. R. 21 Bom. 822

29 ——— *Hereditary Offices (Amendment) Act (Bom. Act V of 1886), s. 2.* S. 2 of the Hereditary Offices Act Amendment Act (Bombay Act V of 1886) is not retrospective. RAHIMKHAN *v.* FATUBIBI BINTESAHEB KHAN
I. L. R. 21 Bom. 118

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STATUTES, CONSTRUCTION OF—*contd.*

30. ——— *Retrospective effect of Acts, principle as to—Mad. Act VIII of 1865.* In a suit for rent for 1865, 1866, it was objected that pottahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on 1st January 1866. *Held* (reversing the decision of the Civil Judge), that Act VIII of 1865 was inapplicable to the case. The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are not exceptions, but the question here was not one of processual, but of material law. MORRIS *v.* SAMBAMURTI RAYAR . . . . . **6 Mad. 122**

31. ——— *Retrospective operation—Gujarat Talukhdars' Act (Bom. Act VI of 1888), s. 31, cl. 2—Collector refusing to confirm sale without sanction under act passed whilst decree was under execution.* A decree upon a mortgage-bond passed against part of a talukhdar's estate on the 15th August 1887 was transferred under s. 320 of the Civil Procedure Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 5th August 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukhdars' Act (Bombay Act VI of 1888), which came into force on the 25th March 1889, had not been obtained. *Held*, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebuted by any intention to interfere appearing in the Act itself. KALIAN MOTI *v.* PATHUBHAI FALJIBHAI **I. L. R. 17 Bom. 289**

32. ——— **Penal provisions in statute** *—Retrospective effect.* Retrospective effect is not to be given to the penal provision of s. 2, Bengal Act VI of 1862. NOBOKANTH DEY *v.* BARODAKANTH ROY . . . . . **1 W. R. 100**

33. ——— *Penal Statute—Bengal Excise Act (Beng. Act VII of 1878).* Penal statute must be construed strictly, *i.e.*, nothing is to be regarded as within the meaning of the statute which is not within the letter and clearly and intelligibly described in the very words of the statute itself. EMPRESS *v.* KOLA LALANG **I. L. R. 8 Calc. 214 : 10 C. L. R. 155**

34. ——— *Penal statute—Act XXXI of 1860.* A penal statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character. REG. *v.* BHISTABIN MADANNA . . **I. L. R. 1 Bom. 308**

35. ——— *Penal Code (Act XLV of 1860), s. 499—English law of defamation. Semble:* S. 499 of the Indian Penal Code should be construed without reference to the English law. *In re* NAGARJI TRIKAMJI . **I. L. R. 19 Bom. 340**

36. ——— **Repeal by implication—** *Repugnancy.* Statutes are not to be held to be repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable. SITAPATHI NAYUDU *v.* QUEEN . . . . **I. L. R. 6 Mad. 32**

37. ——— *Implied repeal—Civil Procedure Code, 1859, s. 187—Act IX of 1850, s. 101.* A special enactment is not impliedly repealed by a subsequent general enactment, if the two enactments are not so repugnant as to be incapable of standing together. Act IX of 1850, s. 101, was not repealed by s. 187 of Act VIII of 1859. SABAPATI MUDALIYAR *v.* NARAYANSVAMI MUDALIYAR . . . . **1 Mad. 115**

38. ——— *Repeal, effect of, on right of action.* A right of action is not taken away by a change in the law, unless by express enactment; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure. FRAMJI BOMANJI *v.* HORMASJI BARJORJI **3 Bom. O. C. 49**

39. ——— *Effect of repeal—Retrospective effect—Dekkhan Agriculturists' Relief Act, 1879—General Clauses Consolidation Act, 1868, s. 6.* The general rule is that a repealed statute cannot be acted on after it is repealed; but, as provided in s. 6 of the General Clauses Act, 1868, all matters that have taken place under it before its repeal remain valid. But a new order of a Court, not ancillary or provisional, but directing a further substantive step in the execution of a decree, is a new proceeding which should be governed by the law in force when the order is made, and not by the law which it repeals. An Act passed to promote some public important object, such as the protection of the property of the Dekkhan agriculturists, may be given on that account, a retro-active operation, if necessary, as the rule against such operation rests itself on such a general public interest, which may, under the circumstances, be deemed of less importance than the one embodied in the Act. SHIVRAM UDARAM *v.* KONDAJI MUKTAJI . **I. L. R. 8 Bom. 340**

40. ——— **Alteration of law—***Law governing suit when law is changed pending suit.* The law as it exists when a suit is commenced must decide the rights of the parties to the suit, unless the Legislature has expressed a clear intention to vary the relative rights of the parties to each other in the new law. Rule followed in the interpretation of Act X of 1859. BUNGSHEEDHUR DOSS *v.* MOHOMED KHULEEL. . **1 Hay 369**

41. ——— *Alteration of law while suit is pending—Act XIX of 1857, s. 219—Repeal, effect of.* Where the law is altered while a suit is pending, the law as it exists when

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STATUTES, CONSTRUCTION OF—*contd.*

the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, shows a clear intention to vary the mutual relations of such parties. GUJERAT TRADING COMPANY *v.* TRIKAMJI VELJI
3 Bom. O. C. 45

42. ——— Right of suit—*Act XVI of 1842—Act VIII of 1868, s. 1—Act XIV of 1870, s. 1.* On the 27th of June 1866 it was agreed by and between *B*, a zamindar, and *D*, a raiyat, that the latter should pay R20 annually as the rent of his holding and that for the future no further sum in excess should be demanded or suit brought for enhancement of rent. At the date of the agreement Act XVI of 1842 was in force. The settlement of the district, where the land in respect of which the agreement was made was situate, expired on the 1st of July 1870, before when Act XVI of 1842 was repealed by Act VIII of 1868, which Act was repealed by Act XIV of 1870, both Acts saving any right or title which had already accrued. *Held*, that no right of action to avoid or right to repudiate the engagement of the 27th of June 1866 accrued to the zamindar before the passing of those Acts. DEOJEET *v.* BHUGWANT
6 N. W. 373

43. ——— Statutes making contracts void and those prohibiting actions on them —The distinction between enactments which declare contracts absolutely void and those which simply provide that no action shall be brought upon such contracts pointed out. VISSAPPA *v.* RAMAJOGI . . . . . 2 Mad. 341

44. ——— Statute imposing duty—*Action for failure to perform it.* Where a statute imposes a duty, it, without express words, gives an action for the failing to perform that duty, and for wrongfully performing it. PONNUSAMY TEVAR *v.* COLLECTOR OF MADURA . 3 Mad. 35

45. ———"Must" and "shall"—*Limitation Act, XIV of 1859, ss. 20, 21.* In interpreting statutes, the words "must" and "shall" may, in some cases, be substituted for the word "may," but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word "may" should be taken as used in its natural, *i.e.*, in a permissive, and not in an obligatory, sense. DELHI AND LONDON BANK *v.* ORCHARD
I. L. R. 3 Calc. 47 : L. R. 4 I. A. 127

46. ——— Provisos—*Hindu Wills Act.* In construing an Act of the Government of India, passed in the form peculiar to the Hindu Wills Act, the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters so far as the latter do not contravene the full and natural meaning of the provisos. ALANGAMONJORI DABEE *v.* SONAMONI DABEE
I. L. R. 8 Calc. 637 : 10 C. L. R. 459

47. ——— Land Acquisition Acts—*Acts.* Acts relating to the acquisition of lands for public

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purposes must be construed strictly in favour of the subject. SORABJI NASSARVANJI DUNDAS *v.* JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY
12 Bom. 250

48. ——— Rules of construction—*Statute of Limitations, 21 Jac. I, c. 16.* Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction of satutes requires that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. The words in the Statute of Limitations, 21 Jac. I, c. 16, s. 7, "beyond the seas," are synonymous in legal import with the words "out of realm," or "out of the land" or "out of the territories," and are not to be construed literally. RUCKMABOYE *v.* LULLOOBHOY MOTTICHUND . . 5 Moo. I. A. 234

49. ——— *Bengal Rent Act X of 1859, s. 77—Meaning of "determined."* The word "determined" meant "legally decided by a Court of competent jurisdiction." GHALIB ALI *v.* KHILLOO
3 N. W. 51 : Agra F. B. Ed. 1874, 243

50. ——— *Road Cess Act (Beng. Act X of 1871)—Interpretation clause, construction of.* In a suit on a bond by which certain land, admittedly lakhiraj, was mortgaged, the purchaser of a portion of the mortgaged property at an auction-sale for arrears of road cess due under Bengal Act X of 1871 was added as a defendant, and the lower Courts, holding the effect of such a sale was to pass the property to the defendants free of encumbrances, made a decree excluding that portion from liability in respect of the mortgage-bond. *Held*, on the construction of Bengal Act X of 1871, that the sale had no such effect, and that the whole of the property was liable to be sold in satisfaction of the plaintiffs' claim. Although the effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places in the Act in which that word occurs, it is not the effect of an interpretation clause that the thing defined has annexed to it every incident which may seem to be attached to it by any other Act of the Legislature, It does not follow therefore, that, because lakhiraj property is defined in the Road Cess Act, 1871, to be a tenure, all the interests and consequences attached by other Acts to tenures generally, or to particular classes of tenures, become annexed to lakhiraj property. UMACHURN BAG *v.* AJADANNISSA BIBEE
I. L. R. 12 Calc. 330

51. ——— *Tax illegally levied.* A statute not only enacts its substantive provisions, but as a necessary result of legal logic, it also enacts as a legal proposition everything essential to the existence of the specific enactments. Where the Legislature has imposed certain duties

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STATUTES, CONSTRUCTION OF—*contd.*

both upon the tax-payer and upon the Municipal Commissioners, and those duties as to the tax-payer enforceable by penalties, are to be performed at a particular time :—*Held*, that there was implied a "latent proposition of law," which is as clear and binding as if it had been explicitly declared. That proposition is that there shall be a legally sanctioned tax at the period at which the duties are to be performed. LEMAN *v.* DAMODARAYA . . . **I. L. R. 1 Mad. 158**

52. ———— *Acts imposing taxes—Ambiguity in Acts.* In order to impose a tax, due, rate, or toll upon a subject, the framers of the Act or bye-law under which such tax, etc., is imposed must use clear and unambiguous words to effect their purpose. When the words used are ambiguous, the intendment of the Courts will be in favour of the subject upon whom the tax is sought to be imposed. Thus where the framers of the Surat bye-law imposed a tax of R1 per Surat mân upon "copper" imported into Surat for consumption, it was held that copper wrought up into pots did not fall within the words of the bye-law. *Semble :* That when a tax is imposed upon goods imported into a town for consumption, and such goods, after having been subjected to the tax upon being imported into the town, are afterwards taken out for sale into the neighbouring villages and brought back unsold, such goods are not liable to be subjected to tax a second time. DULLABH SHIVLAL *v.* HOPE . **8 Bom. A. C. 213**

53. ———— *Bombay Municipal Act (III of 1872), s. 195—Act for public benefit.* Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction could be given to it than where powers are to be exercised merely for private gain or other advantage. OLLIVANT *v.* RAHIMTULA NUR MAHOMED . . . **I. L. R. 12 Bom. 474**

54. ———— *Letters Patent, High Court, cl. 12.* Every statute is to be interpreted and applied so far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of international law. All legislation is, *primâ facie*, territorial. It binds all subjects of the Crown, but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign. KESSOWJI DAMODAR JAIRAM *v.* KHIMJI JAIRAM **I. L. R. 12 Bom. 507**

55. ———— **Legislative power of the Governor-General in Council**—*Stat. 24 & 25 Vict., c. 67, s. 22*—"*Indian territories now under the dominion of Her Majesty*"—"*Said territories*"—*28 & 29 Vict., c. 17, Preamble—32 & 33 Vict., c. 98, s. 1.* The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 & 25 Vict., c. 67), received the Royal assent (*i.e.*, the 1st August 1861), were under the dominion of Her Majesty. In the preamble to the 28 & 29 Vict., c. 17, and in s. 1 of the 32 & 33 Vict., c. 98. Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *Postmaster-General of the United States* v. *Early, Curtis' Rep., U. S., p. 86*, referred to. It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. *Empress* v. *Burah, I. L. R. 3 Calc. 143 : I. L. R. 4 Calc. 183*, referred to. ABDULLA *v.* MOHAN GIR . . **I. L. R. 11 All. 490**

STATUTES, CONSTRUCTION OF—*contd.*

56. ———— **Repeal of statute which repeals another, effect of**—*General Clauses Consolidation Act (X of 1887), s. 7—Reformatory Schools Act (V of 1876), s. 2—Criminal Procedure Code (Act X of 1872), s. 318 ; (X of 1882), ss. 3 and 399.* The repeal of a Statute repealing another statute does not revive the repealed statute. The law in India as embodied in s. 7 of the General Clauses Act (X of 1897) is the same as the law in England. *Queen-Empress* v. *Madasami, I. L. R. 12 Mad. 94*, and *Queen-Empress* v. *Manaji, I. L. R. 14 Bom. 381*, referred to and approved of. DEPUTY LEGAL REMEMBRANCER *v.* AHMED ALI . . **I. L. R. 25 Calc. 333**
2 C. W. N. 11

57. ———— **Codifying statute.** In dealing with the interpretation of an Act intended to codify, a particular branch of the law, the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not to start with an inquiry how the law previously stood. *Bank of England* v. *Vagliano, [1891] A. C. 107*, followed. SARAT CHANDRA SHAH CHOWDHRY *v.* EMPEROR (1902) . **7 C. W. N. 301**

58. ———— **Liberty of subject.** In construing a statute which affects the liberty of the subject, the Courts should not only adopt the natural and ordinary construction, but should construe strictly expressions occurring therein. BISSUMBHUR SINGH *v.* QUEEN-EMPRESS (1900)
5 C. W. N. 108

59. ———— **Previous law.** In interpreting a statute, it should not be considered what the law was before the passing of that statute, but what the Legislature has said is to be of the law *after* the passing of the same. *Bank of England* v. *Vagliano, [1891] A. C. 107, 144 ; Narendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 23 Calc. 563 ; Rajnarain Bhaduri* v. *Katyayani Dabee, I. L. R. 27 Calc. 649*, referred to. LALA SURAJ PROSAD *v.* GOLAB CHAND (1901)
I. L. R. 28 Calc. 517 : s.c. 5 C. W. N. 640

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STATUTES, CONSTRUCTION OF—*concld.*

60. ——————— *Enactments relating to substantive rights—Effect on pending suits—Enactments relating to procedure, effect of.* It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. An exception to this general rule is where enactments merely affect procedure, but do not extend to rights of action. VEDAVALLI NARASIAH *v.* MANRAMMA . . **I. L. R. 27 Mad. 538**

61. ——— **Proceedings in Legislative Council**—*Construction of Act—Probate and Administration Act—High Court.* In construing an Act the proceedings in the Legislative Council cannot be referred to. SARAT SUNDARI BARMANI *v.* UMA PRASAD ROY CHOWDHRY (1904) **8 C. W. N. 578**

62. ——— **Jurisdiction**—*Construction of—Pensions Act (XXIII of 1871), s. 4—Bombay Revenue Jurisdiction Act (X of 1876), s. 4, proviso.* The general presumption is against construing a statute as ousting or restricting the jurisdiction of the superior Courts. The intention must be expressed in clear terms, not merely implied, but necessarily implied : the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Act of Parliament. Such statutes are to be strictly construed when their language is doubtful. A construction, which would impliedly create a new jurisdiction, is to be avoided, especially where it would have the effect of depriving the subject of his free-hold or of any common law right, or of creating an arbitrary procedure. No doubt when a power has been conferred in unambiguous language by statute, the Courts cannot interfere with its exercise and substitute their own discretion for that of persons or bodies selected by the Legislature for the purpose. Nor does any presumption arise against the finality of a decision by an authority with statutory powers to pronounce in respect of a duty or liability created by the statute. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905) **I. L. R. 29 Bom. 480**

63. ——— **"Immediately"**—*Land Acquisition Act (I of 1894), ss. 12 and 18—Notice by the Collector—Reference to Court—Meaning of word "immediately."* Where a statute or written contract provides that a certain thing shall be done "immediately" regard must be had, in construing that word, to the object of the statute or contract as the case may be, to the position of the parties and to the purpose for which the Legislature or the parties to the contract intend that it shall be done immediately. *In re* LAND ACQUISITION ACT (1905) . . . **I. L. R. 30 Bom. 275**

64. ——— **Doubtful expressions**—*Bombay City Police Act (Bom. Act IV of 1902), ss. 12, 16, 18.* In construing an expression of doubtful import occurring in a statute, the Court may well have regard to considerations outside the language of the Act. EMPEROR *v.* ATMARAM (1907) **I. L. R. 31 Bom. 480**

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See CONSTRUCTION OF STATUTES.

See STATUTES, CONSTRUCTION OF.

STATUTORY POWERS.

See INJUNCTION—SPECIAL CASES—PUBLIC OFFICERS WITH STATUTORY POWERS

See RAILWAY COMPANY.
10 B. L. R. 241
I. L. R. 27 Bom. 344

See ZAMINDAR . **14 B. L. R. 209**
L. R. 1 I. A. 364

STATUTORY ROAD.

See PORT COMMISSIONERS' ACT (BENG. ACT V OF 1870), ss. 5, 6, 31, 38, 39.
I. L. R. 33 Calc. 1243

STAY OF EXECUTION.

See APPEAL TO PRIVY COUNCIL—STAY OF EXECUTION PENDING APPEAL.

See EXECUTION OF DECREE.
I. L. R. 34 Calc. 1037

See EXECUTION OF DECREE—STAY OF EXECUTION.

See PRIVY COUNCIL, PRACTICE OF—STAY OF EXECUTION PENDING APPEAL.

STAY OF PROCEEDINGS.

See ACCUSED PERSON . **5 C. W. N. 110**

See ARBITRATION ACT, 1899, s. 19.
I. L. R. 34 Calc. 443

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XIV, r. 13.
13 C. W. N. 690

See CRIMINAL PROCEEDINGS.
I. L. R. 18 Bom. 581
I. L. R. 23 Calc. 610
2 C. W. N. 498; 639
3 C. W. N. 758

See FALSE EVIDENCE—GENERAL CASES.
5 C. W. N. 44

See INSOLVENCY ACT, s. 9.
I. L. R. 21 Bom. 297

See LETTERS PATENT, HIGH COURTS, 1865, CL. 15 . **5 C. W. N. 781**

See MORTGAGE—FORECLOSURE—RIGHT TO FORECLOSURE . **6 C. W. N. 654**

See PARTITION . **13 C. W. N. 690**

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—LIKELIHOOD OF BREACH OF THE PEACE . **I. L. R. 30 Calc. 112**

See PRACTICE—CIVIL CASES—STAY OF PROCEEDINGS . **I. L. R. 21 Calc. 561**
I. L. R. 18 Bom. 65
I. L. R. 35 Calc. 541

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STAY OF PROCEEDING—*contd.*

——— **until trial of test case**—

See PRACTICE—CIVIL CASES—TEST CASE.
I. L. R. 29 Calc. 140

1. ——— **Suits in respect of same subject-matter in different Courts**—*Civil Procedure Code, 1877, s. 20.* *A*, who was employed by *B & Co.* as their agent at Calicut instituted a suit for the balance of an account against his principals in the Court of the Subordinate Judge there in July 1878. In December of the same year, *B & Co.* instituted the present suit against *A* for an account and for damages caused by his alleged negligence. *Held*, that, as in both suits practically the same issues were triable, *A* was entitled as having been first to institute his suit, to proceed in the Court in which he had chosen to bring his suit and to have the other suit stayed, but without prejudice to the right of the plaintiffs in the latter suit to institute a cross claim in the Calicut Court. MECKJEE KHETSEE *v.* KASOWJEE DEVA CHUND
4 C. L. R. 282

2. ——— **Right of plaintiff to choose place of trial**—*Procedure—Venue—Civil Procedure Code (Act XIV of 1882), ss. 27 and 53.* The plaintiff brought this suit in the High Court at Bombay against the defendant for defamation alleged to be contained in a notice that appeared in the *Bombay Gazette* on the 9th April 1888. The defendant was the Chairman of the Hinganghat Mill Company. The plaintiff had been for some years secretary and manager of that Company. In April 1888 he was dismissed from his appointment, and shortly afterwards he filed a suit (No. 1 of 1888) in the Court of the Deputy Commissioner at Wardha, in the Central Provinces (which was the Court of the district in which Hinganghat is situated), for wrongful dismissal. The present suit was filed in July 1888. The defendant took out a summons calling on the plaintiff to show cause why the suit should not be stayed and the plaint returned to the plaintiff, in order that, if he thought proper, it might be presented in the Court at Wardha. The defendant relied on the following points : (i) that neither he nor the plaintiff resided or carried on business at Bombay ; (ii) that all the defendant's witnesses resided at Wardha ; (iii) that the other suit (No. 1 of 1883) was pending at Wardha, and that the decree of that suit would decide the present case also. *Held*, that the plaintiff was entitled to sue in Bombay. GEFFERT *v.* RUCKCHAND MOHLA
I. L. R. 13 Bom. 178

3. ——— **Preliminary decree, appeal against**—*Civil Procedure Code (Act XIV of 1882), ss. 545, 546—Partition suit, preliminary decree in—Powers of Appellate Court to stay subsequent proceedings.* There is no provision in the Code of Civil Procedure which authorizes a Court to which an appeal is preferred against a preliminary decree for partition to stay, pending the hearing of the appeal proceedings taken by the Court which passed the decree subsequent to the passing of such decree. BASANTA KUMAR SIRCAR *v.* BHUT NATH SIRKAR . . . **1 C. W. N. 264**

STAY OF PROCEEDINGS—*concld.*

4. ——— **Proceedings for committal for contempt of Court**—*Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.* When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order. *Gordon* v. *Gordon*, [*1904*] *P. 163*, followed. BAI MOOLBAI *v.* CHUNILAL PITAMBER (1909) . **I. L. R. 33 Bom. 630**

STAY OF PROSECUTION.

——— **pending civil litigation.**

See CRIMINAL PROCEDURE CODE, S. 195.
13 C. W. N. 398

STEAM-TUGS.

1. ——— **Regulation as to tugs**—*River navigation—Towing.* A party having two tugs, *A* and *B*, undertakes to supply tugs to two vessels *P* and *Q*, in the order of their engagements as soon as the tugs are free. *A* is first free, and tows *P*, which has the prior claim, to Diamond Harbour where she becomes disabled. *B* subsequently tows *Q*, and, finding *A* disabled at Diamond Harbour, leaves *Q* and tows *P* out to sea, returning subsequently for *Q*. *Held*, that *B* was not justified in leaving *Q*, but that she ought to have towed her out to sea without interruption. NOWRJEE NUSSERWANJEE *v.* JOHANNES . . **1 Hyde 293**

2. ——— **Government pilots**—*Order to Government pilots prohibiting their engaging tugs at exorbitant charge.* The Government may prohibit its pilots from allowing any vessles under their pilotage charge to be taken in tow of a steamer the owners of which will only render their services on exorbitant terms. ROGERS *v.* RAJENDRO DUTT
2 W. R. P. C. 51 : 8 Moo. I. A. 103

STEP IN AID OF EXECUTION.

See EXECUTION OF DECREE.

STOCKS.

——— **confinement in**—

See MADRAS REGULATION—1816—XI, S. 10 . . **I. L. R. 24 Mad. 271**

STOLEN PROPERTY.

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1. OFFENCES RELATING TO . . . 12185
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See CHARGE TO JURY—SPECIAL CASE—STOLEN PROPERTY.

See PENAL CODE, S. 411.

See STAMP ACT (II OF 1899), S. 69.
I. L. R. 24 Mad. 319

——— **trial for receiving**—

See CRIMINAL PROCEDURE CODE, S. 233.
13 C. W. N. 418

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STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO.

1. ——— Concealment of stolen property—*Penal Code, ss. 411, 414. Held*, that the prisoner, who, having received stolen property, concealed it in his house, could not be charged and convicted for two offences, *viz.*, of having dishonestly received stolen property under s. 411, Penal Code, and of assisting in the concealment of stolen property under s. 414, which applies to persons whose dealing with the stolen property is not of such a kind as to make them guilty of dishonestly receiving or retaining it. GOVERNMENT *v.* NOWLIA **1 Agra Cr. 9**

2. ——— *Penal Code (Act XLV of 1860), s. 411—Evidence—Pointing out stolen property concealed in a place not under the accused's control.* Where the sole evidence against a person charged with an offence under s. 411 of the Penal Code consisted of the fact that the accused had pointed out the place where some of the stolen property was concealed in the field of another person. *Held*, that this was not in itself sufficient evidence to support a conviction under the above-mentioned section. QUEEN-EMPRESS *v.* GOBINDA **I. L. R. 17 All. 576**

3. ——— Assisting in concealing or disposing of—*Guilty knowledge.* Where persons are charged with assisting in concealing or disposing of property which they know or have reason to believe to be stolen, the nature of the property, as well as the circumstances under which it was being made away with, must be taken into consideration. REG. *v.* HARISHANKAR FAKIRBHAT **2 Bom. 136 : 2nd Ed. 130**

4. ——— Voluntarily assisting in the disposal of stolen property—"*Believe*"—"*Suspect*"—*Penal Code, s. 414.* The word "believe" in s. 414 of the Penal Code is much stronger than the word "suspect," and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property, with which he was dealing, was stolen property. It is not sufficient in such a case to show that the accused person was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. EMPRESS *v.* RANGO TIMAJI . . . . **I. L. R. 6 Bom. 402**

5. ——— *Penal Code, ss. 193 and 414—Intention to get innocent person punished—Separate offences, conviction of.* Where the petitioner was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender :—*Held*, that the Magistrate was right in convicting and punishing the petitioner for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193 of the Penal Code, and of voluntarily assisting in concealing stolen property under s. 414, Penal Code. EMPRESS *v.* RAMESHAR RAI . **I. L. R. 1 All. 379**

STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO—*contd.*

6. ——— Money obtained on forged money orders—*Penal Code, s. 410.* Money obtained upon forged money orders is not "stolen property" within the definition thereof given in the Penal Code, s. 410. QUEEN *v.* MON MOHUN ROY **24 W. R. Cr. 33**

7. ——— Receiving stolen property—*Proof of guilty knowledge.* In a case in which the accused is charged with receiving stolen property, it must be clearly proved that he retained the property with guilty knowledge. QUEEN *v.* YAR ALI. *In the matter of the petition of* YAR ALI **13 W. R. Cr. 70**

8. ——— *Evidence—Penal Code (Act XLV of 1860), s. 411.* To constitute the offence of receiving stolen property there must be some proof that some person other than the accused had possession of the property, before the accused got possession of it. ISHAN MUCHI *v.* QUEEN EMPRESS . . **I. L. R. 15 Calc. 511**

9. ——— *Penal Code, ss. 411 and 409—Criminal breach of trust.* A prisoner cannot be convicted, under s. 411 of the Penal Code, for dishonestly receiving or retaining stolen property, in respect of property which he himself has been convicted, under s. 409, Penal Code, of having obtained possession by committing criminal breach of trust. QUEEN *v.* SHUNKUR **2 N. W. 312**

10. ——— *Property stolen at dacoity—Penal Code, s. 412—Proof of commission of dacoity.* In order to sustain a conviction, under s. 412 of the Penal Code, of receiving property stolen at a dacoity, it is necessary to prove that the prisoner knew, or had reason to believe, that dacoity had been committed, or that the persons from whom he acquired the property were dacoits. QUEEN *v.* JOGESHUR BAGDEE . . **7 W. R. Cr. 109**

QUEEN *v.* BISHOO MANJEE **9 W. R. Cr. 16**

11. ——— *Evidence of dishonest receipt of property.* Where stolen property is found with a person who admits having received it, it may be fairly presumed that the receipt was a dishonest one, unless the receiver's conduct is satisfactorily explained. *In the matter of the petition of* RAMJOY KURMOKAR . . **25 W. R. Cr. 10**

12. ——— *Habitually receiving stolen property—Penal Code, s. 413.* A person cannot be said to be an habitual receiver of stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day. In order to support a conviction under s. 413 of the Penal Code of being an habitual receiver of stolen property it must be shown that the property was received on different occasions and on different dates. QUEEN EMPRESS *v.* BABURAM KANSARI **I. L. R. 19 Calc. 190**

13. ——— Animal "nullius proprietas"— *Penal Code, s. 411—Bull set at large in accordance with Hindu religious usage—*

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STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO—*contd.*

Appropriation of bull. A person was convicted and sentenced under s. 411 of the Penal Code for dishonestly receiving a bull, knowing the same to have been criminally misappropriated. It was found that, at the time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies. *Held*, that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore "*nullius proprietas*," and incapable of larceny being committed in respect of it; and that the conviction must be set aside. QUEEN-EMPRESS *v.* BANDHU . **I. L. R. 8 All. 51**

14. ——— **Doli incapax**—*Penal Code, ss. 83, 411—Discharge of child-thief—Proof of theft—Conviction of receiver.* The fact that a child has been tried for theft and discharged under s. 215 of the Code of Criminal Procedure, 1872, on the ground of want of understanding within the meaning of s. 83 of the Penal Code, is no bar to the conviction of a person charged under s. 411 of the Penal Code with receiving the property alleged to have been stolen. QUEEN *v.* BEGARAYI KRISHNA SARANU . . . **I. L. R. 6 Mad. 373**

15. ——— **Possession of stolen property**—*Evidence of theft.* Possession of property which has been stolen from the owner is generally at best only evidence of theft when the date of the theft is so recent as to make it reasonable to presume in the absence of explanation, that the person in whose possession the property is found must have obtained the possession by stealing. QUEEN *v.* POROMESHUR AHEER . . **23 W. R. Cr. 16**

16. ——— *Guilty knowledge, inference of.* Where property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner, it is for the party in whose possession the property is found duly to account for its possession, and unless he can do so a jury may fairly infer, in such circumstances, that it was with a guilty knowledge that the prisoner took that which he knew to be not his own. QUEEN *v.* SHURRUFFOODDEEN . **13 W. R. Cr. 26**

17. ——— *Fraudulent possession of property reasonably suspected of being stolen—Police Act (XIII of 1856), s. 35, cl. (1)—Duty of the prosecution to prove to the satisfaction of the Court that there exist reasonable grounds of suspicion—Onus of proof.* A person cannot be called on to account for his possession of property under s. 35, cl. (1), of the Police Act (XIII of 1856), unless there is evidence which satisfies, not the police officer, but the Court, after judicial consideration, that such property "may be reasonably suspected of being stolen or fraudulently obtained." QUEEN EMPRESS *v.* DHANJIBHAI EDULJI **I. L. R. 20 Bom. 348**

STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO—*contd.*

18. ——— *Presumption—Penal Code, s. 411—Receiver of stolen property—Presumption as to possession of property after the theft.* A common brass drinking-cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884. *Held*, in a case in which the accused was tried for receiving stolen property, that his possession of the stolen property, coupled with the fact that he had failed to give an account as to how he became possessed of the property, would, under ordinary circumstances, raise a probable presumption of his guilt, but where, as in this case, such possession was not a recent possession, but one eleven months subsequent to the act of theft, the presumption against him was so slight that, taken by itself, he ought not to be called upon to explain how his possession was acquired. The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. *Rex* v. *Adam, 3 C. & P. 600; Rex* v. *Cooper, 8 C. & P. 318; Rex* v. *Partridge, 7 C. & P. 551*, followed. INA SHEIKH *v.* QUEEN-EMPRESS **I. L. R. 11 Calc. 161**

19. ——— *Penal Code, s. 411—India-rubber, possession of—Smuggling.* Where a person was charged under s. 411 of the Penal Code with having received stolen property (rubber, the produce of the Government forests at Cachar), and it was not proved that the rubber came from the Government forest, or that it was stolen property, it was *held* that the conviction under s. 411 was bad, and that he could not be convicted of smuggling—smuggling india-rubber not being an offence under the Penal Code. QUEEN *v.* BAJO HURI **19 W. R. Cr. 37**

QUEEN *v.* DASSORUT DASS . **18 W. R. Cr. 63**

And *see* QUEEN *v.* GOUREE CHURN DOSS. **19 W. R. Cr. 38 note**

20. ——— *Presumption—Dishonest receipt of stolen property—Dacoity—Jury.* In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused. The fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity. EMPRESS *v.* MALHARI . . **I. L. R. 6 Bom. 731**

21. ——— *Possession of members of joint family—Finding stolen property in joint family house. Held*, that the bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction. QUEEN-EMPRESS *v.* NIRMAL DASS . . **I. L. R. 22 All. 445**

22. ——— *Penal Code, ss. 411, 414—Concealment of stolen property—Husband*

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STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO—*contd.*

and wife. The only evidence of the receipt of stolen property by a wife was the fact that the property was found in the house where she lived with her husband. *Held*, that that constituted the possession of the husband rather than that of the wife. QUEEN *v.* DESILVA . **5 N. W. 120**

23. ——— **Res nullius**—*Bull set at large in accordance with Hindu religious usage—Penal Code, ss. 410, 411.* A Hindu who, upon the death of a relative, dedicates or lets loose a bull, in accordance with Hindu religious usage, as a pious act for the benefit of the soul of the deceased, thereby surrenders and abandons all proprietary rights in the animal, which thereafter is not "property" which is capable of being made the subject of dishonest receipt or possession within the meaning of ss. 410 and 411 of the Penal Code. *Queen-Empress* v. *Bandhu, I. L. R. 8 All. 51*, and *Queen-Empress* v. *Jamura, All. Weekly Notes (1884) 87*, referred to. QUEEN EMPRESS *v.* NIHAL . **I. L. R. 9 All. 348**

24. ——— *Penal Code, ss. 403, 429—Bull dedicated to an idol.* A bull dedicated to an idol and allowed to roam at large is not *fera bestia* and therefore *res nullius*, but *primâ facie* the trustee of the temple, where the idol is worshipped has the rights and liabilities attaching to its ownership. Such an animal can therefore be the subject of theft and criminal misappropriation. QUEEN-EMPRESS *v.* NALLA **I. L. R. 11 Mad. 145**

25. ——— **Retaining stolen property**—*Penal Code, s. 411—Knowledge.* The offence of dishonest retention of stolen property under s. 411 of the Penal Code may be complete without any guilty knowledge at the time of the receipt. ANONYMOUS **4 Mad. Ap. 42**

26. ——— *Evidence of guilty knowledge.* Evidence of guilty knowledge is necessary to a conviction on a charge of dishonestly retaining stolen property. QUEEN *v.* DOYAL SHILYDAR . . . . . **6 W. R. Cr. 87**

27. ——— *Penal Code, s. 411—Proof that the property is stolen property necessary—Guilty knowledge of retainer.* Where a person is accused of an offence under s. 411 of the Penal Code, he cannot, where the circumstances do not raise the presumption that he received the property knowing it to be stolen, be convicted of that offence merely because he is in possession of the property and does not account for his possession. The prosecution must prove both that the property was stolen and that the accused received it dishonestly QUEEN-EMPRESS *v.* BURKE . **I. L. R. 6 All. 224**

28. ——— *Evidence Act (I of 1872), s. 114—Presumption—Possession of stolen property. Held*, that the finding in the possession of a person six months after the commission of a dacoity, of articles stolen in that dacoity, such articles consisting of jewelry of a very ordinary type and by no means distinctive appearance, is not sufficient to form the basis of a conviction for participation in the dacoity. *Queen-Empress* v. *Burke, I. L. R. 6 All. 224*, and *Ina Sheikh* v. *Queen-Empress, I. L. R. 11 Calc. 160*, referred to. EMPEROR *v.* SUDHAR SINGH (1906) . **I. L. R. 29 All. 138**

STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO—*contd.*

29. ——— *Penal Code s. 411—Dishonest retention of stolen property—Property belonging to different owners—Separate convictions.* Where a person was found in possession of stolen property identified as belonging to different owners, but it did not appear that he had received such property at different times:—*Held*, that such person could not properly be tried and convicted under s. 411 of the Penal Code separately in respect of the property identified by each owner. *Ishan Muchi v. Queen-Empress, I. L. R. 15 Calc. 511*, approved. QUEEN-EMPRESS *v.* MAKHAN **I. L. R. 15 All. 317**

30. ——— *Dishonestly retaining stolen property—Penal Code, s. 411—Legal presumption.* Where a document, purporting to be a Collectorate notice forming part of a record and found by the Court to be genuine, was discovered to be in the possession of persons charged with retaining stolen property, it was held that, in a matter of this kind, it was right to raise legal presumptions arising out of the ordinary course of business and to dispense with direct evidence of the document having been actually on the record or stolen from it. Though it be true that, before a man can be convicted of receiving stolen property knowing it to be stolen, it must be shown that property has been stolen:—*Held*, that the disappearance of the document from the record plus the substitution of an imitation of it in its place showed that it must have been taken with a dishonest object. ISHAN CHANDRA CHANDRA *v.* QUEEN-EMPRESS **I. L. R. 21 Calc. 328**

31. ——— *Penal Code (Act XLV of 1860), ss. 224, 411—Escape from lawful custody—Actual thief arrested by private person whils in possession of stolen property—s. 411 of the Indian Penal Code not applicable to the thief himself.* S. 411 of the Indian Penal Code does not apply to the person who is the actual theif. Where, therefore, a person, whose bullock had been stolen in his absence, traced it to the house of the thief, and there and then arrested him, and made him over to a *chaukidar*, from whose custody he escaped, it was *held* that this was not an escape from lawful custody within the meaning of s. 224 of the Code. *Semble:* That, if the owner of the bullock had himself been entitled to make the arrest, the subsequent custody of the prisoner by the *chaukidar* would have been a lawful custody. *Queen-Empress* v. *Potadu, I. L. R. 11 Mad. 480*, referred to. KING-EMPEROR *v.* JOHRI (1901) . . **I. L. R. 23 All. 266**

32. ——— **Liability of head of the family or managing member**—*Penal Code (Act XLV of 1860), s. 411—Possession of stolen property—Joint Hindu family.* Stolen property consisting of a considerable quantity of cloth, weighing about five maunds, was discovered on search by the police in a locked room in a house belonging to

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STOLEN PROPERTY—*contd.*

1. OFFENCES RELATING TO—*concld.*

and inhabited by a joint Hindu family composed of a father, son and grandson. The son was found to be the managing member of the family, and the key of the room in which the stolen property was found was produced by him. The circumstances were such that it was very improbable that the cloth could possibly have been placed where it was found without the connivance of some or all of the members of the family. *Held*, that, under the above circumstances, the conviction of the managing member of the family under s. 411 of the Indian Penal Code was a proper conviction. *Queen-Empress* v. *Sangam Lal, I. L. R. 15 All. 129*, referred to. EMPEROR *v.* BUDH LAL (1907) . **I. L. R. 29 All. 598**

2. DISPOSAL OF, BY THE COURT.

1. ——— **Right to stolen property**—*Property in cash or notes.* The property in stolen cash, and bills or notes payable to bearer which circulate as cash, is inseparable from possession ordinarily. The property in stolen goods remains in the person from whom they are stolen. ANONYMOUS **1 N. W. Ed. 1873, 298**

2. ——— **Currency note**—*Right to, as between Government and the person from whom it has been stolen, where thief has cashed it at treasury.* A R10 currency note was changed by one *M* at the Government Treasury on the Shevaroy Hills. *M* was subsequently convicted by the Sessions Court of Salem of having stolen the note from one *S*. The note was produced in evidence at the trial, and the Court directed it to be given up to *S* from whom it had been stolen. *Held*, that the Sessions Court was wrong. A note of this kind being in legal view money, the property in it passes by mere delivery, and nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule. QUEEN *v.* MUPPEN. *In the matter of the petition of* COLLECTOR OF SALEM **7 Mad. 233**

3. ——— **Order of Court as to disposal of property**—*Restoration of property by Criminal Court—Remedy by suit in Civil Court.* If personal property, of which a complainant has been forcibly or illegally deprived, comes into the Magistrate's hands, he may order its restoration to its owner, otherwise the complainant must seek to recover it, or its value through the Civil Court. RAMJEEBUN DOOBEY *v.* LUCHMONEE DABEA **W. R. 1864 Cr. 5**

4. ——— *Criminal Procedure Code, 1861, 1869, s. 132A.* Under s. 132A, Criminal Procedure Code (Act VIII of 1869), no order can be passed with reference to the disposal of any property in a Criminal Court, unless that property is produced before the Court: such order must be made at the time of passing judgment. *In the matter of the petition of* RASH MOHUN GOSHAMY. RASH MOHUN GOSHAMY *v.* KALI NATH RAHA . . . . **19 W. R. Cr. 3**

STOLEN PROPERTY—*contd.*

2. DISPOSAL OF, BY THE COURT—*contd.*

5. ——— *Disposal of, by Magistrate where no order had been made by lower Court—Criminal Procedure Code, 1869, ss. 132A, 132 B.* The Assistant Magistrate, on a review of the proceedings of the Subordinate Magistrate, passed orders directing that certain produce should be delivered over to the parties whom he considered entitled thereto. The Subordinate Magistrate had passed no orders under s. 132A of the Criminal Procedure Code. *Held*, that the orders of the Assistant Magistrate were made without any jurisdiction. ANONYMOUS . . . **5 Mad. Ap. 22**

6. ——— *Disposal of, where prisoner acquitted.* Where a person was accused of dishonestly receiving stolen property, knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen:—*Held*, that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418 of Act X of 1872 regarding its disposal. EMPRESS *v.* NILAMBHAR BABU . **I. L. R. 2 All. 276**

7. ——— *Disposal of, by Criminal Court—Criminal Procedure Code, 1872, Ch. XXX, ss. 415, 416, 417—Restoration of property made over by the police.* *A* was charged before the police with theft of certain property. The police considered that no theft had been committed, and reported the matter to a second class Magistrate, who, agreeing with the police, ordered the property to be restored to *A*. On application by the complainant, the District Magistrate found that *A* had removed, though not dishonestly, the property from *B*, a deceased person, and ordered the property to be given by the police to *B's* heirs. It was so given. *Held*, that the provisions of Ch. XXX of the Code of Criminal Procedure do not apply to such a case. Ss. 415, 416, and 417 contemplate proceedings preliminary to, and independent of, inquiry. Upon general principles, where there has been an inquiry, or a trial, and the accused person is discharged or acquitted by any Criminal Court, that Court is bound to restore that property into the possession of the person from whom it is taken, unless, as provided for by s. 418, such Court is of opinion that "any offence appears to have been committed" regarding it, then such order as appears right for the disposal of the property may be made. The High Court cannot direct the restoration of the property already delivered by the police under the illegal order of the District Magistrate. *In re* ANNAPURNABAI **I. L. R. 1 Bom. 630**

In matter of the petition of BASUDEB SURMA GOSSAIN. BASUDEB SURMA GOSSAIN *v.* NAZIROODDEEN . . **I. L. R. 14 Calc. 834**

But see *In re* HAREE BUNDHOO SANTRA **5 W. R. Cr. 55**

8. ——— *Criminal Procedure Code, 1882, s. 517—High Court's Criminal Procedure Act (X of 1875), s. 115*—"*Any property*"

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STOLEN PROPERTY—*contd.*

2. DISPOSAL OF, BY THE COURT—*contd.*

—*Reference to Police Magistrate—Evidence on reference—Review.* The words "any property" in s. 115 of the High Court's Criminal Procedure Act (X of 1875) include as well property voluntarily produced before the Magistrate by a witness in the case as property seized by the police or found on the person of the prisoner. The reference to a Magistrate under s. 115 of the High Court's Criminal Procedure Act, X of 1875, is not a trial for the final determination of the rights of the parties, and it is not incumbent upon the Magistrate on such reference to hear witnesses, but he may rightly order the delivery of property to that one of the rival claimants whom he considers, upon the statements of their respective cases, to have made out a *primâ facie* case, and it is not competent to the High Court to review the decision at which the Magistrate so arrives. REG. *v.* RAMDAS SAMAL DAS. *Ex parte* MADAVJI DHARRAMSI . . **12 Bom. 217**

9. ——— *Criminal Procedure Code, 1882, s. 523—Code of Criminal Procedure, 1872, ss. 415, and 416—Delivery of property seized or stolen—Inquiry into ownership.* The provisions of s. 523 of the Code of Criminal Procedure (Act X of 1882) are wider than the corresponding provisions of the Code of 1872 (ss. 415 and 416), and they enable the Magistrate to enquire into the ownership of property sized by the police, and deliver it to the person entitled to it, instead of to the person from whom it is taken. *In re Annapurnabai, I. L. R. 1 Bom. 630*, distinguished. QUEEN-EMPRESS *v.* JOTI RAJNAK **I. L. R. 8 Bom. 338**

10. ——— *Criminal Procedure Code, 1882, ss. 517, 520, 523—Order of Magistrate restoring property alleged to be stolen—District Magistrate, power of, to set aside such order.* Where on acquittal a Criminal Court passes an order for restoration of property under s. 517 of the Criminal Procedure Code (Act X of 1882), the proper course for the District Magistrate, if he thinks the order improper, is to direct it to be stayed under s. 520, and not to treat the property as subject to an order under s. 523 of the Code, and set it aside. QUEEN EMPRESS *v.* ABHRAM UMAR **I. L. R. 8 Bom. 575**

11. ——— *Criminal Procedure Code, 1882, s. 517—Order as to property as to which offence has been committed—Discharge of accused.* On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate, under s. 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer of the district, holding that it was the property of Government. *Held*, that, the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal and must be set aside. In setting it aside the High Court held, however, following *In re Annapurna Bai, I. L. R. 1 Bom. 630*, that they had no power to order restitution of the elephant. *In*

STOLEN PROPERTY—*contd.*

2. DISPOSAL OF, BY THE COURT—*contd.*

the matter of the petition of BASUDEB SURMA GOSSAIN. BASUDEB SURMA GOSSAIN *v.* NAZIRUDDIN . . . . **I. L. R. 14 Calc. 834**

12. ——— *Criminal Procedure Code, s. 517—Disposal of calf, not in esse at time of theft.* *R's* cow having been stolen, the thief, after a lapse of a year and a half, was convicted. Six months after the theft, *V* innocently purchased the cow which, while in his possession, had a calf. The Magistrate, under s. 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by *V* to *R*. *Held*, that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal. *In re* VERNEDE . . **I. L. R. 10 Mad. 25**

13. ——— *Criminal Procedure Code (Act X of 1882), ss. 517 and 523—Disposal of property produced before a Court during an inquiry—Restoration of previous possession if no offence has been committed.* S. 517 of the Code of Criminal Procedure is the only section under which a Court can make an order for the disposal of property produced before it in the course of an inquiry or trial. And it has jurisdiction to pass the order only if the case falls within the section, that is, if it is property "regarding which an offence appears to have been committed, or which has been used for the commission of an offence." Otherwise, the only legal order which the Court can pass is one restoring the previous possession. A Presidency Magistrate, finding the evidence not sufficient to warrant a conviction, discharged the accused, but ordered the property which had been produced during the inquiry to be detained until the title of the rightful owner was proved before a Civil Court. On a subsequent day he, apparently acting under s. 523 of the Code, ordered the property to be delivered to the complainant, from whose possession it had not been taken. *Held*, that both the orders were *ultra vires*. The Magistrate was therefore directed to dispose of the property in a legal manner. If he found that the case fell within s. 517, he should pass such order as he thought fit; if he found that it did not, he must restore the previous possession. *In re* DEVIDIN DURGAPRASAD **I. L. R. 22 Bom. 844**

14. ——— *Criminal Procedure Code (Act X of 1882), ss. 517 523, 524—Order as to standing crops on land of which person asks to be restored to possession.* On 27th September 1897 complainant charged one *R* with criminal trespass under s. 447 of the Penal Code (Act XLV of 1860). He alleged that in the previous July *R* had entered into possession of the land and sowed rice upon it, and that, when in the month of September 1897 he (the complainant) went to the field, *R* had turned him out by force and refused to vacate the land. On the 17th November 1897 the case was heard by the third class Magistrate, who convicted *R* of the offence charged. On the following day (18th November 1897) the complainant applied to the Magistrate under s. 522 of the Code of Criminal

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STOLEN PROPERTY—*contd.*

2. DISPOSAL OF, BY THE COURT—*contd.*

Procedure (Act X of 1882) to be restored to possession of land and of the standing crops. The Magistrate ordered possession of the land to be restored to the complainant, but attached the crops under Ch. XLIII of the Criminal Procedure Code. Thereupon one *V* intervened and claimed the crops as having been sown by himself. His claim was disallowed, and the crops were ordered to be sold and the proceeds credited to Government under ss. 523 and 524 of the Code. *Held*, that the order passed under ss. 523 and 524 with reference to the crops were illegal. The corps were not property in respect of which the offence was committed, nor were they used in the commission of the offence. They were not such property as is referred to in s. 517, 523, or 524 of the Criminal Procedure Code. NARAYAN GOVIND *v.* VISAJI . **I. L. R. 23 Bom. 494**

15. ——— *Criminal Procedure Code, 1882, ss. 517 and 523—Evidence of ownership—Evidence Act (I of 1872), s. 25—Confession made to police officer, admissibility of, for other purposes than as a confession.* Statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under s. 523 of the Criminal Procedure Code (Act X of 1882). An order, after trial, made by a Criminal Court for the restoration of property under s. 517 of the Criminal Procedure Code (Act X of 1882) is conclusive as to the immediate right to possession ; where an order has to be made under s. 523, the Magistrate may in the inquiry proceed on such evidence as is available and make an order for handing the property to the person he thinks entitled. This does not conclude the right of any person. The real owner may proceed against the holder of the articles or for damages as for conversion. The High Court declined to interfere with an order, made by a Magistrate under s. 523 of the Criminal Procedure Code, for the delivery of property where the Magistrate made such order upon the mere evidence of a confession of the accused to the police that the property was stolen from the adjudged owner. QUEEN-EMPRESS *v.* TRIBHOVAN MANEKCHAND . **I. L. R. 9 Bom. 131**

16. ——— *Criminal Procedure Code, 1882, s. 517—Order for the disposal of property by first class Magistrate—Appeal from such order to the Sessions Court.* A decree-holder preferred a complaint against his judgment-debtors, charging them, under s. 207 of the Penal Code (Act XLV of 1860), with concealing certain moveable property for the purpose of screening it from execution. Some property was found by the police to have been so concealed in the house of a third person. The chief constable took possession of it, and kept it in his custody pending the inquiry which the first class Magistrate was about to make in the matter. Before the Magistrate entered upon the inquiry, the

STOLEN PROPERTY—*concld.*

2. DISPOSAL OF, BY THE COURT—*concld*

complainant caused the property in the custody of the police to be attached and sold in execution of his decree against the accused. At the Court-sale the complainant himself purchased the property, and thereupon the Magistrate ordered the property to be handed over to him. This order was reversed on appeal by the Sessions Judge. *Held*, that the order of the first class Magistrate for the disposal of the property was not, and could not have been, made under s. 517 of the Criminal Procedure Code (Act X of 1882), as the Magistrate did not hold any inquiry, nor form any opinion on the conclusion of such inquiry as to whether "any offence appeared to have been committed regarding such property." The Sessions Judge had therefore no jurisdiction to hear any appeal from the first class Magistrate's order. *In re* ANANT RAMCHANDRA LOTLIKAR
I. L. R. 10 Bom. 197

17. ——— *Criminal Procedure Code, 1882, ss. 517, 520.* An order passed under s. 517 of the Code of Criminal Procedure may be revised by a Court of appeal, although no appeal has been preferred in the case in which such order was passed. QUEEN-EMPRESS *v.* AHMED
I. L. R. 9 Mad. 448

18. ——— *Criminal Procedure Code (Act V of 1898), s. 517—Disposal of stolen property on conviction of the thief—Babashahi coin—Legal tender—Customary coin.* A witness for the prosecution in a case of theft produced a sum of money in Babashahi (Baroda) coin (part of the stolen property), which the accused had paid to him in satisfaction of a debt. The accused was convicted, and at the close of the trial the Court, under s. 517 of the Criminal Procedure Code (Act V of 1898), ordered the money to be restored to the complainant from whom it had been stolen. *Held*, that the order was right. The stolen coins were not current coin of the realm, and were neither by statute nor by the law of merchants in British India legal tender. The property in them did not, therefore, pass by mere delivery, but remained in the complainant. *Collector of Salem, 7 Mad. H. C. Rep. 233*, and *Empress* v. *Joggessur Mochi, I. L. R. 3 Calc. 379*, distinguished. *In re* MATHUR LALBHAI (1901) . . . . **I. L. R. 25 Bom. 702**

STOPPAGE IN TRANSITU.

See SALE OF GOODS.
I. L. R. 17 Bom. 62

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF.
2 Agra 11
I. L R. 14 Bom. 57

STORING JUTE.

——— **Storage of jute without license**—*Beng. Act II of 1872, s. 34—Criminal Procedure Code, 1861, Ch. XV.* Before a conviction for storing jute in a warehouse without a license can be had under s. 4 of Bengal Act II of 1872, proceedings should be taken under the provisions of Ch. XV of

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STORING JUTE—*concld.*

the Criminal Procedure Code, 1861, as required by s. 34 of the former Act. QUEEN *v.* BHAGWAN CHUNDER KOONDOO . . 19 W. R. Cr. 4

STRANGER.

———— introduction of, into joint family—

See HINDU LAW — JOINT FAMILY — POWERS OF ALIENATION BY MEMBERS —OTHER MEMBERS.
I. L. R. 1 All. 429
I. L. R. 2 All. 898

See HINDU LAW—PARTITION—RIGHT TO PARTITION—PURCHASER FROM WIDOW.
18 W. R 23
I. L. R. 9 Calc. 580
I. L. R. 12 Calc. 209

———— in possession—

See RECEIVER . I. L. R. 36 Calc. 713

STREET.

See PRIVATE STREET.

See PUBLIC ROAD, HIGHWAY, STREET OR THOROUGHFARE.

———— *Discharge into drains not forming part of street—Definition of street.* A defendant was charged under s. 4 of the Madras District Municipalities Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed :—*Held*, that a "street" is any way or road in a city having houses on both sides, and that in consequence this definition excluded the drain or ditch on either side of the roadway ; that the drain was not part of the "street," and that the offence charged had not been committed. VENKATARAMA CHETTI *v.* EMPEROR (1905) . . I. L R. 28 Mad. 17

STRIDHAN.

See HINDU URDU LAW.
I. L. R. 32 Calc. 261
9 C. W. N. 109 ; 119
I. L. R. 33 Calc. 315 ; 345
I. L. R. 30 Bom. 431
I. L. R. 33 Bom. 452

See HINDU LAW—STRIDHAN.

See HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION . 3 W. R. 49 ; 105
8 W. R. 519
2 Agra 230
1 Mad. 85
5 Mad. 111
I. L. R. 1 Mad. 281
I. L. R. 2 Mad. 333

See MITAKSHARA. I. L. R. 30 Bom. 333

See MORTGAGE . 9 C. W. N. 914

See WILL . . 9 C. W. N. 769

STRIDHAN—*concld.*

———— ajautuka—

See HINDU LAW—STRIDHAN.
10 C. W. N. 1 ; 510 ; 802

STRIKING OFF EXECUTION-PROCEEDINGS.

See ATTACHMENT—STRIKING OFF EXECUTION-PROCEEDINGS.

See EXECUTION OF DECREE—STRIKING OFF EXECUTION-PROCEEEDINGS.

See LIMITATION ACT, 1877, ART. 179 (1871, ART. 167 ; 1859, S. 20)—STEP IN AID OF EXECUTION—STRIKING CASE OFF FILE, FFFECT OF.

See LIMITATION ACT, 1877, ART. 179 (1871, ART. 167 ; 1859, S. 20)—STEP IN AID OF EXECUTION—SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER.
I. L. R. 4 Calc. 877

STRIKING OFF PROCEEDINGS.

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—STRIKING OFF PROCEEDINGS.

SUB-LEASE.

See BENGAL TENANCY ACT, S. 85, CL. (*2*).
11 C. W. N. 190

See SUB-LETTING.

———— by occupancy raiyat—

See LANDLORD AND TENANT.
I. L. R. 34 Calc. 04
13 C. W. N. 220

SUB-LETTING.

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.
2 Agra, Pt. II, 202
W. R. 1884, Act X, 31
I. L. R. 20 All. 489

See LANDLORD AND TENANT—TRANSFER BY TENANT I. L. R. 14 Bom. 384
I. L. R. 15 All. 219 ; 231
I. L. R. 29 Calc. 148
6 C. W. N. 916 ; 919

See SALE FOR ARREARS OF RENT—INCUMBRANCES. I. L. R. 28 Calc. 205

SUB-MORTGAGE.

See MORTGAGE . I. L. R. 33 Calc. 638
I. L. R. 29 All. 385

See TRANSFER OF PROPERTY ACT, S. 90.
I. L. R. 31 All. 352

SUBORDINATE COURT.

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—APPEALABLE ORDERS . I. L. R. 3 Calc. 522

See CRIMINAL PROCEDURE CODE, S. 437.

See SANCTION FOR PROSECUTION—POWER TO GRANT SANCTION.
I. L. R. 22 Calc. 487

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SUBORDINATE COURT—*concld.*

——— duty of—*Conflict of opinion in High Courts.* The lower Courts are bound to follow the concurrent decisions of the Court to which they are subordinate, and are not at liberty to adopt a contrary opinion expressed by another High Court. KORBAN ALLY MIRDHA *v.* SHARODA PROSHAD AICH **I. L. R. 10 Calc. 82**

S.C. KORBAN ALI MIRDHA *v.* PITUMBARI DASI. **13 C. L. R. 256**

SUBORDINATE JUDGE, JURISDICTION OF.

See CIVIL COURTS ACT (XII OF 1887), S. 13. **13 C. W. N. 265**

See COMPANIES ACT, S. 130. **I. L. R. 17 All. 252**

See DEKKAN AGRICULTURISTS' RELIEF ACT, S. 3 . **I. L. R. 15 Bom. 30**
I. L. R. 16 Bom. 128

See DEKKAN AGRICULTURISTS' RELIEF ACT, S. 4 . **I. L. R. 19 Bom. 46**

See DEKKAN AGRICULTURISTS' RELIEF ACT, S. 15 (*d*). **I. L. R. 16 Bom. 351**

See EXECUTION OF DECREE—TRANSFER OF DECREES FOR EXECUTION AND POWER OF COURT, ETC . **I. L. R. 18 Bom. 61**

See INSOLVENCY—INSOLVENT DEBTORS UNDER CIVIL PROCEDURE CODE. **I. L. R. 21 Bom. 45**

See PLAINT—RETURN OF PLAINT. **I. L. R. 20 Bom. 675**

See PROBATE—JURISDICTION IN PROBATE CASES . **I. L. R. 25 Calc. 341**

See RIGHT OF SUIT—CHARITIES AND TRUSTS . . **I. L. R. 15 Bom. 148**
I. L. R. 21 Bom. 48

See VALUATION OF SUIT—SUITS. **I. L. R. 14 Mad. 183**
I. L. R. 22 Bom. 315

1. **——— Suit brought to set aside probate.** A Subordinate Judge has no jurisdiction to try a suit brought to set aside a probate. BULDEB SURMAH *v.* TARANATH SURMAH **22 W. R. 416**

2. **——— Complaint under Mad. Reg. IV of 1816, s. 35, cl. 1.** A Subordinate Judge has jurisdiction to entertain a complaint under cl. 1, s. 35, of Madras Regulation IV of 1816. *Ponnusami Pillai* v. *Pachai, I. L. R. 2 Mad. 336*, overruled. PONNUSAMI *v.* KRISHNA **I. L. R. 5 Mad. 222**

3. **——— Trial of suit for land**—*Officer appointed in the Sonthal Pergunnahs under s. 2, Act XXXVII of 1855—Bengal Civil Courts Act, 1871—Reg. III of 1872, s. 5.* An officer in the Sonthal Pergunnahs, appointed by the Lieutenant-Governor of Bengal under s. 2 of Act XXXVII of 1855, although vested with powers of a Subordinate Judge under Act VI of 1871, has jurisdiction to try suits in regard to land, etc., where the value of the matter in dispute exceeds the value of ₹1,000. RAM RUNJUN CHUCKERBUTTY *v.* RAM PROSAD DASS **5 C. L. R. 128**

SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

4. **——— Valuation of suits**—*Joinder of causes of action—Civil Procedure Codes (Act VIII of 1859), ss. 8, 6 (Act X of 1877), s. 15—Bengal Civil Courts Act (VI of 1878), s. 19.* S. 6 of Act VIII of 1859 (corresponding with s. 15 of Act X of 1877), which provided that "every suit shall be instituted in the Court of the lowest grade competent to try it," did not affect the jurisdiction of a Subordinate Judge to try a suit wherein several causes of action were joined, the cumulative value of which was over ₹1,000; notwithstanding that, if separate suits had been brought on these several causes, such suit must have been instituted in the Court of the Munsif. MASHOOLLAH KHAN *v.* RAM LALL AGURWALLAH . . **I. L. R. 6 Calc. 6**

5. **———** *Suit for account—Claim valued at less than ₹5,000 but value to be accounted for exceeds that sum. Quœre:* Whether a first class Subordinate Judge has jurisdiction to try a suit for an account where the plaint states that the property in the hands of the defendants in respect of which the account is prayed, exceeds ₹5,000, but values the claim at ₹100. MANOHAR GANESH *v.* BAWA RAMCHARAN DAS **I. L. R. 2 Bom. 219**

6. **——— Appeal transferred**—*Bengal Civil Courts Act, 1871—N.-W. P. Rent Act, 1881, ss. 206, 207, 208.* A Subordinate Judge, to whom an appeal is transferred under the Bengal Civil Courts Act (VI of 1871), has not the power to dispose of it in the manner provided by ss. 206, 207, and 208 of the N.-W. P. Rent Act, 1881: the District Judge alone has the power to dispose of appeals in that manner. *Ram Parsad* v. *Rai Kishen, I. L. R. 6 All. 36*, followed. LODHI SINGH *v.* ISHRI SINGH **I. L. R. 6 All. 295**

7. **——— Appeal transferred**—*Act XII of 1881, ss. 185, 206, 207, 208.* The defendant in a suit instituted in a Civil Court set up as a defence that it was cognizable in the Revenue Court. The Court of first instance (Munsif) disallowed this defence, and gave the plaintiff a decree. The defendant appealed to the District Judge, again contending that the suit was cognizable in the Revenue Court. The appeal was transferred by the District Judge to the Court of the Subordinate Judge. The Subordinate Judge dismissed the suit on the ground that it was not cognizable in the Civil Courts but in the Revenue. *Held*, that, looking to the terms of ss. 189, 206, 207 and 208 of the N.-W. P. Rent Act, the District Judge had no power to transfer the appeal to the Subordinate Judge, who had not the power vested in the Appeallate Court by s. 208. RAM PRASAD *v.* RAI KISHEN **I. L. R. 6 All. 36**

8. **———** *N.-W. P. Rent Act (XII of 1881), ss. 93, 206, 207, and 208—Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887), s. 22, cl. 3—Transfer of appeal in a Rent Court suit from the District Judge to the Subordinate*

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SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

Judge—Powers exerciseable by the Subordinate Judge. Cl. (3) of s. 22 of Act XII of 1887 makes ss. 206, 207, and 208 of Act XII of 1881 applicable to appeals in suits within s. 93 of Act XII of 1881 when such appeals have been transferred under s. 22 of Act XII of 1887 by a District Judge to a Subordinate Judge and are being heard by such Subordinate Judge. NANDAN PRASAD *v.* CHANGUR
I. L. R. 16 All. 363

9. ——— **Appeal referred by District Judge**—*Bengal Civil Courts Act (VI of 1871), s. 26—Power of review—Civil Procedure Code, 1859, s. 376.* Where a Subordinate Judge hears and disposes of an appeal referred to him by the District Judge under Act VI of 1871, s. 26, he does so as District Judge, and has therefore by implication the same power of reviewing his judgment as a District Judge has under s. 376, Act VIII of 1859. *In the matter of* SHAMA CHURN BHUTT *v.* PAYNE & CO.
18 W. R. 292

10. ——— **Appeal from Munsif after Act XIV of 1869**—*Assistant Judges in Bombay Presidency.* A decision passed on appeal from a decision of a Munsif by an Assistant Judge, subsequent to the date on which Act XIV of 1869 came into operation (14th March 1869), and prior to the date on which the Assistant Judges in the Bombay Presidency were invested with appellate powers under the Act (4th April 1869), was not illegal, as the Act did not alter the procedure as regards appeals against decisions passed by Courts constituted under the old Regulations, under which the Assistant Judges had power to hear appeals. SAKHO NARAYAN KHANDALKAR *v.* NARAYAN BHIKAJI KHANDALKAR . . **6 Bom. A. C. 238**

11. ——— **Power to enquire into application for execution of decree against ancestor of Sirdar**—*Agent for Sirdars.* Where a person's name was entered in red ink in the Dekkan Sirdars' list, indicating that he was entitled only to the rank and precedence of a third class Sirdar, it was *held* that a Subordinate Judge had jurisdiction to inquire into an application for execution of a decree passed against his ancestor by the Agent for Sirdars in the Dekkan. MAHARAJ GIR *v.* ANANDRAV . . **8 Bom. A. C. 25**

12. ——— **Mortgage lien above limit of Subordinate Judge's jurisdiction**—*Attachment.* One *D* applied to the subordinate Court of Sasvad for the attachment and sale of certain immoveable property in execution of a money-decree, under which the sum of R1,317-4-9 was due to him from his judgment-debtor. On the attachment of the property, the applicant presented a petition to the Court to the effect that he (applicant) had a mortgage lien on the property for R10,368, and that it might be sold subject to his lien and possession as mortgagee. The Subordinate Judge raised the question whether he had jurisdiction to entertain the application and inquire into the merits of the alleged mortgage. He was of opinion that he had, and referred the question for the opinion of the High Court, which concurred in his opinion and answered the question in the affirmative. PURSHOTAM SIDHESHVAR *v.* DHONDU AMRIT
I. L. R. 6 Bom. 582

SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

13. ——— **Mortgage lien, inquiry into**—*Collateral inquiry into a mortgage lien on attached property—Insolvency of a judgment-debtor.* The plaintiff obtained a decree against *N* and *R* for R165-11-0 in the first class subordinate Court of Satara, and applied for execution against the person of *R*. When brought before the Court, *R* applied to be declared an insolvent under s. 344 of the Civil Procedure Code (Act X of 1877). The plaintiff then moved the Court to strike off his application for execution, and to send his decree to the second class subordinate Court of Vita for execution. The Satara Court accordingly sent the decree to the Vita Court and granted a certificate to the plaintiff under ss. 223 and 224 of the Civil Procedure Code. The Satara Court also informed the Vita Court that proceedings were pending in the Satara Court regarding the insolvency of *R*. On the application of the plaintiff, the Vita Court attached certain immoveable property belonging to *N* and *R*. Thereupon one *V T* claimed a mortgage lien on it for R9,415-9-3. The Vita Court therefore referred for the opinion of the High Court the question whether it had jurisdiction to inquire into the validity of the mortgage lien claimed by *V T*, and whether the execution of the decree in the Vita Court was to be stayed, pending the inquiry into the alleged insolvency of *R* in the Satara Court. *Held*, that the Vita Court had jurisdiction to inquire into the validity of the alleged mortgage lien; that execution in that Court against *R* was to be stayed pending the inquiry in the Satara Court regarding his alleged insolvency, but that there was no reason for staying the execution of the decree against *N* in the Vita Court. VISHNU DIKSHIT *v.* NARSINGHRAV . . **I. L. R. 6 Bom. 584**

14. ——— **Subordinate Judge invested with powers of Small Cause Court**—*Civil Procedure Code, 1877, s. 525—Arbitration award.* A Subordinate Judge, although invested with the jurisdiction of a Judge of a Court of Small Causes, does not on that account become a Judge of a Court of Small Causes, nor his Court such a Court within the meaning of the Civil Procedure Code. He therefore has power, within the limits of his ordinary pecuniary jurisdiction, to receive and file awards of arbitrators under s. 525 of the Civil Procedure Code (Act X of 1877). BALKRISHNA *v.* LAKSHMAN . . **I. L. R. 3 Bom. 219**

15. ——— *Difference between a Court of Small Causes constituted under Act XI of 1865 and a Court of a Subordinate Judge invested with the jurisdiction of a Judge of a Small Cause Court under s. 28 of Act XIV of 1869—Transfer of decree for execution—Act XI of 1865, s. 20—Code of Civil Procedure (Act XIV of 1882), s. 223—Act XIV of 1869, s. 28.* The Courts of Subordinate Judges invested with the jurisdiction of a

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SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

Judge of a Small Cause Court under s. 28 of Act XIV of 1869 do not thereby become "Courts of Small Causes constituted under Act XI of 1865." They merely exercise a similar jurisdiction. This makes their decisions final in the cases to which the jurisdiction extends, but it does not imply that the variations of procedure prescribed expressly for the Courts constituted under Act XI of 1865 are applicable to Courts constituted under a different Act and subject to different conditions. The Court of a Subordinate Judge exercising Small Cause Court powers is, under s. 5 of the Code of Civil Procedure (Act XIV of 1882), one of the "other Courts exercising jurisdiction of a Court of Small Causes," and, as such, its procedure is governed by the Civil Procedure Code without the variations provided by Act XI of 1865. Under s. 223 (*d*) of the Civil Procedure Code, the Court which has passed a decree in its Small Cause Court jurisdiction may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court, as it might to a different Court, for execution without requiring a certificate under s. 20 of Act XI of 1865. For this purposes, the two branches or sides of the Subordinate Judge's Court may be regarded as different Courts. BHAGVAN DAYALJI *v.* BALU . **I. L. R. 8 Bom. 230**

16. ——— *Suit for interest due on a mortgage.* The plaintiff sued to recover interest due on a mortgage of immoveable property. The defendant pleaded that the plaintiff had received the profits of the mortgaged property, and had got possession of certain materials worth four thousand rupees, and that the morgage-debt had been paid off. The suit was tried before a Subordinate Judge in his capacity of a Judge of a Court of Small Causes, who held that he had no jurisdiction to go into the questions raised by the defendant in his defence and he gave judgment for the plaintiff. *Held*, on application to the High Court, that the defence being virtually that the the debt had been paid off, and that nothing was due to the plaintiff, the Subordinate Judge had jurisdiction to decide the suit. BABURAV AMRIT PETHE *v.* GANPATRAV DAMODAR **I. L. R. 10 Bom. 69**

17. ——— *Civil Procedure Code (Act XIV of 1882), s. 295—Decree passed by Subordinate Judge—Decree by same Court in exercise of its Small Cause jurisdiction—Rateable distribution of assets.* Certain moveable property was at first attached in execution of a money-decree passed by a Subordinate Judge in his Small Cause jurisdiction, of which a part was afterwards sold. In execution of a money-decree passed by the same Subordinate Judge in his ordinary jurisdiction the remaining property was attached and sold. Prior to the date of this sale the applicant applied for execution of a money-decree passed in his favour by the same Subordinate Judge in his Small Cause jurisdiction, and prayed for rateable distribution of the proceeds along with other decree-holders. *Held*, that the application must be allowed.

SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

Although a Subordinate Judge invested under Act XIV of 1869, s. 28, with Small Cause powers, acquires the jurisdiction of two Courts, he does not become the Judge of two Courts, but remains the Judge of a Subordinate Court. MALHARI *v.* NARSO KRISHNA . . . **I. L. R. 9 Bom. 174**

18. ——— *Execution of decree—Transfer of decree for execution—Act XI of 1865, s. 20—Act XIV of 1869, s. 28.* The plaintiff having obtained a money-decree against *H* and others in a suit in the Subordinate Judge's Court at Dhulia, applied for execution by attachment and sale of their immoveable property. That property was accordingly sold, but before the realization of the assets the defendant, who also had obtained a money-decree against the same judgment-debtors in the same Court in its Small Cause jurisdiction, applied for the execution of his decree by attachment and sale of the immoveable property which had already been attached at the instance of the plaintiff. The Court, under s. 295 of the Civil Procedure Code (Act XIV of 1882), reteably distributed the proceeds of the sale between the plaintiff and the defendant. The plaintiff now brought this suit in the Small Cause jurisdiction of the Subordinate Judge's Court at Dhulia to recover from the defendant the amount paid to him, alleging that it had been illegally paid, as the procedure laid down in s. 223 of the Code had not been followed. *Held*, that, as ruled in *Rhagavan Dayalji v. Balu, I. L. R. 8 Bom. 230*, a Subordinate Judge invested with Small Cause Court powers has generally to follow the procedure prescribed in the Code of Civil Procedure. This governs his proceedings both in trial and execution, whether the suit is a Small Cause suit or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally are locally co-extensive, there is no distinction of sides or branches. But where, as in some cases the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is, in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a Small Cause should not generally be executed on property beyond the Small Cause jurisdiction without a transfer, *i.e.*, a dealing with the execution as in a suit tried in the usual way for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court. DHARAMDAS SANTIDAS. *v.* VAMAN GOVIND **I. L. R. 9 Bom. 237**

19. ——— *Civil Procedure Code (Act XIV of 1882), s. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Practice.* In a suit brought by the plaintiff to recover R36-7-9 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set off R72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference

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SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

to the High Court :—*Held*, that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off. RAMPRATAB *v.* GANESH RANGANATH . . **I. L. R. 12 Bom. 31**

20. ——————— *Appeal—Suit cognizable by a Court of Small Causes—Act XI of 1865, ss. 2, 6, 12, 21—Bombay Civil Courts Act (XIV of 1869), s. 28—Final decision.* The plaintiff sued to recover R5 as damages for the wrongful removal of a tree. The suit was filed in the Court of a second class Subordinate Judge, who was invested under Act XIV of 1869, s. 28, with the jurisdiction of a Judge of a Court of Small Causes. The case, which was in itself of the nature of a Small Cause, was, however, tried as an ordinary suit according to the rules of the Civil Procedure Code. The Subordinate Judge rejected the plaintiff's claim. An appeal was made to the District Court, which reversed the Subordinate Judge's decree, and awarded the claim. *Held*, that, the suit having really been a Small Cause, no appeal lay to the District Court, though the Subordinate Judge did not use the procedure of Act XI of 1865. Having the Small Cause Court jurisdiction, the Subordinate Judge must be taken to have dealt with the case under that jurisdiction, even if he was not quite alive to it at the time. A suit taken cognizance of under s. 2, 6, or 12 of the Mofussil Small Cause Court Act (XI of 1865) does not cease to be a suit tried under the Act, because of some divergence from its summary procedure. A surplusage of form and elaborateness does not change the character of the decision for the purpose of its finality. S. 28 of the Bombay Civil Courts Act (XIV of 1869) does not, when jurisdiction is given under it, necessarily divide the Court into two separate Courts ; but still it creates an additional and distinct jurisdiction. Since Act IX of 1887 came into force, the Court is to be regarded as two Courts in such cases. PITAMBAR VAJIRSHET *v.* DHONDU NAVLAPA **I. L. R. 12 Bom. 486**

21. ——————— *Suit against Trustee—Person collecting or receiving subscriptions for building a temple—Civil Procedure Code (Act XIV of 1882), s. 30.* A person collecting and receiving subscriptions for the purpose of building a temple, in pursuance of a resolution come to at a meeting of the community, holds them in the capacity of a trustee, and a suit in respect thereof should be filed, under s. 30 of the Civil Procedure Code (Act XIV of 1882), in a Subordinate Judge's Court, and not in a Small Cause Court. MAHOMED NATHUBHAI *v.* HUSEN **I. L. R. 22 Bom. 729**

22. ——————— **Power of Subordinate Judge to try Munsif's case**—*Act XVI of 1868, ss. 13, 15, 16—Bengal Civil Courts Act (VI of 1871), ss. 19, 20—Civil Procedure Code, ss. 15, 578. Per* PETHERAM, *C.J.*, and BRODHURST, MAHMOOD, and DUTHOIT, *J.J.*—The object of ss. 19 and 20 of the Bengal Civil Courts Act, 1871, was

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to create in the District Judge, Subordinate Judge and Munsif concurrent jurisdiction up to R1,000. *Per* PETHERAM, *C.J.*—S. 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be over crowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so ; it is not bound to refuse to entertain it. *Per* DUTHOIT, *J.*—The words in s. 57 of the Civil Procedure Code "shall be" are an instruction which the Court is bound to follow, and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal. BRODHURST and MAHMOOD, *JJ.*—S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades. *Russick Chunder Mohunt* v. *Ram Lall Shaha, 22 W. R. 301*, and *Sufee-ool-lah Sircar* v. *Begum Bibee, 25 W. R., 219*, followed. *Per* OLDFIELD, *J.*—S. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them. *Held*, therefore, by PETHERAM, *C.J.*, and OLDFIELD, BRODHURST, and MAHMOOD, *JJ.*, where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction. The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge. *Per* DUTHOIT, *J.*—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction. NIDHI LAL *v.* MAZHAR HUSAIN . . . **I. L. R. 7 All. 230**

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23. ——— *Civil Procedure Code (Act XIV of 1882), s. 15—Munsif, jurisdiction of.* S. 15 of the Civil Procedure Code does not preclude a Subordinate Judge from trying a suit within the jurisdiction of the Munsif's Court. *Ledgard* v. *Bull, L. R. 13 I. A. 134,* distinguished. MATRA MONDAL *v.* HARI MOHAN MULLICK
I. L. R. 17 Calc. 155

See AUGUSTINE *v.* MEDLYCOTT.
I. L. R. 15 Mad. 241

24. ——— *Bengal Civil Courts Act (VI of 1871), s. 18—Sale in execution of decree—Local limits of jurisdiction.* Where a District Judge, under the authority vested in him by s. 18 of the Bengal Civil Courts Act (VI of 1871), has assigned to a Subordinate Judge the local limits of his particular jurisdiction, that officer can only exercise jurisdiction within such local limits. *Obhoy Churn Coondoo* v. *Golam Ali, I. L. R. 7 Calc. 410,* and *Prem Chand Day* v. *Mokhoda Debi, I. L. R., 17 Calc. 699,* followed. DAKHINA CHURN CHATTOPADHYA *v.* BILASH CHUNDER ROY
I. L. R. 18 Calc. 526

25. ——— *Concurrent jurisdiction with District Munsif—Suit of less than R2,500, in value. Quœre:* Whether a Subordinate Judge has not concurrent jurisdiction with a District Munsif in suits less than R2,500 in value. *Matra Mondal* v. *Hari Mohan Mullick, I. L. R. 17 Calc. 155,* and *Nidhi Lal* v. *Mazhar Husain, I. L. R. 7 All. 230,* followed. KRISHNASAMI *v.* KANAKASABAI . . **I. L. R. 14 Mad. 183**

26. ——— *Bombay Civil Courts Act (XIV of 1869), s. 28—Provincial Small Cause Courts Act (IX of 1887), s. 33—Judge exercising Small Cause Court jurisdiction.* S. 33 of Act IX of 1887 precludes a Subordinate Judge invested with Small Cause Court powers under s. 28 of Act XIV of 1869 from entertaining a counter-claim beyond the pecuniary limits of his Small Cause Court jurisdiction. BAROTE GAGA PARSHOTAM *v.* PANJU RAMJAN . **I. L. R. 14 Bom. 371**

27. ——— *Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1877), s. 13, cl. 2—District Judge, power of—Transfer of Property Act (IV of 1882), ss. 88, 90—Sale in execution of mortgage decree—Execution of decree.* When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a district, the District Judge is not competent, under s. 13 (2) of the Bengal, N.-W. P., and Assam Civil Courts Act, to assign to them different areas so as to limit or define their respective jurisdictions. The Court of such a Subordinate Judge which passed a mortgage decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property lying within the district, but outside the area assigned to it by the District Judge. BACHU KOER *v.* GOLAB CHAND
I. L. R. 27 Calc. 272

28. ——— *Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Waiver of objection to jurisdiction, effect of, when Court has no inherent jurisdiction.* An appeal, having been entered in a District Court against the decision of a District Munsif, was heard in part by the District Judge, who remanded the suit to the District Munsif for findings on fresh issues. Findings having been duly returned, the District Judge transferred the appeal to the Subordinate Judge, who heard and determined it. *Held,* that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits under s. 12 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of s. 13 of the said Act, which enables a District Judge to transfer appeals to him, and, unless that section is complied with, the Subordinate Judge has no jurisdiction to hear or determine any appeal. S. 13 does not authorize the transfer to a Subordinate Judge of an appeal part heard and pending before the District Judge. The fact that objection was not taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction. KUMARASAMI REDDIAR *v.* SUBBARAYA REDDIAR . . . **I. L. R. 23 Mad. 314**

29. ——— *Act XIV of 1869, ss. 23 and 24—Subordinate Judge appointed to assist another Subordinate Judge, powers of.* Where a Subordinate Judge is deputed, under s. 23 of Act XIV of 1869, to assist another Subordinate Judge, the assistance by the Judge so deputed can only be afforded within the limits of his jurisdiction as fixed by s. 24 of the Act, and cannot be invoked except in matters within his competence. The plaintiff, having obtained a decree against the defendant in a suit in which the subject-matter of the suit and the amount of the decree exceeded R5,000 in the Court of a Subordinate Judge of the first class, presented it in that Court for execution. The Subordinate Judge transferred it for execution to the second class Subordinate Judge who had been appointed, under Act XIV of 1869, to assist him, and whose jurisdiction extended to R5,000 only. The second class Subordinate Judge ordered execution to issue. The defendant appealed, and this order was reversed. The plaintiff appealed to the High Court, and raised, for the first time, an objection that the second class Subordinate Judge had no jurisdiction to entertain the application for execution. The defendant contended that this objection was taken too late on second appeal. *Held,* that the second class Subordinate Judge has no jurisdiction to entertain and deal with the plaintiff's application for execution, and that the plaintiff's

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objection should be allowed. An objection to the jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings. SIDHESHWAR PANDIT *v.* HARIHAR PANDIT . **I. L. R. 12 Bom. 155**

30. ——— *Malicious prosecution—Suit against a Mamlatdar for malicious prosecution undertaken by him at the instance of his superior officer, to clear his character—Subordinate Judge, power of, to try such suit.* The defendant, who was a Mamlatdar, was required by his superior officer to clear his character from certain charges of bribery which had been brought against him in an anonymous letter, and he accordingly prosecuted the plaintiffs whom he suspected of having written the letter. The plaintiffs were convicted and sentenced by a Magistrate, but on appeal were acquitted by the Sessions Judge. The plaintiffs thereupon brought this suit in a Subordinate Judge's Court to recover damages from the defendant for malicious prosecution. The jurisdiction of the Subordinate Judge to try the suit being questioned, he referred the case to the High Court. *Held*, that the Subordinate Judge had jurisdiction to try the suit. The defendant was sued in his individual, and not in his official, capacity ; and the fact that he was a Mamlatdar when he prosecuted the plaintiffs could not affect the character in which he was sued. BANKAT HARGOVIND *v.* NARAYAN VAMAN DEVBHANKAR. . . . **I. L. R. 11 Bom. 370**

31. ——— *Malicious prosecution—Prosecution, when official—Bombay Civil Courts Act (XIV of 1869), s. 32—Bombay Act X of 1876, s. 15—Prosecution instituted by order of superior officer.* An officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor. If any particular class of interests is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not assigned to an officer as such, the consent or the order of his superior will not make the act an official one which in its nature is not so, lying outside his official functions. The defendant was a forest officer in the service of Government. He prosecuted a certain person for theft in the Magistrate's Court at Sirsi. The accused was defended by the plaintiff, who was a pleader. During the hearing of the case the defendant in open Court made use of certain expressions towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff sent him a notice claiming R4,500 as damages for the injury

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done to him by the defendant. The defendant thereupon lodged a complaint before the Divisional Magistrate at Sirsi, charging the plaintiff, under s. 189 of the Penal Code, with holding out a threat, etc., to a public servant for the purpose of inducing him to refrain from doing his duty as such public servant. The Magistrate dismissed the charge, and the plaintiff then filed the present suit against the defendant for malicious prosecution. The defendant pleaded that in lodging the complaint against the defendant he had acted in his official capacity and under the orders of his superior officer with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer ; and that therefore the Court of the Subordinate Judge had no jurisdiction. The Subordinate Judge held that he had no jurisdiction, being of opinion that the defendant had prosecuted the plaintiff in his character as a public servant, and that therefore the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant, and as such was cognizable by the District Judge only, under s. 32 of the Bombay Civil Courts Act (XIV of 1869). He therefore dismissed the suit. On appeal, the Acting District Judge was also of opinion that the Subordinate Judge had no jurisdiction ; but he held that the Subordinate Judge was wrong in dismissing the suit, instead of returning the plaint for presentation to the District Court. He, therefore, reversed the decree of the Subordinate Judge, and referred the plaintiff to the District Judge. On appeal by the plaintiff :—*Held*, by the High Court, that the defendant was sued as a private person for an alleged wrong to the plaintiff, and that the suit was rightly brought in the Court of the Subordinate Judge. The order appealed from was therefore reversed, and the District Judge was directed to dispose of the appeal on its merits. GOPI MAHABLESVAR BHAT *v.* SHESO MANJU **I. L. R. 12 Bom. 358**

32. ——— *Suit against Collector—Act done in official capacity—Bombay Revenue Jurisdiction Act (X of 1876), s. 15.* The plaintiff sued the Collector of Dharwar and his chitnis for having destroyed certain certificates of efficiency which had been given to him by Mamlatdars in whose service he had been employed. The defendants pleaded that the certificates had been destroyed, because they were not issued by the Mamlatdars in proper form. *Held*, that the act of the defendants was an act done by them in their official capacity, and that the Subordinate Judge could not entertain the suit. SWAMIRAYACHARYA *v.* COLLECTOR OF DHARWAR **I. L. R. 15 Bom. 441**

33. ——— *Bombay Civil Courts Act (XIV of 1869), s. 32, as amended by the Bombay Revenue Jurisdiction Act (X of 1876), s. 15, and by Bom. Act XV of 1880, s. 3—Bom. Reg. II of 1827, s. 43—Suit against officer of Government—Acts done by the defendant in his official capacity—Civil Procedure Code, 1882, s. 424.* On the death

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SUBORDINATE JUDGE, JURISDICTION OF—*contd.*

of the talukhdar of Kerwada, leaving a widow and a minor son, the Mamlatdar of Amod, acting under the order of the Collector of Broach, entered the talukhdar's house, made an inventory of the moveables, took possession of the property of the deceased and locked up some of the rooms. Among the property seized (it was alleged) was certain property belonging to the widow. She brought this suit against the Collector and Mamlatdar, claiming damages for these wrongful acts. The suit was filed in the Court of the Subordinate Judge. *Held*, that the acts complained of were done by the defendants in their official capacity, and that under s. 32 of the Bombay Civil Courts Act (XIV of 1869) the Subordinate Judge had no jurisdiction to entertain the suit. ALLEN *v.* BAI SHRI DARIABA
I. L. R. 21 Bom. 754

34. _____ *Patil and kulkarni of village—Impressment of bullocks by patil and kulkarni of village for use of Government officer—Suit for damages for acts done by officer of Government in official capacity—Bombay Revenue Jurisdiction Act (X of 1876), s. 15—Bombay Civil Courts Act (XIV of 1869), s. 32—Bom. Reg. IV of 1818, s. 52.* The patil and kulkarni of a village having impressed a pair of bullocks belonging to the plaintiff for the use of an abkari inspector, the plaintiff sued them for damages in the Court of a Subordinate Judge. The defendants pleaded (*inter alia*) that the Subordinate Judge had no jurisdiction to try the suit under the Bombay Revenue Jurisdiction Act (X of 1876). *Held*, that the suit was properly instituted in the Court of the Subordinate Judge, as the defendants were sued in their private capacity. It is not clear that the rules about impressment of carts found in Ch. I of Nairne's Revenue Handbook actually order village patils to impress carts against the owner's will; neither it is clear what officers are to be supplied. There is nothing to show that any law ever imposed this duty on a kulkarni, or that provision was made after the repeal of the Regulation of 1818 as regards patils except for military bodies. BUDHO *v.* KESO
I. L. R. 21 Bom. 773

35. _____ *Money lent to public officer—Money lent to him in his official capacity—Bombay Civil Courts Act (XIV of 1869), s. 32.* The plaintiff had contracted to supply materials requisite for a public building. The defendant was the Supervisor, Public Works Department, in charge of the works. From time to time defendant borrowed money from the plaintiff and, *inter alia*, four sums amounting to R385 which he paid as wages to labourers working under him. It was not proved, however, that he had borrowed the moneys as Supervisor, and the defendant did not plead that he borrowed them in his official capacity. *Held*, that, inasmuch as a Public Works Supervisor has not usually authority to borrow money for the purpose of the work of which he may be in charge, or any way to pledge the credit of Government, the mere statement of the defendant when he

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borrowed the moneys that he wanted them to pay the labourers was not under the circumstances enough to show that the defendant borrowed them in his official capacity, and that the Subordinate Judge had authority to entertain the suit in respect of them. In claims arising out of contract the same test must be applied to determine the question of jurisdiction as in those having their origin in tort, *viz.*, was the loan contracted by the defendant in his official capacity? HANMANT ANYABA *v.* RAJMAL MANICKCHAND . . **I. L. R 22 Bom. 170**

36. _____ *Dismissal of suit by Munsif on preliminary point—Remand by Subordinate Judge on appeal—Fresh appeal before Second Subordinate Judge, who disagrees with the finding of the former Subordinate Judge.* Where there are two Subordinate Judges in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate presiding officers. *Suraj Din* v. *Chattar, I. L. R. 3 All. 755*, and *Ram Kirpal* v. *Rup Kuari, I. L. R. 6 All. 269*, referred to. KHARAG PRASAD BHAGAT *v.* DURDHARI RAI
I. L. R. 14 All. 348

37. _____ *Application for declaration of heirship—Bom. Reg. VIII of 1827, s. 2—Subordinate Judge invested with function of District Court under Act VII of 1889.* A Subordinate Judge who (under s. 26 of Act VII of 1889) has been invested by Government with the functions of a District Court under Act VII of 1889 has jurisdiction to hear and determine an application made under s. 2 of Bombay Regulation VIII of 1827. PITAMBAR MANCHARAM *v.* ISHVAR JADURAM . . . **I. L. R. 17 Bom. 230**

38. _____ *Act XII of 1887 (Bengal Civil Courts Act), s. 10—Jurisdiction—Act XII of 1881 (N.-W. P. Rent Act), s. 189—Powers of Subordinate Judge in charge of the office of the District Judge—Revenue Court appeal. Held*, that a Subordinate Judge in temporary charge, under s. 10 of Act XII of 1887, of the office of the District Judge, is competent to take up and decide Revenue Court appeals which may be pending on the file of the District Judge. RAHMAT ALI KHAN *v.* ABDULLA (F.B. 1901) . **I. L. R. 23 All. 455**

SUBORDINATE MAGISTRATE.

_____ refusal of, to take proceedings—

See MAGISTRATE—POWERS OF MAGISTRATES . **I. L. R. 29 Calc. 242**

SUB-REGISTRAR.

See MAGISTRATE, JURISDICTION OF—TRANSFER OF MAGISTRATE DURING SUIT. . **I. L. R. 15 Mad. 132**

See REGISTRAR.

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SUBROGATION.

See COMPANY—WINDING UP—DUTIES AND POWERS OF LIQUIDATORS.
I. L. R. 18 Calc. 31

See TRANSFER OF PROPERTY ACT, 1882, ss. 82, 100 . I. L. R. 31 All. 166

SUBSCRIPTION.

See ATTACHMENT. I. L. R. 35 Calc. 641

See RIGHT OF SUIT—SUBSCRIPTION.
10 C. L. R. 197
I. L. R. 14 Calc. 64

SUBSISTENCE-MONEY.

1. ——— Payment of subsistence-money—*Civil Procedure Code, 1859, s. 276.* According to Act VII of 1859, as it stood at the end of 1876 and until October 1877, the batta for the maintenance of a debtor could not become payable until he was arrested and brought before the Court and the order made for his committal to the civil jail. KASTURCHAND *v.* RAOJI SADASHIV
I. L. R. 4 Bom. 65

2. ——— *Illegal commitment—Duty of jailor.* Unless subsistence-money is paid before the commitment, the commitment is illegal. The jailor is bound by the words of the Act. It is for him, and not for the prisoner, to see that the money is paid. *In the matter of* THOMSON . . . . . Bourke O. C. 421

3. ——— Fixing subsistence-money—*Detention in jail on decree of defendant arrested prior to deree—Right to discharge.* Where a defendant is arrested prior to decree under Act VIII of 1859, s. 78, and a decree is afterwards obtained against him in the suit, the plaintiff, if he wishes to detain the defendant in prison, must have him brought before the Court, and his subsistence-money fixed, in the same way as in the case of an arrest in execution of a decree; and if he fails to do so, the defendant is entitled to his discharge from prison. *In the matter of* CALLACHAND DASS
1 Ind. Jur. N. S. 827

S.C. RAMPERSAUD ROY *v.* CALLACHAND DOSS.
Bourke O. C. 423

4. ——— *Order for allowance—Application for discharge in absence of order—Civil Procedure Code, 1859, ss. 276, 278.* *S H* and two other debtors in the custody of the Sheriff on a *ca. sa.* appeared on a *habeas corpus* for the execution creditor to show cause why they should not be discharged. *S H* had been arrested in execution of a decree in a suit which was begun under the old procedure in the Supreme Court, and the question was whether the procedure in his case should be regulated by Act VII of 1855 or Act VIII of 1859. The grounds relied on by all three prisoners (besides the above in *S H's* case) were, that no order for the allowance had been made by the Court, nor had they been brought before it for that purpose. *Held*, that the case of *S H* was to be regulated by the old procedure, and as under Act VII of 1835 no order for allowance was necessary, he must be remanded to jail. *Held*, also (PEACOCK, *C.J.*, *dissentiente*), that a prisoner arrested on a *ca. sa.* must, within a convenient time, be brought before the Court to have his allowance fixed; that an "allowance" within the meaning of s. 276 or 278 of Act VIII of 1859 meant subsistence-money fixed by order of the Court; that the Court must have the prisoner before them to exercise their discretion upon a matter which must be determined before he can be formally committed to prison, and which may be so determined as to entitle him to be discharged; that a decree must be carried into execution by and under the direction of the Court which pronounces it by means of a special application to the Court, and an order passed thereupon; that a jailor or other officer cannot lawfully receive a prisoner for debt under commitment unless the preliminary payment of subsistence has been made in compliance with the order of the Court; and that the jailor cannot lawfully detain a judgment-debtor when the time limited for payment of any subsistence-money under the order of the Court passes without due payment accordingly. *In re* SUMBOO CHUNDER HALDAR. *In re* DOORGAPERSAUD MITTER. *In re* RAKHAB DOSS
Bourke O. C. 59

5. ——— Right of debtor to discharge—*Omission to make order for allowance—Civil Procedure Code, 1859, ss. 276, 278.* A debtor, having been imprisoned on a writ of *ca. sa.*, was brought up on a *habeas corpus*, and applied for his discharge on the ground that his arrest and imprisonment were illegal, as no order for his allowance under s. 276 of Act VIII of 1859 had been made. Sufficient subsistence-money, however, was paid to the Sheriff previous to the arrest, and he was kept amply supplied with it. *Held*, that ss. 276 and 278 of Act VIII of 1859 applied as much to the execution of a mofussil decree as to an arrest by writ of the High Court; that no one is to be imprisoned in execution of a decree unless subsistence-money for a month in advance be paid to the person to whose custody he is committed; that a similar payment must be received in advance every successive month pending the imprisonment; that if any such payment be not made, the prisoner is entitled to be released; that the "allowance" referred to in s. 276 of Act VIII of 1859 meant subsistence-money of 4 annas per diem; that s. 276 of Act VIII of 1859 enacted only that the prisoner shall have an allowance of 4 annas per diem paid monthly, unless the Court shall specially fix a less amount; that an order for an allowance to the prisoner was not necessary, and was intended only as a relief to the execution-creditor; that the omission to have such order made did not render the arrest and imprisonment illegal; that in the absence of such order, s. 278 of Act VIII of 1859 ensured 4 annas a day as subsistence-money for the prisoner. AGA ALI KAHN *v.* JOYDOYAL PERSAUD Bourke O. C. 52

6. ——— *Non-payment of subsistence-money in advance—Civil Procedure Code, 1859, s. 276.* The monthly subsistence-money under s. 276 of Act VIII of 1859 must be paid in

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SUBSISTENCE-MONEY—*contd.*

advance; therefore, where a debtor was arrested and subsistence-money paid for January, but no further deposit was made till 4th February, the prisoner was *held* entitled to his discharge. *In re* KONOY LOLL DOSS . . **Brouke O. C. 51**

7. ——— *Application for discharge on non-payment of subsistence-money—Petition for discharge—Civil Procedure Code, 1859, s. 278.* A prisoner was arrested on the 30th of December on a *ca. sa.* dated the 24th of December, on which day the execution-creditor paid subsistence-money for thirty days. This failing, on the 29th of January, the prisoner made a fruitless application to the Sheriff for more, and then applied to the Court for his discharge, upon which notice was directed to be given to the execution-creditor. *Held*, that no particular form of petition of discharge was required from a prisoner applying for his discharge for non-payment of subsistence-money; that subsistence-money must be paid in advance by the execution-creditor before putting a writ of *ca. sa.* in force; that the discharge by the Sheriff of a prisoner detained on a writ of *ca. sa.* was equally imperative on the happening of any of the contingencies specified in s. 278 of Act VIII of 1859; and that on failure of subsistence-money the prisoner should be released, and further detention of him by the person in whose custody he is was illegal. SPEYER *v.* JANSSEN. **Bourke O. C. 28**

8. ——— *Non-payment of subsistence-money in advance—Act VIII of 1859, ss. 276, 278.* A prisoner was arrested on August 4th, and committed to prison on the evening of the same day. Before his committal, the execution-creditor paid into the hands of the Jailor a sum sufficient for his subsistence-money for twenty-seven days, at the established rate of 4 annas per day. On the 5th August a writ of *habeas corpus* was applied for to bring the prisoner up, and on the 6th a further sum of 4 annas was paid to the Jailor to cover any deficiency in the former payment. *Held*, that the requirements of s. 276, Act VIII of 1859, had not been fulfilled, and that the prisoner was entitled to his discharge under s. 278. DUTT *v.* CORNELIUS . . . **5 B. L. R. Ap. 79**

9. ——— *Mode of payment of subsistence-money.* On the 30th of September, the plaintiff, a detaining creditor, paid to the Jailor of the Calcutta Jail subsistence-money for thirty days, for a prisoner confined at the suit of the plaintiff, the Jailor then having a balance of 4 annas over from the subsistence-money for September. *Held*, that there was a sufficient compliance with s. 276 of Act VIII of 1859. HALADHAR DEY *v.* AMBIKA CHARAN BOSE . **5 B. L. R. Ap. 8**

10. ——— **Refund of subsistence-money**—*Release at request of creditor—Bom. Act IV of 1865.* Where the defendants were arrested though the Munsif's Court in execution of a decree, but were released at the request of the execution-creditor before they had been sent to the civil jail, it was *held* that the execution-creditor was entitled to a refund of the balance of subsistence-money advanced by him that remained in the Munsif's hands at the time of his debtor's release. S. 10 of Act IV of 1865 (Bombay) was not applicable to such a case. *Ex parte* KASHINATH BALAL OK **5 Bom. A. C. 84**

SUBSISTENCE-MONEY—*concld.*

11. ——— **Effect of discharge of debtor**—*Non-payment of subsistence-money—Future arrest in execution of same decree, effect of, discharge on.* The discharge of a defendant from confinement in jail, in consequence of the plaintiff's failure to pay subsistence-money at the rate fixed by the Court, bars a second arrest and imprisonment in execution of the decree. APPIAH CHETTY *v.* CHENGADOO . . . . **4 Mad. 76**

SUB-SOIL RIGHTS.

See DIGWARI TENURE.

I. L. R. 34 Calc. 753

See LEASE . **I. L. R. 33 Calc. 203**

See MINERAL RIGHTS.

See MINES AND MINERALS.

See SERVICE TENURE **12 C. W. N. 193**

SUBSTANTIAL INJURY.

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—SUBSTANTIAL INJURY—IRREGULARITY.

SUBSTANTIAL QUESTION OF LAW.

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH AN APPEAL LIES OR NOT—SUBSTANTIAL QUESTION OF LAW.

See QUESTION OF LAW.

SUBSTITUTION OF EXECUTOR IN PLACE OF SUPPOSED LEGAL REPRESENTATIVE.

See BENGAL TENANCY ACT (VIII OF 1885), S. 106 . . **12 C. W. N. 8**

SUBSTITUTION OF NAMES.

See LIMITATION ACT, 1877, SCH. II. ART. 175A. . . **11 C. W. N. 156**

See SUBSTITUTION OF PARTIES.

——— *Appeal, abatement of.* An application for the substitution of the legal representative of a deceased appellant was made more than six months after his death. No notice of the application was given to the respondents and the Judge's attention was apparently not drawn to the fact that the application was made out of time. *Held*, that the *ex parte* order granting the application did not preclude the respondents from urging at the hearing that the appeal should abate, and it was open to the Court to go into that question. TRIPURA SUNDARI DEBI *v.* DAKSHINA MOHUN ROY (1906) . **11 C. W. N. 698**

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SUBSTITUTION OF PARTIES.

See MORTGAGES . 13 C. W. N. 787

See PARTIES—SUBSTITUTION OF PARTIES.

SUB-TENANT.

See SUPERIOR LANDLORD.
I. L. R. 36 Calc. 256

SUCCESSION.

See ADVERSE POSSESSION.
I. L. R. 27 All. 436

See CIVIL PROCEDURE CODE, 1882, s. 215A.
I. L. R. 27 All. 374

See CIVIL PROCEDURE CODE, 1882, ss. 278 AND 283 . I. L. R. 27 All. 464

See CONVERTS.

See COURT FEES ACT, s. 7, SCH. I.
I. L. R. 27 All. 447

See CRIMINAL PROCEDURE CODE, 1898, ss. 87, 88 AND 89 . I. L. R. 27 All. 572

See CUTCHI MEMONS.
I. L. R. 30 Bom. 197 ; 270

See ENGLISH LAW—PRIMOGENITURE.
5 Bom. O. C. 172

See HEREDITARY OFFICES ACT (BOM. ACT III OF 1874), ss. 4, 5.
I. L. R. 25 Bom. 470

See HINDU LAW.
I. L. R. 31 Calc. 224
I. L. R. 26 All. 119 ; 472
I. L. R. 29 Bom. 91
I. L. R. 27 All. 96 ; 581 ; 634
I. L. R. 33 Calc. 187 ; 247 ; 307 ; 345 ; 458
I. L. R. 30 Bom. 607
10 C. W. N. 95 ; 510 ; 802

See HINDU LAW—

CUSTOM—INHERITANCE AND SUCCESSION ;

ENDOWMENT—SUCCESSION IN MANAGEMENT ;

INHERITANCE.

STRIDHAN . I. L. R. 33 Bom. 452

See INHERITANCE.

See JOINT PROPERTY.
I. L. R. 27 All. 153

See LANDLORD AND TENANT.
10 C. W. N. 17

See MAHOMEDAN LAW—DEBTS.
I. L. R. 4 Calc. 142
I. L. R. 4 All. 361
I. L. R. 7 All. 822

See MAHOMEDAN LAW—INHERITANCE.

See MALABAR LAW—INHERITANCE.

See MARRIAGE SETTLEMENT.
1 Ind. Jur. N. S. 290

SUCCESSION—*contd.*

See N.-W. P. RENT ACT (XII OF 1881), s. 9.
I. L. R. 31 All. 51

See OUDH ESTATES ACT, ss. 2, 10, 13, 14, 15 and 22 I. L. R. 26 All. 119 ; 393

See OUDH ESTATES ACT, s. 8.
8 C. W. N. 201

See PARSIS . . I. L. R. 1 Bom. 506
I. L. R. 2 Bom. 75
I. L. R. 4 Bom. 537
I. L. R. 5 Bom. 506
I. L. R. 6 Bom. 151
I. L. R. 11 Bom. 1
I. L. R. 22 Bom. 355 ; 909

See PLEADINGS . I. L. R. 27 All. 78

See PRACTICE . . 10 C. W. N. 230

See PRIVY COUNCIL, PRACTICE OF—REVIVOR OF APPEAL.
I. L. R. 21 Calc. 997
L. R. 21 I. A. 163

See PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 28.
I. L. R. 27 All. 622

See RAJ, SUCCESSION TO.

See RELIGIOUS ENDOWMENT.
I. L. R. 33 Calc. 689

See SALSETTE, LAW APPLICABLE IN.
I. L. R. 19 Bom. 680

See SPES SUCCESSIONIS.

See SUCCESSION ACT.

——— deed altering course of, by Hindu law—

See COMPROMISE—CONSTRUCTION, ENFORCING, EFFECT OF, AND SETTING ASIDE DEEDS OF COMPROMISE.
6 B. L. R. 202
13 Moo. I. A. 497

——— shebait—

See HINDU LAW—SUCCESSION.
8 C. W. N. 809

——— to foreign State—

See JURISDICTION.
I. L. R. 35 Calc. 777

——— to istemrari mokurrari tenure—

See LEASE—CONSTRUCTION.
I. L. R. 30 Calc. 883

——— to permanent tenure—

See BENGAL TENANCY ACT, s. 16.
I. L. R. 24 Calc. 241

——— to raj—

See HINDU LAW—CUSTOM—INHERITANCE AND SUCCESSION.

See HINDU LAW—INHERITANCE—IMPARTIBLE PROPERTY—IMPARTIBLE RAJ.

See JUDGMENT IN REM . 11 B.L. R. 244
14 Mo. I. A. 367

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——— to recover profits of sir land in an undivided mahal—

See LIMITATION . **I. L. R. 7 All. 348**

——— to set aside mortgages on the ground of insanity—

See CONTRACT ACT, s. 12. **I. L. R. 27 All. 1**

——— to talukdari—

See OUDH ESTATES ACT (I OF 1869).

1. ——— **Nawab of Tonk**—*Primogeniture—Impartible estate—Special family custom—Effect of British settlement on tenure and its customs—Estates appurtenant to Nawabship of Tonk—Grant of villages by Nawab as maintenance. Held,* upon the evidence, that succession to the chiefship of Tonk went, by special family custom, in the line of primogeniture, and that the ownership of the lands of the *ilaka* in suit went with the chiefship. Accordingly, the title of the respondent, being in the elder line, was preferred to that of the appellant, who was nearer in degree. *Held,* that the effect of the British settlement of the villages in suit with the appellant's father was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the chief for the time being, as it were *jure coronæ*, the proprietorship thereof, subject to succession by the said family custom. The appellant being grantee from the Government of a pension fund, part of an hereditary cash allowance originally graned to his father, and also grantee of a village from his father for his subsistence : *Held,* that, these grants being independent of each other, and derived from different sources, there was no ground for putting the appellant to his election, and that he was entitled to keep both. MUHAMMAD AFZAL KHAN *v.* GHULAM KASIM KHAN (1903) . . **I. L. R. 30 Calc. 843**
s.c. L. R. 30 I. A. 190

2 ——— **Hindu Law**—*Dharwar district—Sister—Brother's widow.* In the district of Dharwar a sister is preferred as an heir to a brother's widow. RUDRAPA *v.* IRAVA (1904)
I. L. R. 28 Bom. 82

3. ——— *Hindu Law—Murali—Married sisters—Exclusive right claimed by Murali as unmarried daughter to inherit her father's property—Kanya—Maiden — Mitakshara— Vyavaharamayukha—Act XXI of 1850.* A *Vaghya* (male dedicated to the god Khandoba) had three daughters, one of whom was a *Murali* (female dedicated to the god Khandoba) and two married. After the *Vagya's* death his *Murali* daughter, who lived by prostitution and had children by promiscuous intercourse, claimed her father's property as heir to the exclusion of her sisters under the rule of Hindu Law that an unmarried daughter inherits to her father before his married daughter. The first Court allowed the claim. On appeal by one of the defendants (married daughters) the Judge varied the decree by allowing the plaintiff a third share in the property. On second appeal by the plaintiff the appellate decree was confirmed, there being no appeal or cross-objection by the defendants against that portion of the decree whereby the plaintiff was allowed to share her father's property equally with her married sisters. *Held,* further, that a woman, who in her maiden condition becomes a prostitute, being neither a *kanya* (unmarried) nor a *kulastri* (married), but being at the same time, notwithstanding her prostitution, a qualified heir as held in *Advyapa* v. *Rudrava, I. L. R. 4 Bom. 104,* would be entitled to succeed to her father's property only in default of either married or unmarried daughters. TARA *v.* KRISHNA (1907) . **I. L. R. 31 Bom. 495**

4. ——— *Hindu law—Competition between full sister and half-brother's son—Mitakshara—Sister's place in the line of heirs—Vyavahara Mayukha, views of, on the point—Value of the commentaries of Balambhatta and Nanda Pandita—Conflict between Mitakshara and Vyavahara Mayukha—Rule as to harmonising the difference.* In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is between her and a half-brother's son, the latter being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha. The interpretation put by WESTROPP, *C.J.*, upon Balambhatta's texts in *Sakharam Sadashiv Adhikari* v. *Sitabai, I. L. R. 3 Bom. 353,* commented upon and dissented from, except in cases where the Vyavahara Mayukha alone is applicable. *Rudrapa* v. *Irava, I. L. R. 28 Bom. 82,* explained. *Per* CHANDAVARKAR, *J.*—The commentary of Balambhatta on the Mitakshara is not regarded in this Presidency as an authority to be accepted in the interpretation of the former work without question. These observations apply more or less to Nanda Pandita also. It is a well established rule of the Bombay High Court that where the Mitakshara is silent or obscure, the Court must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible. BHAGWAN *v.* WARUBAI (1908)
I. L. R. 32 Bom. 300

5. ——— *Hindu Law—Mitakshara—Stridhan—Maiden's stridhan—Priority between maternal grandmother and father's mother's sister.* Under the Mitakshara, the father's mother's sister is entitled to succeed to the stridhan of a maiden in preference to her maternal grandmother. JANGLUBAI *v.* JETHA APPAJI (1908)
I. L. R. 32 Bom. 409

6. ——— *Hindu Law—Mother inheriting to her son takes a limited estate.* Under the Hindu Law applicable in Bombay a mother succeeding as heir to her son takes a limited estate. VRIJBHUKANDAS *v.* BAI PARVATI (1907)
I. L. R. 32 Bom. 26

7. ——— *Hindu law—Mitakshara—Adopted son—Adoptive mother entitled*

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SUCCESSION—*concld.*

to succeed in preference to adoptive father. Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption. ANANDI *v.* HARI SUBA (1909)
I. L. R. 33 Bom. 404

8. ——— **Mahomedan Law**—*Shia branch—Descendants of paternal uncles and aunts—Stirpital succession.* The heirs by consanguinity under the Shia law of inheritance fall into three classes. In the first class are, first the parents, and secondly children and other lineal descendants. In the second class there are first grand-parents and ascendants and secondly brothers and sisters and their descendants. And in the third class come paternal and maternal uncles and aunts of the deceased and his parents and their descendants. Succession in the third class, like that in the first and second class is *per stirpes* and not *per capita.* AGA SHERALLI *v.* BAI KULSUM KHANAM (1908) . . **I. L. R. 32 Bom. 540**

SUCCESSION ACT (X OF 1865).

See ADMINISTRATION BOND.
10 C. W. N. 673

See CONVERTS . **I. L. R. 10 Mad. 69**
I. L. R. 20 Bom. 53

——— **ss. 2 and 3**—*Minor.* The definitions of " minor " and " minority " in the Succession Act do not apply to cases in which a person enters into a contract on his own behalf, and not in any representative character under that Act. SULTAN CHAND *v.* SMYTH
12 B. L. R. 358 : 21 W. R. 221

——— **ss. 3, 179, 187, 260.**

See EVIDENCE . **I. L. R. 32 Calc. 710**

——— **s. 4—**

See DIVORCE ACT, s. 35.
5 B. L. R. Ap. 9
I. L. R. 5 Calc. 357
I. L. R. 9 Mad. 12

See HUSBAND AND WIFE.
8 B. L. R. 372
I. L. R. 1 Calc. 285

1. ——— *Operation of section—Rights acquired before passing of Act.* The provisions of s. 4 of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the Act passed. SARKIES *v.* PROSONOMOYEE DOSSEE
I. L. R. 6 Calc. 794 : 8 C. L. R. 76

2. ——— *Married woman, liability of—Separate estate—Restraint on anticipation—Husband and wife—Married Women's Property Act (III of 1874), s. 8.* In a suit against a husband and wife, and the trustees of the wife's marriage settlement on two joint and several promissory notes given by the husband and wife after their marriage, but before the passing of the Married Women's Property Act (III of 1874), the

SUCCESSION ACT (X OF 1865)—*contd.*

——— **s. 4**—*concld.*

plaintiff sought to render liable property settled on the marriage upon the wife for her separate use without power of anticipation. The marriage was contracted after the passing of the Succession Act. *Held,* that s. 4 of that Act did not prevent the operation of the clause in the marriage settlement in restraint of anticipation. *Held,* further, that s. 8 of the Married Women's Property Act, 1874, does not apply to contracts made before the passing of the Act. *Semble : per* COUCH, *C.J.*—If the contract had been made after that Act came into operation, the plaintiff would have had a remedy against the wife's separate estate, notwithstanding the clause restraining anticipation. PETERS *v.* MANUK
13 B. L. R. 383 : 22 W. R. 175

3. ——— **and s. 44**—*Husband and wife—Parties with English domicile married in India—Succession to moveable property.* *H M*, a British subject having his domicile in England, married in Calcutta, in April 1866, *C*, a widow, who at the time of the marriage had also an English domicile. *C*, after her marriage with *H M*, became entitled as next of kin to shares in the moveable properties of her two sons by her former marriage : these shares were not realized nor reduced into possession by *C* during her life. *C* died in 1872, leaving her husband, but no lineal descendants. In March 1874, *H M* filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875 letters of administration of the estate and effects of *C* were, with the consent of *H M*, granted to the Administrator-General of Bengal, by whom the shares to which *C* became entitled as next of kin of her sons were realized. In a special case for the opinion of the Court under Ch. VII, Act VIII of 1859 :—*Held,* that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee, as assignee of the estate of *H M*, was entitled to the whole fund realized by such shares in the hands of the Administrator-General. S. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile. MILLER *v.* ADMINISTRATOR-GENERAL OF BENGAL . . . . **I. L. R. 1 Calc. 412**

4. ——— *Marriage—Husband and wife—Domicile—Succession to property.* A person with an English domicile marrying a wife with an Indian domicile is, on her death, entitled to inherit the whole of her moveable property to the exclusion of the next of kin. Ss. 4 and 44 of the Succession Act do not affect the law of succession, but relate to the immediate effect of marriage on moveable property belonging to either of the married persons, and not comprised in an antenuptial settlement. HILL *v.* ADMINISTRATOR-GENERAL OF BENGAL . **I. L. R. 23 Calc. 506**

——— **s. 5.**

See FOREIGN STATE.
I. L. R. Calc. 17

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SUCCESSION ACT (X OF 1865)—*contd.*

——— **and s. 10—**

See DOMICILE . **I. L. R. 4 Calc. 106**

——— **ss. 20, 22, 105**—*Relationships contemplated by the Act are legitimate relationships only—Gift by will of the residue to such charities as the trustees may think deserving, is good.* The Succession Act (X of 1865) contemplates only those relationships, which the law recognizes, that is, those flowing from a lawful wedlock. The gift, by will, of the residue to " such charities as the trustees may think deserving " is a good gift, the objects being wholly charitable. SMITH *v.* MASSEY (1906) **I. L. R. 30 Bom. 500**

——— **s. 35—**

See CONVERTS . **I. L. R. 9 Mad. 466**

——— **s. 42—**

See PARSIS . . **I. L. R. 2 Bom. 75**

——— **s. 47—**

See CIVIL PROCEDURE CODE, 1882, s. 440. **I. L. R. 31 Bom. 413**

——— **s. 48—**

See PARDANASHIN WOMEN. **5 C. W. N. 505**

——— **s. 48, Illus. (g), (h)—**

See WILL, EXECUTION OF. **11 C. W. N. 324**

——— **ss. 48, 54—**

See WILL—VALIDITY OF WILL. **I. L. R. 7 Mad. 515**

——— **s. 50—**

See WILL—ATTESTATION.

See WILL—SIGNATURE.

——— **s. 51—**

See WILL . **I. L. R. 29 Bom. 530**

——— **s. 54—**

See WILL—CONSTRUCTION. **I. L. R. 4 Mad. 244**

——— **s. 56—Will of a Jew.**—*Revocation of will—Lawful polygamous marriage.* The will of a Jew, made subsequently to his first marriage, but previously to a second marriage in the lifetime of his first wife, *held* to be revoked by such second marriage under s. 56 of the Succession Act. GABRIEL *v.* MORDAKAI . **I. L. R. 1 Calc. 148**

——— **ss. 56, 57—**

See HINDU LAW, WILL. **I. L. R. 30 Mad. 369**

——— **s. 58—**

See PROBATE—OF WHAT DOCUMENTS GRANTED . . **I. L. R. 29 Calc. 31**

See WILL—ATTESTATION. **1 C. W. N. 428**

SUCCESSION ACT (X OF 1865)—*contd.*

——— **s. 68—**

See WILL—CONSTRUCTION. **I. L. R. 15 Mad. 448**

——— **s. 75—**

See WILL—CONSTRUCTION. **I. L. R. 6 All. 583**

——— **s. 78—Will—Appointment by general bequest**—*Power created subsequently to the will—Civil Procedure Code (Act XIV of 1882), s. 527, case stated under.* A general power of appointment may be well exercised by a will executed previously to the creation of the power and that too by a mere residuary gift. DINSHAW SORABJI *v.* DINSHAW SORABJI (1907) **I. L. R. 31 Bom. 472**

——— **s. 82—**

See COMPROMISE . **I. L. R. 31 Mad. 474**

See HINDU LAW—WIDOW—POWER OF WIDOW—POWER OF DISPOSITION OR ALIENATION . . **5 C. W. N. 300**

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ESTATES ABSOLUTE OR LIMITED . **I. L. R. 24 Calc. 646** **I. L. R. 22 Bom. 833**

——— **ss. 82, 111—**

See HINDU LAW . **I. L. R. 35 Calc. 896**

——— **ss. 82, 111, 116, 117—**

See HINDU LAW. **I. L. R. 33 Calc. 947; 1306**

——— **s. 84**—*Will—Construction of document—Devise to "eldest son and to his lawful male children according to the law of inheritance"—Marriage—Marriage between Christian and Mahomedan performed according to Mahomedan rites.* Thomas Skinner, domiciled in the North-Western Provinces, and the owner of considerable landed property, died in 1865, leaving a will, made on the 22nd of October 1864, *i.e.*, before the passing of the Indian Succession Act, by which, amongst other dispositions, it was provided that—" my private zamindari, presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant, may at my demise descend to my eldest son, Thomas Brown Skinner and to his lawful male children according to the law of inheritance. In the event of my eldest son Thomas Brown Skinner dying without lawful male children, the above-mentioned private zamindari, *et cetera*, shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, *et cetera*, shall descend to my female children or in the event of their death, to the female children born in wedlock of my sons in succession." *Held*, that the construction of such a will was not governed by English law or by the provisions of the Indian Succession Act, 1865, which was not retrospective ; but the will was to be construed, as

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SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 84—*concld.*

was laid down by the Privy Council in the case of *Barlow* v. *Orde, 13 Moo. I. A. 277*, according to principles of justice, equity and good conscience. So construing the will and having regard to the circumstances of the family, at the time of its execution, the testator must not be taken to have intended to confer an absolute estate on his eldest son, but that his sons who should acquire the property should have a life estate only, and that the absolute estate should devolve upon the eldest son of the testator who should be entitled to the property for life and should leave a son surviving him. *Secretary of State* v. *The Administrator-General of Bengal, 1 B. L. R. 87 O. C., Abraham* v. *Abraham, 9 Moo. I. A. 193, 199, Broughton* v. *Pogose, 12 B. L, R. 74*, referred to. *Semble :* That a marriage ceremony performed according to Mahomedan rites between a Christian man and a Mahomedan woman can create no valid marriage between the parties. RICHARD ROSS SKINNER *v.* DURGA PRASAD (1904) . . . **I. L. R. 31 All. 239**

——— s. 90—

See WILL—CONSTRUCTION.
I. L. R. 26 Mad. 433
6 C. W. N. 321

——— s. 91—

See WILL—CONSTRUCTION.
I. L. R. 6 All. 583

——— s. 93—

See NATIVE CHRISTIANS.
I. L. R. 31 Bom. 25

——— *Intestate and testamentary succession—Native Christians—Converts from Hindu religion—Joint family—Co-parcenership—Inheritance.* The Indian Succession Act (X of 1865) does not affect rights of co-parcenership as between those to whom it applies. The purpose of that Act was to amend and define the rules of law applicable to intestate and testamentary succession. It is with the *devolution* of rights on intestacy that the Act deals. It does not purport to enlarge the category of heritable property. S. 93 of the Act actually recognises a joint tenancy with the right of survivorship. *Navroji Manockji Wadia* v. *Perozbai, I. L. R. 23 Bom. 80*, referred to. FRANCIS GHOSAL *v.* GABRI GHOSAL (1906)
I. L. R. 31 Bom. 25

——— s. 94—

See WILL—CONSTRUCTION.
I. L. R. 26 Mad. 433

1. ——— s. 96—Hindu law—*Bequest to daughter and her sons from generation to generation—Testator pre-deceased by legatee who left daughters—Lapse of legacy—Succession Act (X of 1865), ss. 92, 96.* A Hindu testator, who had no male issue, bequeathed certain real property to his eldest daughter and her sons, from generation to generation. The legatee, who had daughters, pre-deceased the testator, who then also died, leaving a widow and other daughters him surviving. The daughters of the deceased legatee claimed the property as the lineal descendants of the testator, contending that, although s. 96 of the Indian Succession Act did not apply to the case, it should be held to govern it by analogy, as affording a guide to justice, equity and good conscience : *Held*, that the words used in the will must be construed as meaning "heirs," and that the provision contained in s. 96 of the Indian Succession Act could not be extended to such a case. RAMAMIRTHAM *v.* RANGANATHAN (1900)
I. L. R. 24 Mad. 299

SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 96—*concld.*

2. ——— *Hindu Wills Act (XXI of 1870), ss. 2, 3—Lapsed legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act (V of 1881), s. 131.* A testator, by his will, dated the 22nd April 1878, gave a legacy of R5,000 to his son's daughter *J*, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia. The testator died on the 2nd February 1881, and *J* in October 1879 ; the money due by the Rajah of Bettia was realized on the 7th December 1884. *J* left an only child *B*, who was born before the death of the testator. *B* sued to recover the legacy left to her mother ; the defence was that the legacy had lapsed. *Held*, that *J* was in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator, because a lineal descendant of her's survived the testator. JITU LAL MAHATA *v.* BINDA BIBI . . . . **I. L. R. 16 Calc. 549**

——— s. 98—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.
I. L. R. 8 Calc. 157 ; 637
I. L. R. 15 Bom. 326 ; 652
I. L. R. 16 Bom. 492

See WILL—CONSTRUCTION.
I. L. R. 4 Calc. 670

——— *Application of section—Vested interests. Semble :* S. 98 of the Succession Act applies only to vested interests. MASEYK *v.* FERGUSSON . . **I. L. R. 4 Calc 304**

——— ss. 98—103—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS.

——— s. 101—

See PERPETUITIES, RULE AGAINST.
I. L. R. 20 Bom. 511

See WILL . **I. L. R. 30 Bom. 477**

——— ss. 101, 102—

See WILL—CONSTRUCTION.
I. L. R. 4 Calc. 304
I. L. R. 31 Mad. 517

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SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 105—

See WILL—CONSTRUCTION.
I. L. R. 15 Mad. 448
6 C. W. N. 321
I. L. R. 26 Mad. 532

——— s. 106—

See WILL—CONSTRUCTION.
I. L. R. 6 All. 583

——— s. 107—

See REGISTRATION ACT.
I. L. R. 30 Bom. 304

——— s. 111—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ESTATES ABSOLUTE OR LIMITED.

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—SURVIVORSHIP.
I. L. R. 23 Calc. 563
L. R. 3 I. A. 18

See WILL—CONSTRUCTION.
3 C. W. N. 478

——— ss. 111, 116—*Hindu Law—Will—Construction—Authority to adopt—Bequest to adopted son—Authority to adopt declared invalid—Gift over to daughters—Testacy or intestacy—Nature of interest taken by each daughter—Daughter with natural children and daughter with adopted child—Preferential right to inherit—Meaning of "to whom and whose respective sons I give, devise and bequeath the same"—Limitation, words of—Succession Act (X of 1865), ss. 111, 116 and 117.* S. 111 of the Succession Act only applies when the prior bequest is capable of taking effect and is not *ab initio* void. If a bequest has failed *ab initio*, s. 116 applies. A testator by his Will authorised adoptions in a manner which, in a suit brought by the adopted son, was held to be invalid under the Hindu Law. The Will further directed that in case "some of such adopted sons surviving his wife and dying under the age of 18 years without leaving a son or sons, his executors should make over and divide the whole of the estate both real and personal into and between his daughters in equal shares, to whom and their respective sons he bequeathed the same." *Held*, that s. 116 of the Succession Act, incorporated in the Hindu Wills Act, applied and this constituted a gift over to the daughters. That the gift, a valid gift to the adopted sons, having failed, the daughters became entitled to the estate absolutely and in equal shares, and the words "their respective sons" in the above clause were words of limitation and not words of purchase. Though under the Hindu Law a Hindu married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by Will, unless her interest is curtailed by express words or by necessary implication. *Ramasami* v. *Papayya, I. L. R. 16 Mad. 466, Lala Ram Jewan Lal*, v. *Dal Koer, I. L. R. 24 Calc. 406, Kalany Koer* v. *Lachmee Pershad,*

SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 111—*concld.*

24 W. R. 395, Bhobatarini Debya, v. *Peary Lal Sanyal, I. L. R. 24 Calc. 646, Atul Krishna Sarcar* v. *Sanyasi Charan Sircar, 9 C. W. N. 784.* The Court, following the practice laid down in *Lalit* v. *Chukkun, L. R. 24 I. A. 76*, left the question, whether the gift is defeasible on either daughter dying without male issue, open. Under the Hindu Law an adopted son holds the same position as a son born as regards inheritance from the adoptive mother's relations. RADHA PROSAD MULLICK *v.* RANI MONI DASSI (1906) . 10 C. W. N. 695

——— s. 114—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—BEQUEST FOR IMMORAL CONSIDERATION.
I. L. R. 23 Mad. 613

——— s. 125—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ESTATES ABSOLUTE OR LIMITED . I. L. R. 24 Calc. 406

See WILL—CONSTRUCTION.
I. L. R. 22 Bom. 774

——— s. 128—*Legacy to person appointed executor—Rebuttal of presumption—Parol evidence—Hindu Wills Act (XXI of 1870), s. 2.* The language of s. 128 of the Succession Act is peremptory and leaves no room for a presumption, and it is not left to the Court to decide whether the legacy is given to the person in his character as executor or not. The rule as to the admissibility of parol evidence to rebut the presumption, which may possibly upon the decisions obtain in England, has no force in this country where such evidence is inadmissible. PROSONO COOMAR GHOSE *v.* ADMINISTRATOR-GENERAL OF BENGAL . I. L. R. 15 Calc. 83

——— s. 159—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS, AND REMOTENESS . . I. L. R. 20 Bom. 450

See WILL—CONSTRUCTION.
I. L. R. 15 Mad. 448

——— s. 179—

See ADMINISTRATOR.
I. L. R. 27 Bom. 103

See EXECUTOR . I. L. R. 27 Bom. 281

See PARTIES—PARTIES TO SUITS—EXECUTORS . I. L. R. 12 Bom. 621

See PROBATE—POWER OF HIGH COURT TO GRANT, AND FORM OF.
I. L. R. 6 Bom. 460

——— ss. 179—187—

See PROBATE—EFFECT OF PROBATE.

——— s. 181—

See ADMINISTRATION.
I. L. R. 26 Bom. 267

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SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 182—

See PROBATE—TO WHOM GRANTED.
7 B. L. R. 563
I. L. R. 15 Mad. 360

——— s. 187—

See ADMINISTRATION.
I. L. R. 26 Bom. 267

See CERTIFICATE OF ADMINISTRATION—EFFECT OF CERTIFICATE.
23 W. R. 252

See PROBATE—JURISDICTION IN PROBATE CASES . . I. L. R. 14 Calc. 37

See REPRESENTATIVE OF DECEASED PERSON . . I. L. R. 14 Mad. 454

See VENDOR AND PURCHASER—TITLE.
I. L. R. 15 Bom. 657

——— *Will—Application by legatee for letters of administration—Grant limited to recovery of legacy only—Suit by another legatee to recover legacy—Maintainability—Proof of Will only essential.* Letters of administration with a copy of the will annexed in respect of the entire estate left by the testator was granted by the District Judge to a legatee to whom the testator had bequeathed an allowance for maintenance. On appeal, the High Court directed that the letters should be limited to the realisation by the grantee of that allowance only. But before fresh letters in terms of the High Court's order could be issued by the District Judge the legatee died. Subsequently another legatee to whom also the testator had bequeathed an allowance for maintenance brought a suit for recovery of the same. *Held*, that s. 187 of the Succession Act was no bar to the recovery of the plaintiff's claim. If a will is once proved and probate or letters of administration granted, that would entitle any one of the legatees or any one claiming under the will to obtain relief from Court. S. 187 of the Succession Act does not contemplate that every legatee claiming under a will should have to obtain separate probate or letters of administration in respect of the estate or a portion of the estate in order to be entitled to maintain a claim for the legacy. CHANDRA KISHORE ROY *v.* PROSANNA KUMAR DASS (1906)
10 C. W. N. 864

——— ss. 187, 188—

See PROBATE—OPPOSITION TO, AND REVOCATION OF, GRANT.
I. L. R. 4 Calc. 360
I. L. R. 17 Calc. 272

——— s. 190—

See REPRESENTATIVE OF DECEASED PERSON . . I. L. R. 30 Calc. 1044

See RIGHT OF SUIT—INTESTACY.
I. L. R. 18 Bom. 337

——— ss. 190, 191—*Intestate—Sale of property of intestate in execution of decree against some of his heirs—Title to sale-proceeds—Letters of administration.* S sued some of the heirs to a person governed by the Succession Act, 1865, who died intestate, such heirs being in possession of a part of the estate of the deceased, for a debt due to him by the deceased, and obtained a decree against such persons. In execution of this decree, property belonging to the deceased was sold. Before the sale-proceeds were paid to *S*, *R*, an heir to the deceased, obtained in the District Court letters of administration to the estate of the deceased, and an order for payment to her of such sale-proceeds. Thereupon *S* sued *R* for such sale-proceeds and to have the District Court's order directing payment thereof to her set aside. *Held*, that, with reference to ss. 190 and 191 of the Succession Act, 1865, the decree obtained by *S* against persons who did not legally represent the estate of the deceased, and the proceedings taken against such persons in execution of such decree, gave *S* no title to the sale-proceeds which formed part of the estate of the deceased, and the suit was therefore not maintainable. SUKH NANDAN *v.* RENNICK
I. L. R. 4 All. 193

SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 190—*concld.*

——— ss. 190—213—

See LETTERS OF ADMINISTRATION.

——— s. 224—

See ILLEGITIMACY . 11 B. L. R. Ap. 6

——— s. 232—

See PROBATE—AMENDMENT OF ERROR IN PROBATE . I. L. R. 4 Calc. 582

——— ss. 234—261—

See PROBATE—OPPOSITION TO, AND REVOCATION OF, GRANT.

——— s. 235—

See JUDICIAL COMMISSIONER, ASSAM.
12 W. R. 424

——— s. 237—*Exemplification of will—Probate—Order to produce testamentary paper.* The testator died in Calcutta, leaving a will, whereof he appointed *A*, *B*, *C*, and *D* executors. *D*, the mother of the testator, had carried on business in partnership with the testator in Calcutta, and a considerable portion of the testator's estate was in India. *A* renounced probate, and the will was proved in England by *B* and *C*, who sent their agents in Calcutta an exemplification of the will for the purpose of obtaining a grant of probate or letters of administration to the estate in India. In an application by *D* for an order directing the agents to bring the exemplification into Court with a view to obtaining probate thereof:—*Held*, that the exemplification was an instrument which the Court would order to be produced under s. 327, Succession Act. *In re the goods of* NEWTON
8 B. L. R. Ap. 76

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SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 239—

See RECEIVER . I. L. R. 17 Bom. 388

——— s. 240—

See LETTERS OF ADMINISTRATION.
I. L. R. 17 Bom. 689
I. L. R. 24 Mad. 120

See PROBATE—POWER OF HIGH COURT TO GRANT . I. L. R. 24 Mad. 120

——— s. 242—

See ADMINISTRATOR.
I. L. R. 35 Calc. 955
12 C. W. N. 802

See PROBATE—EFFECT OF PROBATE.
8 B. L. R. 208

——— ss. 242, 257, 269—

See ADMINISTRATION BOND.
I. L. R. 33 Calc. 713
10 C. W. N. 673

——— s. 244—

See PROBATE—JURISDICTION IN PROBATE CASES . . . 4 C. L. R. 498

——— s. 246—

See LETTERS OF ADMINISTRATION.
I. L. R. 25 All. 355

——— s. 255—

See EXECUTOR . I. L. R. 21 Bom. 400

——— s. 256—

See PROBATE—ADMINISTRATION BONDS.
I. L. R. 7 Calc. 84
3 Mad. Ap. 10
4 C. L. R. 498
I. L. R. 26 Calc. 407

——— ss. 256, 257—

See ADMINISTRATION BOND.
6 N. W. 62
I. L. R. 10 All. 29

——— s. 257—

See ACT XL OF 1858, s. 21.
I. L. R. 5 All. 248

See GUARDIAN—LIABILITY OF GUARDIANS.
I. L. R. 5 All. 248

——— s. 258—*Grant of letters of administration with will annexed—Practice.* Letters of administration with the will annexed may, under s. 258 of the Succession Act, be granted after the expiration of seven clear days from the death of the testator. *In the goods of* WILLSON
I. L. R. 1 Calc. 149

——— s. 261—

See PROBATE—APPLICATION FOR PROBATE, ETC. . I. L. R. 19 Mad. 458

SUCCESSION ACT (X OF 1865)—*contd.*

——— s. 263—

See APPEAL—CERTIFICATE OF ADMINISTRATION . I. L. R. 20 Calc. 245

See APPEAL—PROBATE.
I. L. R. 27 Calc. 5

——— s. 264—

See REFERENCE TO HIGH COURT—CIVIL CASES . . I. L. R. 5 Calc. 756

——— s. 265—

See APPEAL—PROBATE 2 C. L. R. 589

——— s. 266—

See RIGHT OF SUIT—INTESTACY.
I. L. R. 18 Bom. 337

——— s. 269—

See ADMINISTRATOR.
I. L. R. 27 Bom. 103

See EXECUTOR . I. L. R. 1 All. 710

See LETTERS OF ADMINISTRATION.
I. L. R. 23 Calc. 579

——— s. 280—

See ADMINISTRATOR.
I. L. R. 17 Bom. 637

——— s 282—

See ADMINISTRATOR . 8 Bom. O. C. 20

See ADMINISTRATOR-GENERAL'S ACT.
I. L. R. 25 Calc. 54

See CIVIL PROCEDURE CODE, 1882, s. 244.
I. L. R. 29 Bom. 96

1. ——— *Decree, satisfaction of—Executor—Administrator.* Where a person obtains a decree against an executor or administrator, he is entitled to have his decree satisfied out of the assests of the deceased, and s. 282 of the Succession Act does not interfere with that right. NILKOMUL SHAW *v.* REED
12 B. L. R. 287 : 17 W. R. 513

2. ——— *Debt—Liability to pay calls on shares is company.* A liability to pay calls is a debt within the meaning of s. 282 of the Succession Act. ASIATIC BANKING COMPANY *v.* VIEGAS . . . . 8 Bom. O. C. 20

3. ——— *Judgment-creditor—Execution of decree—Right to assests in hands of Administrator-General—Administrator-General's Act (II of 1874), s. 35.* A decree for money was obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator-General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator-General. *Held,* that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate. REMFRY *v.* DEPENNING
I. L. R. 10 Calc. 929

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SUCCESSION ACT (X OF 1865)—*concld.*

——— s. 328—

See ADMINISTRATOR . 8 Bom O. C 20

——— s. 331 :

——— "Hindu" includes Sikh—

See PROBATE AND ADMINISTRATION ACT (V OF 1881) . 7 C. W. N. 895

See PROBATE—POWER OF HIGH COURT TO GRANT, AND FORM OF. I. L. R. 6 Bom. 452

See WILL—FORM OF WILL. 2 B. L. R. A. C. 79

1. ——— *Jains—"Hindu."* The term "Hindu" in s. 331 of Act X of 1865 means and includes a "Jain," and consequently in matters of succession, Jains are not governed by that Act. BACHERBI *v.* MAKHAN LAL I. L. R. 3 All. 55

2. ——— *Native Christians—Hindu law—Inheritance.* The Succession Act governs the succession in Native Christian families; and since the passing of that Act such families have not been at liberty to adhere to the Hindu law of succession. *Held*, that, if the family continued to observe the Hindu law of succession until the Succession Act altered their rule of succession, the members of the family who were born before the latter Act came into operation could not be deprived of the rights acquired by them under the Hindu law. PONNUSAMI NADAN *v.* DORASAMI AYYAN . . . . I. L. R. 2 Mad. 209

3. ——— *Native Christian—Application under Act XXVII of 1860 for certificate of administration.* Petitioner, a Native Christian, applied under Act XXVII of 1860 for a certificate of heirship to his deceased grandfather. The Civil Judge refused it on the ground that Native Christians are not "Hindus" within the meaning of the term as used in s. 331 of the Succession Act (X of 1865), and therefore that they are affected by the provisions of that Act, and cannot proceed under Act XXVII of 1860. *Held*, upon appeal, that the order of the Civil Judge was right. *In the matter of the petition of* VATHIAR 7 Mad. 121

4. ——— and s. 2—*Converts to Christianity from Hinduism—Inheritance—Evidence of custom of inheritance—Koli caste of fishermen.* The Indian Succession Act (X of 1865), and the rules of inheritance prescribed by it, apply to Hindus who have become Christians; and evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible. DAGREE *v.* PACOTTI SAN JAO I. L. R. 19 Bom. 783

——— ss. 331, 332—

See PROBATE . I. L. R. 31 Calc. 11

SUCCESSION CERTIFICATE.

See DEBT . I. L. R. 36 Calc. 936

See HINDU LAW. I. L. R. 35 Calc 631

See RIGHT OF SUIT . 13 C. W. N. 509

See SUCCESSION CERTIFICATE ACT.

——— costs of—

See HINDU LAW—LEGAL NECESSITY. I. L. R. 36 Calc. 753

SUCCESSION CERTIFICATE ACT (VII OF 1889).

See APPEAL—CERTIFICATE OF ADMINISTRATION (ACT VII OF 1889).

See BOMBAY CIVIL COURTS ACT, s. 16. I. L. R. 16 Bom. 277

See CERTIFICATE OF ADMINISTRATION—ACT VII OF 1889.

See IMPARTIBLE ESTATE. I. L. R. 30 Mad. 454

See RIGHT OF SUIT . 13 C. W. N. 509

1. ——— Succession Certificate Act (VII of 1889), object of.—*Succession certificate*—The object of the Succession Certificate Act (VII of 1889) is to obtain the appointment of some one to give a legal discharge to debtors to the estate for the debts due, and not to have nice and intricate questions of law as to the rights of parties to the estate of the deceased decided on an application under it. GUNINDRA PROSAD *v.* JUGMALA BIBI (1903) . I. L. R. 30 Calc. 581

2. ——— *Enquiry under the Act—Debts, existence of—Payment of money due into Court—Certificate in respect of the money so paid—Practice.* The Succession Certificate Act (VII of 1889) is intended for the protection of debtors, but this only means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act or is compelled by the decree of a Court to pay it to that person, he is lawfully discharged. There is nothing in the Act which either expressly or by necessary implication requires the Court granting a certificate to hold an enquiry into the existence of any debt alleged by the person applying to be due as a preliminary condition of the grant. The Court has merely to ascertain the representative title of the applicant for the certificate and not the existence or non-existence of the debt. The fact that the amount of the debt to recover which a certificate is applied for is paid into Court does not extinguish the debt or affect the necessity of taking out the certificate under the Succession Certificate Act (VII of 1889). BAI KASHI *v.* PARBHU KEVAL (1904) . I. L. R. 28 Bom. 119

3. ——— Village Courts Act (Mad. Act I of 1889). The provisions of the Succession Certificate Act apply to suits in a Village Munsif. Court. RASIBI AMMAL *v.* OLAGA PADAYACHI I. L. R. 21 Mad. 115

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SUCCESSION CERTIFICATE ACT (VII OF 1889)—*contd.*

——— ss. 1 (*4*), 7 (*3*)—*Certificate of succession—Grant of certificate opposed by party setting up a will—Procedure—Hindu law.* The widow of a deceased Hindu applied for a certificate of succession under Act No. VII of 1889. In opposition to this application an alleged will of the deceased was set up, and it was proved that the deceased, being of sufficient testamentary capacity, had, shortly before his death caused a draft will to be prepared, that he had had the draft read to him twice and explained to him, that he made it over to a person appointed a trustee under the will telling him to have it faired out and brought to him for signature, but that he died before this was done without having expressed any intention, except in one small particular, of wishing to alter the draft so made. The Court below found in favour of the will and dismissed the application for a certificate. *Held*, on appeal, that, although the lower court ought not to have tried any question beyond that of the existence of the will, as the conclusion that the deceased had made a will in the terms alleged by the objectors was justified by the evidence, the application for a certificate was rightly dismissed. JANKI *v.* KALLU MAL (1908) **I. L. R. 31 All. 236**

——— ss. 3 (*2*), 8 and 9—*Grant of certificate—Order to file security—Practice.* Where a Judge acting under s. 9 of the Succession Certificate Act requires security to be furnished by a person to whom a certificate of succession is granted, the amount of the security should be specified in the order and a time should be prescribed within which the security must be furnished. *Semble* : That s. 8 of the Act cannot be applied to the case of the fixed deposit in a bank, such not being a security within the meaning of s. 3 (*2*). GULRAJI KUNWARI *v.* JAGDEO PRASAD (1906) . **I. L. R. 28 All. 477**

——— s. 4—

See DEBT . **I. L. R. 36 Calc. 936**

See DECREE EX PARTE. **I. L. R. 35 Calc. 767**

See LIMITATION ACT, 1877, SCH. II, ART. 179—NATURE OF APPLICATION—GENERALLY **I. L. R. 20 Calc. 755**
I. L. R. 20 Bom. 76

See PARTIES—PARTIES TO SUITS—PARTNERSHIP, SUITS CONCERNING. **I. L. R. 18 Calc. 86**

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 622. **I. L. R. 16 Mad. 454**

1. ——— *Certificate not necessary in so far as the decree is made enforceable against mortgaged property, but necessary so far as the decree imposes personal liability.* A decree for the enforcement of a mortgagee's rights as against the mortgaged property is not a decree for a "debt" within the meaning of s. 4 of Act VII of 1889 ; but it would be otherwise with reference to

SUCCESSION CERTIFICATE ACT (VII OF 1889)—*contd.*

——— s. 4—*concld.*

personal decree for the debt, and a certificate will be a condition precedent to such a personal decree. *Fateh Chand* v. *Muhammad Bakhsh, I. L. R. 16 All. 259*, not followed. PALANIYANDI PILLAI *v.* VEERAMMAL (1905) . **I. L. R. 29 Mad. 77**

2. ——— *Certificate—Personal decree—Suit for sale on a mortgage.* S. 4 of the Succession Certificate Act (VII of 1889) limits the necessity of a certificate under the Act to those suits in which the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt "and does not apply to a suit for a sale on a mortgage." *Kanchan Modi* v. *Baij Nath Singh, I. L. R. 9 Calc. 336 ; Baid Nath Das* v. *Shamanand Das, I. L. R. 22 Calc. 143*, and *Mohomed Yusuf* v *Abdur Rohim, I. L. R. 26 Calc. 839*, followed. *Fateh Chand* v. *Muhamad Bakhsh, I. L. R. 16 All. 259*, not followed. *Santaji Khanderao* v. *Raoji, I. L. R. 15 Bom. 105*, distinguished. NANCHAND *v.* YENAWA (1904) **I. L. R. 28 Bom. 630**

3. ——— *Application by heir of mortgagee for supplementary decree—Succession certificate, if necessary—"Debt"—Transfer of Property Act (IV of 1882), s. 90.* Where after a preliminary decree had been made in a mortgage suit, the mortgagee died, and his sons got themselves substituted on the record and an order absolute was made in their favour, but the proceeds of the sale of the mortgaged property proving insufficient, they applied for a personal decree for the balance under s. 90 of the Transfer of Property Act : *Held* (on a review of the authorities), that until the applicants obtained a certificate under the Succession Certificate Act no such decree could be made in their favour. SAHADEV SUKUL *v.* SAKHAWAT HOSSEIN (1907) . **12 C. W. N. 145**

——— s. 4 (*1*) (a)—

See LIMITATION . **I. L. R. 32 Calc. 126**

See SUCCESSION CERTIFICATE. **I. L. R. 32 Calc. 418**

——— s. 4 (*1*) (a)—*Suit for account—Debt, recovery of.* A suit for account is not a suit for the recovery of a debt within the meaning of s. 4 of the Succession Certificate Act. The plaintiff, as heir of a deceased person, sued the defendant, who was the latter's agent, for an account. *Held*, that he was entitled to judgment against the defendant for an account without producing a succession certificate. *Sabju Sahib* v. *Noordin Sahib, I. L. R. 22 Mad. 139*, referred to. BISSESWAR ROY *v.* DURGADAS MEHARA (1905) . **I. L. R. 32 Calc. 418**

——— s. 5—*Succession certificate not to be questioned by any Court in subsequent proceedings based thereon.* Where a certificate of succession had been granted by a Court empowered under Act VII of 1889 to grant such certificate, it is not open to a Court, before which such succession certificate is produced as authority to collect the debt entered therein to question the right of the Court,

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SUCCESSION CERTIFICATE ACT (VII OF 1889)—*contd.*

——— s. 5—*concld.*

which granted the certificate. DURGA DAS *v.* GULLU (1905) . . . . **I. L. R. 27 All. 87**

——— s. 6—

See HINDU LAW . **I. L. R. 35 Calc. 631**

——— s. 6, cl. (d)—*Guardian and Wards Act (VIII of 1890), s. 27—Minor—Guardian—Succession certificate.* A certificate under the Succession Certificate Act (VII of 1889) can be granted to the guardian of a minor. *Gulabchand Gumnaji* v. *Moti Chotraji, I. L. R. 25 Bom. 523,* distinguished. *Ex parte* MAHADEO GANGADHAR (1904) **I. L. R. 28 Bom. 344**

——— ss. 6, 7 and 9—*Summary proceedings—Questions of disputed adoption not to be determined in such proceeding—Security—Guardians right to certificate on behalf of the minor—Guardian and ward—Minor—Practice—Procedure.* Questions arising under the Succession Certificate Act (VII of 1889) are to be determined by a summary proceeding, *i.e.*, by a short inquiry leading up to and resulting in a rapid decision, in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit. The nature of the inquiry must depend on the circumstances of each case. An application by a guardian of a minor is not contemplated by s. 6, cl. (*d*), of Act VII of 1889, which only permits the petitioner, who claims the right for himself, to apply. Where on an application for a certificate under the Succession Certificate Act (VII of 1889), s. 6, questions of adoption affecting the right to the certificate were raised, which could not be summarily disposed of : *Held*, that the Judge ought to have decided the *primâ facie* right of the applicant under cl. 3 or cl. 4 of s. 7 of the Act, without waiting to decide the issue raised as to the adoption. GULABCHAND GAMNAJI *v.* MOTI CHATRAJI (1900) . . **I. L. R. 25 Bom. 523**

——— s. 7—

1. ——— *Nature of inquiry—Summary inquiry—Civil Procedure Code (Act XIV of 1882), s. 141.* There must be an inquiry before a certificate is granted under the Succession Certificate Act ; but the inquiry is to be a summary one ; and, when a Judge has legal evidence before him on which he comes to a proper conclusion, his proceedings cannot be set aside because they seem not to have been of a very protracted nature. Such a decision does not in any way bar the rights of the parties, nor does it establish the right of the party to the debt to collect which the certificate is granted. *Hurri Krishna Panda* v. *Balabhadra Panda, I. L. R. 23 Calc. 431 ; Radha Rani Dassi* v. *Brindabun Chundra Bosack, I. L. R. 25 Calc. 320 ; Sivamma* v. *Subbamma, I. L. R. 17 Mad. 477 ; Dharmaya Sangappa* v. *Sayana Malapa, I. L. R. 21 Bom. 53,* referred to. JIGRI BEGUM *v.* SYED ALI NAWAB (1901) . . **5 C. W. N. 494**

SUCCESSION CERTIFICATE ACT (VII OF 1889)—*contd.*

——— s. 7—*concld.*

2. ——— *Succession certificate—Certificate, right to—Title.* In a proceeding under s. 7 of the Succession Certificate Act (VII of 1889) the Court is bound to decide, though in a summary manner, the question as to the right to the certificate, especially when there is a conflict between two parties. *Raghu Nath Misser* v. *Pate Koer, 6 C. W. N. 345,* distinguished. *Hurri Krishna Panda* v. *Balabhadra Panda, I. L. R. 23 Calc. 431,* approved of. BASANTA LAL *v.* PARBATI KOER (1904) . . . . **I. L. R. 31 Calc. 133 s.c. 8 C. W. N. 51**

3. ——— s. 7 (*3*)—*Application for certificate to collect debts—Objection as to status of family of deceased—Inquiry necessary.* Where, on an application for a certificate to collect debts due to a deceased person made by the widow, an objection was filed by a nephew of the deceased that he and the deceased were members of a joint Hindu family and therefore no certificate could be granted to the widow ; it was *held* that the Court was bound to make some inquiry, not necessarily an exhaustive one, into the facts set up by the objector, and was not warranted in passing an order granting a certificate without making any inquiry at all. BALMAKUND *v.* KUNDAN KUNWAR (1905) **I. L. R. 27 All. 452**

——— s. 9—

See ante, SS. 6, 7 AND 9.

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, S. 622. **I. L. R. 19 Bom. 790**

1. ——— ss. 9 and 19—*Order granting certificate conditionally on the giving of security by the applicant—Appeal.* When on an application for the grant of a certificate of succession under s. 7 of Act VII of 1889, the Court passes an order conditioned on the previous filing of security, such an order is not an order " granting, refusing or revoking a certificate within the meaning of s. 19 of the Act, and no appeal will lie therefrom." *Bhagwani* v. *Manni Lal, I. L. R. 13 All. 214,* and *Bai Devkore* v. *Lalchand Jibandas, I. L. R. 19 Bom. 790,* followed. *Venkatasami Naik* v. *Chinna Narayana Naik, 5 Mad. L. J. 28 ; Arya Pillai* v. *Thangammal, I. L. R. 20 Mad. 442 ;* and *Radha Rani Dassi* v. *Brindabun Chundra Basak, I. L. R. 25 Calc. 320,* referred to. NANNHU MAL *v.* GULABO (1904) **I. L. R. 26 All. 173**

2. ——— *S. 3 of Act XXIV of 1839 and rule X of rules framed thereunder—General Clauses Act of 1868, s. 2 (12)—Agent to the Governor, Vizagapatam, is a District Judge within s. 19 of the Succession Certificate Act and an appeal lies to the High Court against his order—Scope of inquiry in proceedings under Succession Certificate Act.* S. 2 (*12*) of the General Clauses Act of 1868 defines a District Judge as the Judge of a Principal Civil Court of Original Jurisdiction.

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SUCCESSION CERTIFICATE ACT (VII OF 1889)—*concld.*

——— **s. 9—*concld.***

Under s. 3 of Act XXIV of 1839 and rule X of the rules framed thereunder, the Agent is the Judge of the Principal Court of Civil Jurisdiction within the Agency. The Agent is therefore a District Judge within the definition in s. 2 (*12*) of the General Clauses Act of 1868. The General Clauses Act of 1868 was in force in 1889, when the Succession Certificate Act was passed and the Agent to the Governor, Vizagapatam, is a District Judge and the Court presided over by him is a District Court as defined in s. 9 of the Succession Certificate Act. An appeal therefore lies to the High Court under s. 19 of the Succession Certificate Act from the order of the agent as from an order of the District Court. *Chakrapani* v. *Varahalamma, I. L. R. 18 Mad. 227*, not followed. In inquiries under the Succession Certificate Act, the Court may decline to decide points which will involve a lengthy and complicated inquiry. BABUBALENDRUNI GURUVARAJUN *v.* CHANDRASEKARARAJU (1908)
I. L. R. 31 Mad. 362

——— **ss. 10, 19—**

See APPEAL—CERTIFICATE OF ADMINISTRATION . I. L. R. 25 Mad. 634

——— **s. 17—**

See COURT FEES ACT, 1870, s. 26.
I. L. R. 19 Bom. 145

——— **s. 19—**

See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL.
I. L. R. 17 Mad. 167

——— **s. 26—**

See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL.
I. L. R. 17 Mad. 167

See SUBORDINATE JUDGE, JURISDICTION OF . . I. L. R. 17 Bom. 230

SUCCESSION (PROPERTY PROTECTION) ACT, 1841.

See ACT—1841—XIX.

See HINDU LAW—INHERITANCE.
I. L. R. 34 Calc. 929

SUDDER COURT.

——— **Meaning of term—*Act VIII of 1842—Criminal Procedure Code, 1861, s. 19.*** Meaning of the term "Sudder Court" as defined by Act VIII of 1842 and by s. 19 of the Criminal Procedure Code. REG. *v.* VYANKATASVAMI
2 Bom. 2nd Ed. 106

"SUDDER KHAJANA."

——— **Meaning of term.** The words "sudder khajana" do not necessarily mean a rental payable to Government, but may mean a rental payable to the zamindar. KALEE TARA DABIA *v.* NITTIANUND SHAHA . . . . . 12 W. R. 90

SUDRAS.

See HINDU LAW—ADOPTION—REQUISITES FOR ADOPTION—CEREMONIES.

See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT BE ADOPTED.
W. R. 1864, 133
I. L. R. 1 Mad. 62
I. L. R. 3 Calc. 443
I. L. R. 6 Mad. 43
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7 Bom. Ap. 26
8 Bom. A. C. 67
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I. L. R. 10 Calc. 688

See HINDU LAW—

INHERITANCE—ILLEGITIMATE CHILDREN.

See HINDU LAW—INHERITANCE—JOINT PROPERTY AND SURVIVORSHIP.
I. L. R. 4 Bom. 37
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See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—ILLEGITIMATE CHILDREN . . 3 B. L. R. P. C. 1
13 Moo. I. A. 141
2 B. L. R. P. C. 15
5 Mad. 405
I. L. R. 8 Mad. 325; 557
I. L. R. 1 Mad. 306

See HINDU LAW—MARRIAGE—VALIDITY OR OTHERWISE OF MARRIAGE—INTERMARRIAGE . 3 B. L. R. P. C. 1
13 Moo. I. A. 141
I. L. R. 1 Calc. 1
I. L. R. 15 Calc. 708
I. L. R. 33 Bom. 693

See HINDU LAW—PARTITION—RIGHT TO PARTITION—ILLEGITIMATE CHILDREN.
I. L. R. 12 Mad. 401
I. L. R. 25 Mad. 429

SUFFICIENT CAUSE.

See DISMISSAL FOR DEFAULT.
11 C. W. N. 430

SUICIDE.

See ABATEMENT . . 1 Agra Cr. 21
3 N. W. 316

See ENGLISH LAW—SUICIDE.
1 W. R. P. C. 14: 9 Moo. I. A. 387

——— **Attempt to commit suicide—*Penal Code, s. 309—Intention—Locus pœnitentiæ.*** *R*, with the intention of committing suicide by throwing herself into a well, ran to the well, where she was arrested. She was convicted under s. 309 of the Penal Code of having attempted to commit suicide. *Held*, that the conviction was illegal. QUEEN-EMPRESS *v.* RAMAKKA
I. L. R. 8 Mad. 5

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SUIT.

See ABATEMENT OF SUIT.

See ADMINISTRATION BOND.
I. L. R. 33 Calc. 713

See ATTACHMENT.
I. L. R. 33 Calc. 639

See BENAMIDAR . I. L. R. 35 Calc. 551

See BENGAL RENT ACT, 1869, s. 101.
6 B. L. R. 569

See BENGAL RENT ACT, 1869, s. 102.
19 W. R. 307
23 W. R. 207

See BENGAL TENANCY ACT (VIII OF 1885), ss. 91, 106, 153, 167.

See BROACH ENCUMBERED ESTATES ACT, s. 19 . . I. L. R. 5 Bom. 448

See CIVIL PROCEDURE CODE, 1882, ss. 11, 13, 30, 43, 373, 622.

See CIVIL PROCEDURE CODE, 1882, ss. 373, 374 . I. L. R. 29 Bom. 219

See CIVIL PROCEDURE CODE, 1882, s. 424.
I. L. R. 26 All. 220

See CONTRIBUTION, SUIT FOR.

See COURT FEES ACT, 1870, s. 11.
I. L. R. 24 Calc. 173

See COURT OF WARDS ACT, 1879, s. 20.
I. L. R. 18 Calc. 500

See DEKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 44.
I. L. R. 30 Bom. 101

See DISMISSAL OF SUIT.

See EJECTMENT, SUIT FOR.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWER OF COURT . . I. L. R. 18 Calc. 635
I. L. R. 12 All. 392

See EXECUTRIX . I. L. R. 35 Calc. 1100

See GRANT . I. L. R. 35 Calc. 478

See JURISDICTION . I. L. R. 31 Mad. 86

See JURISDICTION—SUITS FOR LAND.

See LIMITATION ACT (XV OF 1877), s. 14.
I. L. R. 35 Calc. 924

See LIMITATION ACT, 1877, s. 14 (1871, s. 15) . . . . 3 Agra 39
I. L. R. 1 All. 97

See LIMITATION ACT, 1877, s. 22.
I. L. R. 35 Calc. 1065

See LIMITATION ACT, 1877, SCH. II, ART. 84 (1871, ART. 85).
I. L. R. 1 Bom. 253
I. L. R. 22 Calc. 943

See LIMITATION ACT, 1877, SCH. II, ART. 179 (1871, ART. 167)—PERIOD FROM WHICH LIMITATION RUNS—WHERE PREVIOUS APPLICATION HAS BEEN MADE.
I. L. R. 2 Calc. 336

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See MINOR—REPRESENTATION OF MINOR IN SUITS.

See PARTIES.
I. L. R. 35 Calc. 182; 519

See PAUPER SUIT.

See PENSIONS ACT, s. 4.
I. L. R. 16 Bom. 731

See PRACTICE—CIVIL CASES—OPENING CASE FOR DEPENDANT.
I. L. R. 29 Calc. 32

See RAILWAYS ACT, ss. 77 AND 80.
I. L. R. 26 All. 207

See RES JUDICATA—ADJUDICATIONS.
I. L. R. 3 Calc. 340

See RIGHT OF SUIT.

See TRESPASS . I. L. R. 36 Calc. 28

See VALUATION OF SUIT.

——— abatement of—

See ABATEMENT OF SUIT.

——— adjustment of—

See ARBITRATION—REFERENCE OR SUBMISSION TO ARBITRATION.
7 C. W. N. 180

——— against public officer—

See CIVIL PROCEDURE CODE, 1882, s. 424
I. L. R. 29 All. 567

——— by or against Receiver—

See RECEIVER. I. L. R. 30 Calc. 593

——— by mortgagee for possession—

See TRANSFER OF PROPERTY ACT, ss. 67, 111, 116. . I. L. R. 31 All. 318

——— change in form of—

See PLAINT—AMENDMENT OF PLAINT.

See VARIANCE BETWEEN PLEADING AND PROOF.

——— civil and political—

See PRIVY COUNCIL.
I. L. R. 33 Calc. 219

——— for adjustment of accounts—

See APPEAL . I. L. R. 29 All. 730

——— for administration—

See HINDU LAW—REVERSIONERS, ADMINISTRATION SUIT BY.
I. L. R. 29 Calc. 260

See LETTERS PATENT, HIGH COURTS, 1865, CL. 12 . I. L. R. 29 Calc. 315

——— for administration of trust—

See CIVIL PROCEDURE CODE, s. 539.
I. L. R. 33 Calc. 789

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SUIT—*contd.*

——— for arrears of maintenance—

See MAINTENANCE I. L. R. 33 Bom. 50

——— for compensation—

See ATTACHMENT BEFORE JUDGMENT. I. L. R. 29 All. 615

——— for declaration of title—

See LIMITATION ACT, 1877, SCH. II, ART. 120 . . . I. L. R. 31 All. 9

——— for declaration of right to officiate in hereditary office—

See JURISDICTION OF CIVIL COURT—OFFICES, RIGHT TO.

See RIGHT OF SUIT—OFFICE OR EMOLUMENT.

——— for a declaratory decree—

See SPECIFIC RELIEF ACT, S. 42; PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ARTS. 13 AND 31; LIMITATION ACT, 1877, S. 20, SCH. II, ART. 148, ARTS. 110 AND 116.
I. L. R. 26 All. 138; 167; 215; 358; 382; 606

——— for false imprisonment—

See FALSE IMPRISONMENT. I. L. R. 30 Calc. 872

——— for land—

See JURISDICTION—SUITS FOR LAND.

——— for money charged on immoveable property—

See LIMITATION ACT, 1877, SCH. II, ART. 132.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—MONEY-DECREES ON MORTGAGES.

——— for money deposited on current account—

See LIMITATION ACT (XV OF 1877), SS. 19, 20; SCH. II, ARTS. 59 AND 60. I. L. R. 29 All. 773

——— for partition of immoveable property—

See CIVIL PROCEDURE CODE, 1882, S. 396. I. L. R. 28 All. 75

See CONTENTIOUS SUIT. I. L. R. 33 Calc. 658

——— for possession—

See LIMITATION ACT, 1877, SCH. II, ART. 14 . . I. L. R. 29 Calc. 367

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES. I. L. R. 29 Calc. 682

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——— for possession by judgment-debtor—

See CIVIL PROCEDURE CODE, 1882, SS. 244, 583 . I. L. R. 31 All. 364

——— for possession of immoveable property—

See LIMITATION . I. L. R. 30 Mad. 308

See SPECIFIC RELIEF ACT, 1877, S. 42. I. L. R. 31 All. 241

——— for profits—

See LAMBARDAR AND CO-SHARER. I. L. R. 29 All. 287

See AGRA TENANCY ACT, II OF 1901, S. 201 (*3*) . I. L. R. 31 All. 253; 257

——— for recovery of joint possession—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 539.

See COURT-FEES ACT, 1870, SCH. II, ART. 17 . . I. L. R. 31 Calc. 511

See JOINT PROPERTY, CIVIL PROCEDURE CODE, 1882, S. 539. I. L. R. 26 All. 162; 588

See MALICIOUS PROSECUTION. I. L. R. 31 Calc. 406

See SPECIFIC PERFORMANCE, VALUATION OF SUIT, APPEAL, HINDU LAW. I. L. R. 31 Calc. 262; 355; 487; 584

——— for redemption—

See MORTGAGE, BY CONDITIONAL SALE. I. L. R. 31 All. 300

——— for rent in deposit—

See BENGAL TENANCY ACT, S. 149. 11 C. W. N. 380

——— for restitution of conjugal rights—

See ACT XII OF 1887, SS. 15, 18 AND 19. I. L. R. 33 Calc. 545

See RESTITUTION OF CONJUGAL RIGHTS.

——— for share of fees—

See JURISDICTION OF CIVIL COURT—FEES AND COLLECTIONS AT SHRINES.

See RIGHT OF SUIT—OFFICE OR EMOLUMENT.

——— for turn of worship of idol—

See LIMITATION ACT, 1877, SCH. II, ART. 131 . 6 B. L. R. 352: 15 W. R. 29 I. L. R. 4 Calc. 683 I. L. R. 8 Calc. 807: 10 C. L. R. 439

——— for wrongful removal of attached property—

See ATTACHMENT, EFFECT OF. I. L. R. 30 Mad. 207

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——— in formâ pauperis—

See PAUPER SUIT.

——— institution of—

See LIMITATION ACT, 1877, s. 4.

——— liability of sons in suit by father—

See HINDU LAW . I. L. R. 31 All. 176

——— maintainability of, in Civil Court—

See U. P. LAND REVENUE ACT, III OF 1901, s. 233 (*k*) . I. L. R. 31 All. 541

——— on bond—

See CONTRACT ACT, s. 16. I. L. R. 31 All. 386

——— restoration of—

See CIVIL PROCEDURE CODE, 1882, ss. 98, 99, AND 100.

——— revival of—

See ABATEMENT OF SUIT—SUITS. I. L. R. 5 Calc. 139

See LIMITATION ACT, 1877, SCH. II, ARTS. 171, 171A, 171B.

See LIMITATION ACT, 1877, SCH. II, ART. 178 . . . I. L. R. 6 Calc. 60
I. L. R. 8 Calc. 420
I. L. R. 5 Calc. 139
I. L. R. 5 Bom. 29

See PARTIES—SUBSTITUTION OF PARTIES.

——— title of—

See HIGH COURT, JURISDICTION OF—CALCUTTA—CIVIL. 2 Ind. Jur. N. S. 245

See PRACTICE—CIVIL CASES—PARTIES. I. L. R. 22 Calc. 270

——— to enforce registration—

See REGISTRATION ACT (III OF 1877), s. 21 . . . I. L. R. 31 All. 52

See REGISTRATION ACT (III OF 1877), s. 77 . . I. L. R. 30 Calc. 532

——— to recover possession of immovable property—

See DOCUMENT . I. L. R. 30 Calc. 433

——— to recover surplus sale proceeds—

See LIMITATION ACT, 1877, SCH. II, ART. 29 . I. L. R. 30 Calc. 440

——— to set aside compromise—

See MINOR . . I. L. R. 34 Calc. 83

——— to set aside sale—

See NOTICE . . I. L. R. 34 Calc. 787

SUIT—*contd.*

——— valuation of—

See SUITS VALUATION ACT (VII OF 1887) s. 8 . . . . I. L. R. 31 All. 44

——— withdrawal of—

See WITHDRAWAL OF SUIT.

1. ——— **Notice of revival.** Before a suit can be revived, notice should be served upon the opposite party to appear in support of the decree as originally made. HURO MOHUN MOOKERJEE *v.* MOHENDRO NATH GHOSE 16 W. R. 135

2. ——— **Right to revive suit**—*Act LIII of 1860, s. 2—Civil Procedure Code, 1859, s. 378*, S. 2, Act LIII of 1860, referred to appeals and also to suits, and as the suit of the special appellant, which had been decreed in the Court of first instance, was dismissed by the lower appellate Court, the special appellant was *held* entitled to a revival of his suit. S. 378, Act VIII of 1859, refers to applications for review of judgment, but this was an application for revival of the suit under s. 2, Act LIII of 1860. BUNGSHEEDUR MUNDUL *v.* PUDDO LOCHUN ROY . . W. R. F. B. 11
1 Ind. Jur. O. S. 5 : Marsh. 38 : 1 Hay 90

3. ——— **Revival of suit by successor of Judge**—*Ex parte decree—Act X of 1859, s. 58.* Where defendants against whom an *ex parte* decree has been passed by a Collector applied to his successor under s. 58, Act X of 1859, for a revival of the suit, showing good and sufficient cause for that their non-appearance, and there had been a failure of justice, the successor was competent to alter or rescind his predecessor's decree according to the justice of the case. RUGHOO MOHINEE DOSSEE *v.* KASHEE NATH ROY CHOWDHRY KASHI NATH ROY CHOWDHRY *v.* SHABITREE SOONDUREE DOSSEE . . 10 W. R. 156

4. ——— **Effect of revival**—*Act X of 1859, s. 58.* The revival of a suit under s. 58, Act X of 1859, did not reopen the case as regards all the defendants, but only as regards the party who had applied to have his particular case revived and heard on the merits. BROJONATH SURMAH CHUCKERBUTTY *v.* ANUND MOYEE DEBIA CHOWDHRAIN . . . . 7 W. R. 237

5. ——— **Form of order for revival**—*Abatement—Civil Procedure Code (Act XIV of 1882), ss. 365, 366, 371.* The plaintiff died on the 28th August 1883, and in December 1884 letters of administration to his estate was granted to the Administrator-General. The defendant died in June 1884, leaving a widow and one son him surviving. By his will he appointed two executors. On the 3rd February 1885 the Administrator-General took out a summons to revive the suit. *Held*, that, notwithstanding the provisions of s. 365 of the Civil Procedure Code (XIV of 1882) and of the Limitation Act XV of 1877, it was competent for a Judge in chambers to revive the suit by making an order for abatement under s. 366 of the Code, coupled with an order under

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SUIT—*contd.*

s. 371 setting aside the order for abatement. FULVAHU *v.* GOCULDAS VALLABHDAS
I. L. R. 9 Bom. 275

6. ——— **Mode of revival**—*Revival by Bill—Civil Procedure Code, 1877.* There is nothing in the Civil Procedure Code to prevent a suit being revised as before it was passed by Bill, if the simpler mode of proceeding is for any reason not available. ATTERMONEY DOSSEE *v.* HURRY DOSS DUTT **I. L. R. 7 Calc. 74: 9 C. L. R. 357**

7. ——— **Suit for possession—Limitation**—*Non-occupancy raiyat—Specific Relief Act (I of 1877), s. 9—Limitation Act (XV of 1877), Art. 120 and Art. 142. Held,* by the Full Bench (Prinsep, *J.*, dissenting), that the period of limitation applicable to the case of a non-occupancy raiyat, who has been dispossessed from his holding, otherwise than in execution of a decree, is either six or twelve years as provided for in Art. 120 or 142 of the Limitation Act (XV of 1877). The remedy indicated in s. 9 of the Specific Relief Act (I of 1877) is not the only remedy which the Legislature has provided for a non-occupancy raiyat, who has been dispossessed otherwise than in due course of law. *Bhagabati Charan Roy* v. *Luton Mondul, 7 C. W. N. 218,* overruled. TAMIZUDDIN *v.* ASHRUB ALI (1904)
I. L. R. 31 Calc. 647

8. ——— **Restoration of suit—Limitation**—*Dismissal of suit—Adjournment—Civil Procedure Code (Act XIV of 1882), ss. 120, 103, 155—Limitation Act (XV of 1877), Sch. II, Art. 163—Notice of motion—"Sufficient cause"—Practice.* Where a suit is dismissed for want of prosecution an application for its restoration must be made within 30 days of such dismissal; and a notice that the application would be made on a future date does not prevent limitation from running. *Khetter Mohan Sing* v. *Kissy Nath Sett, I. L. R. 20 Calc. 899.* Where the long vacation intervenes to save limitation, the matter must be mentioned on the first day after the re-opening of the Court—that is, the first day on which the Court sits. *Semble:* An appearance by counsel on the calling on of a case merely to ask for an adjournment is not such an appearance in the suit as will necessarily render ss. 102 and 103 of the Civil Procedure Code inapplicable. HINGA BIBEE *v.* MUNNA BIBEE (1904)
I. L. R. 31 Calc. 150
s.c. 8 C. W. N. 97

9. ——— **Public road—Right of owner of soil**—*Right of suit—Parties—Civil Procedure Code (Act XIV of 1882), s. 30—Right of way—Tort—Damages—Injunction—Minor—Cause of action.* Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to exercise all rights of ownership so as not to interfere with the right of way, which exists in the public. *Vestry of St. Mary Newington* v. *Jacobs, L. R. Q. B. 47,* referred to. When the owner of such soil is responsible for keeping the road in order and in

SUIT—*contd.*

good repair, he is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road without proving special damage. A minor is not responsible for a tort committed by the manager of his estate, provided the tortious act was not in connection with the management of the estate. MAHARAJ BAHADUR SINGH *v.* PARESH NATH SINGH (1904) . . **I. L. R. 31 Calc. 839**

10. ——— **Set-off**—*Maintainability of suit—Civil Procedure Code (Act XIV of 1882), ss. 43, 111—Previous suit—Omission to claim set-off in the previous suit in respect of the sum due—Effect of such omission—Cross suit.* In a previous suit brought by *A*, against *B*, the latter had claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts between the parties, and had omitted to claim a set-off in respect of the remainder. In a subsequent suit brought by *B* against *A* for the remainder, the defence was that the suit was not maintainable. *Held,* that *B* having claimed a set-off in respect of part of the cause of action in the previous suit brought against him, was debarred under s. 43 of the Civil Procedure Code from bringing this suit. NAWBUT PATTAK *v.* MAHESH NARAYUN LAL (1905) **I. L. R. 32 Calc. 654**

11. ——— **Suit for costs incurred in Criminal Court**—*Damages.* A suit will not lie to recover the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court. *Fazal Imam* v. *Fazal Rasul, I. L. R. 12 All. 166,* approved. CHURAMONI DASI *v.* BAIDYA NATH NAIK (1905)
I. L. R. 32 Calc. 429

12. ——— **Partition suit**—*Decree based on an agreement—Appeal by plaintiff—Application for withdrawal of suit—Decree dismissing appeal—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 373 and 582. Held,* that when in a partition suit defendants have by concession of the plaintiff acquired rights, which otherwise could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect by withdrawing from the suit in the Appellate Court. SATYABHAMABAI *v.* GANESH BALKRISHNA (1905)
I. L. R. 29 Bom. 13

13. ——— **Withdrawal from suit**—*Suit—Omission of part of claim—Fresh suit for claim omitted, if barred—Leave to withdraw on condition—Non-fulfilment of condition—Effect.* If a plaintiff withdraws from a suit without the leave of the Court, s. 43 of the Civil Procedure Code is a bar to his instituting a fresh suit in respect of any portion of the claim, which he may have omitted to include in his previous suit. The same consequences follow when a plaintiff is allowed to withdraw with liberty to bring a fresh suit on condition of paying the defendant's costs within a certain time and fails to pay such costs within that time. HARE NATH DAS *v.* HOSSAIN ALI (1905) . . . **10 C. W. N. 8**

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SUIT—*concld.*

14. ——— **Right of suit**—*Parties.* S. 315 of the Civil Procedure Code is only an enabling section and not prohibitive of an independent action in a Civil Court. A suit was brought by an auction purchaser for the recovery of purchase-money from the decree-holder, who had received it, on the ground that the judgment-debtor had no title to the property sold. *Held*, that the suit was not barred by the provisions of s. 315 of the Civil Procedure Code. That the judgment-debtor was not a necessary party. SURENDRA NATH GHOSE *v.* BENI MADHAB MISRA (1905) **10 C. W. N. 274**

15. ——— **Suit against two defendants—Decree against one**—*Appeal by defendant made liable—No appeal against the other defendant—Appellate Court's finding against the defendant against whom the suit was dismissed.* A suit for money was instituted against *A* and *K*. The Court of first instance held that *A* was liable and dismissed the suit against *K*. *A* appealed, but did not make *K* a party to it. The lower Appellate Court found that *K* was liable and not *A*, and decreed *A's* appeal. *Held*, that no decree could be passed against *K*, as the plaintiff had allowed the decree of the Court of first instance dismissing his suit against *K* to become final. NIZAM-UD-DIN *v.* ABDUL AZIZ (1909) **I. L. R. 31 All. 521**

16. ——— **Suit for damages against joint tort-feasors**—*Compromise between plaintiff and one of the defendants—Such compromise no bar to a decree against the other defendants.* The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held*, that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. *Brinsmead* v. *Harrison*, *7 Sc. & L. 547*, and *Thurman* v. *Wild*, *11 A. & E. 453*, referred to. RAM KUMAR SINGH *v.* ALI HUSSAIN (1909) . . **I. L. R. 31 All. 173**

SUIT IN FORMA PAUPERIS.

See PAUPER SUIT.

SUITS VALUATION ACT (VII OF 1887)

See VALUATION OF SUIT.

See BENGAL, NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT (XII OF 1887), s. 21. **I. L. R. 31 Calc. 365 ; 849**

See COURT FEES ACT, 1870, s. 7, cl. (iv) (*b*), cl. (*v*) . **I. L. R. 33 Bom. 658**

See RESTITUTION OF CONJUGAL RIGHTS **I. L. R. 31 Calc. 849**

——— **ss. 2, 11**—*Restitution of conjugal rights—Jurisdiction of Munsiff—Valuations of suit—Mahomedan marriage, requirement of.* A suit for restitution of conjugal rights is not triable by a Munsif under s. 19, sub-s. (1), of Act (II of 1887, but is triable by a District Judge or a Subordinate Judge under s. 18 of that Act. *Matra Mondul* v. *Hari Mohun Mullick*, *I. L. R. 17 Calc. 155 ; Golam Rahman* v. *Fatima Bibi*, *I. L. R. 13 Calc. 239 ; Mowla Newaj* v. *Sajidunnessa Bibi*, *I. L. R. 18 Calc. 378 ;* and *Shiri* v. *Shiri*, *5 Moo. P. C. 81*, referred to. Where a Court of first instance exercised jurisdiction with respect to a suit by reason of an arbitrary valuation and no objection to jurisdiction was taken in that Court :—*Held*, that the suit ought not to be dismissed by an Appellate Court on the ground of want of jurisdiction, regard being had to s. 11 of the Suits Valuation Act. *Semble :* When a Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent convert it into a proper judicial process. *Ledgard* v. *Bull*, *I L. R. 9 All. 191 ; L. R. 13 I. A. 134 ; Munshi Naidor* v. *Subramaniya Sastri*, *I. L. R. 11 Mad. 26 ; L. R. 14 I. A. 160*, and *Raja Har Narain Singh* v. *Choudhurain Bhagwant Kuar*, *I. L. R. 13 All. 300 ; L. R. 18 I. A. 55*, referred to. The formal requirements of a valid Mahomedan marriage discussed. *Badal Aurat* v. *Queen-Empress*, *I. L. R. 19 Calc. 79*, referred to. AKLEMANESSA BIBI *v.* MAHOMED HERUN (1904) **I. L. R. 31 Calc. 849**

SUITS VALUATION ACT (VII OF 1887)—*contd.*

——— **s. 2**—*concld.*

——— **s. 8.**

See COURT-FEES ACT, 1870, s. 7, cl. (4) *b* and cl. *v.* **I. L. R. 33 Bom. 325**

See COURT-FEES ACT (VII of 1870), s. 7(4)*c* . **I. L. R. 31 Mad. 89**

See JURISDICTION. **I. L. R. 32 Calc. 734 13 C. W. N. 493**

See LIMITATION **I. L. R. 32 Calc. 716**

See MUNSIF, JURISDICTION OF. **I. L. R. 19 Mad. 56**

See PRINCIPAL AND AGENT. **I. L. R. 32 Calc. 719**

1. ——— **Suit for redemption of mortgage.**—*Court Fees Act, cl. (ix)—Valuation of suit. Held*, that the value for purposes of jurisdiction of a suit for redemption of mortgage is the amount of the principal mortgage money and not the value of the property mortgaged. *Kubair Singh* v. *Atma Ram*, *I. L. R. 5 All. 332*, and *Amanat Begam* v. *Bhajan Lal*, *I. L. R. 8 All. 438*, followed. The law as laid down in these cases has not been affected by the passing of Act No. VII of 1887, s. 8. KEDAR SINGH *v.* MATABADAL SINGH (1908) . . . . **I. L. R. 31 All. 44**

2. ——— **Suit for declaration and consequential relief**—*Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint.* In a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court fees and jurisdiction. *Hari Sanker Dutt* v. *Kali Kumar Patra*,

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SUITS VALUATION ACT (VII OF 1887) —*contd.*

——— s. 8—*concld.*

I. L. R. 32 Calc. 734, followed. *Dayaram* v. *Gordhandas*, *I. L. R. 31 Bom. 73*, distinguished. VACHHANI *v.* VACHHANI (1908).
I. L. R. 33 Bom. 307

3. ——— ss. 8, 11—*Court Fees Act* (*VII of 1870*), *s. 7, paras. iv, v, vi, ix and x, cl.* (*d*)—*Suit for a declaration with consequential relief—Valuation for the purpose of jurisdiction and for the fiscal purpose of Court-fees.* Though the valuation of suits for the purpose of jurisdiction is distinct from their valuation for the fiscal purpose of Court fees, still s. 8 of the Suits Valuation Act (VII of 1887) provides that when in suits other than those referred to in the Court Fees Act (VII of 1870), s. 7, paras. v, vi, ix and x, clause (*d*), *ad valorem* Court fees are payable, the value as determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same. *Per* RUSSELL, *Ag. C. J.*—The words "as determinable" in s. 6 of the Suits Valuation Act (VII of 1887) mean, as determinable by the Court which has to try the case. *Per* ASTON, *J.*—S. 4 of the Suits Valuation Act (VII of 1887) seems to indicate that the principle adopted by the Legislature for valuing a suit, mentioned in Sch. II, Art. 17, of the Court Fees Act (VII of 1870), which relates to land or an interest in land is that the value of such a suit for purposes of jurisdiction shall be governed by the value of the land or interest in land. It being nowhere enacted in the Act that where such value is not determined by rules made under s. 3, the value shall be such as the plaintiff chooses to adopt, I am of opinion that the value must be (where disputed) determined by judicial decision in the suit, such determination being subject to the provisions of s. 11 of the Suits Valuation Act (VI of 1887). DAYARAM *v.* GORDHAN DAS (1906). . . . **I. L. R. 31 Bom. 73**

——— s. 9, Rule 2—

See VALUATION OF SUIT.
I. L. R. 30 Mad. 18

——— ss. 9, 11.

See APPEAL, RESTITUTION OF CONJUGAL RIGHTS **I. L. R. 31 Calc. 344; 849**

——— ss. 9 and 21.

See ACT XII OF 1887, SS. 15, 18 AND 19.
I. L. R. 28 All. 545

See CIVIL COURTS ACT (XII of 1887).
I. L. R. 28 All. 545

See SUIT FOR RESTITUTION OF CONJUGAL RIGHTS . . **I. L. R. 28 All. 545**

——— s. 11.

See APPELLATE COURT—GENERAL DUTY OF APPELLATE COURT
I. L. R. 25 All. 174

See APPELLATE COURT—OBJECTIONS TAKEN FOR FIRST TIME ON APPEAL.
I. L. R. 18 Mad. 418

SUITS VALUATION ACT (VII OF 1887) —*concld.*

——— s. 11——*Refusal to hear application of appeal—Civil Procedure Code* (*Act XIV of 1882*), *ss. 557, 582, 588 cl.* (*6*), *622—Valuation of suit—Bengal, N.-W. P. and Assam Civil Courts Act* (*XII of 1887*), *s. 21, sub-s. 2—Jurisdiction.* No appeal lies against the order of an Appellate Court returning a memorandum of appeal for presentation to the proper Court. *Kunhikutti* v. *Achotti*, *I. L. R. 14 Mad. 462*, dissented from. *A* brought a suit against *B* in the Court of a Munsif. *B* objected to it on the ground that the suit had been undervalued, and, if properly valued, it would not lie in that Court. The Munsif overruled the objection, and gave judgment for the plaintiff on the merits. *B* appealed to the District Judge who held that, the proper value of the suit being over rupees five thousand, he had no jurisdiction to entertain the appeal, and he accordingly returned the memorandum of appeal to the appellant's pleader. A rule having been obtained against this order: *Held*, that the District Judge was bound to hear and dispose of the appeal, having regard to the provisions of s. 11 of the Suits Valuation Act (VII of 1887), and to determine, amongst other questions, whether the under valuation of the suit had prejudicially affected the disposal of it on its merits. RAGHUNATH CHARAN SINGH *v.* SHAMO KOERI (1904) . . **I. L. R. 31 Calc. 344**

——— ss. 11, 21—

See RESTITUTION OF CONJUGAL RIGHTS.
I. L. R. 34 Calc. 352

SUMMARY DECISION.

See LIMITATION ACT, 1877, SCH. II, ART. 178 (1859, s. 22).

SUMMARY JURISDICTION.

See RECEIVER . **I. L. R. 36 Calc. 52**

SUMMARY ORDER.

——— suit to set aside—

See LIMITATION ACT, 1877, SCH. II, ART. 13 (1871, ART. 15).

SUMMARY PROCEDURE.

See MAGISTRATE, JURISDICTION OF—GENERAL JURISDICTION.
I. L. R. 15 Mad. 83

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO . **I. L. R. 20 Calc. 351**

See NEGOTIABLE INSTRUMENTS, SUMMARY PROCEDURE ON.

See PRACTICE—CIVIL CASES—LEAVE TO SUE OR DEFEND.
I. L. R. 3 Calc. 539

See SUCCESSION CERTIFICATE ACT, SS. 6, 7 AND 9 . **I. L. R. 25 Bom. 523**

SUMMARY PROCEEDING.

See INSOLVENCY . **I. L. R. 36 Calc. 489**

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SUMMARY SUIT.

——— cross claim in—

See COMPENSATION—CIVIL CASES.
I. L. R. 18 Bom. 717

SUMMARY TRIAL.

See CATTLE TRESPASS ACT, s. 20.
I. L. R. 23 Calc. 248

See CRIMINAL PROCEEDINGS.
5 C. W. N. 252

See FALSE CHARGE.
I. L. R. 28 Calc. 251

See PRACTICE—CRIMINAL CASES—SIGNATURE OF MAGISTRATE.
I. L. R. 6 Mad. 396

See WORKMEN'S BREACH OF CONTRACT ACT, ss. 1, 2 . **I. L. R. 33 Bom. 22**

1. ——— **Requisites for legal conviction**—*Criminal Procedure Code, 1872, ss. 222-230——Procedure.* In summary cases under Ch. XVIII, ss. 222-230, of the Code of Criminal Procedure, 1872, the formalities provided by that chapter should be most strictly observed. If they are not a conviction will be set aside. QUEEN *v.* JOHRIE SINGH . . . . **22 W. R. Cr. 28**

2. ——— *Criminal Procedure Code, 1872, s, 222—Procedure.* In a case tried under the summary procedure authorized by s. 222 of the Criminal Procedure Code, 1872, it must appear clearly on the face of the conviction that the case was dealt with as one of those which come under the purview of that section. If the case be one of theft, it should appear what the value of the property alleged to have been stolen really was. QUEEN *v.* ABHEEN PARRIDA **20 W. R. Cr. 17**

3. ——— **Test of summary trial**—*Criminal Procedure Code, 1872, s. 222—Care in recording proceedings and in decision.* Where the procedure is of a summary nature, the trial is summary, notwithstanding the length and carefulness of the record and decision. QUEEN *v.* DOMA RAM **24 W. R. Cr. 66**

4. ——— *Test of summary case—Criminal Procedure Code, 1872, s. 222—Jurisdiction to try summarily.* It is the nature of the complaint which should determine whether a case should be tried summarily under s. 222 of the Code of Criminal Procedure. Where the acts complained of amount to an offence which a Magistrate cannot try summarily, he is not competent to hold a summary trial. *Dwarkanath Mazoomdar* v. *Nabe Das, 21 W. R. 829,* and *Chundar Shekur Thakoor* v. *Nitaloo, 2 W. R. 29,* followed. *In the matter of* BEPUTOOLLA *v.* NAJIM SHEIKH **2 C. L. R. 374**

5. ——— *Criminal Procedure Code, 1872, s. 222—Criterion for testing.* Whether a case is triable summarily or not, must be determined by the complaint, not by an estimate formed by the Magistriate (*e.g.*, of the worth of the property which the accused is charged with having

SUMMARY TRIAL—*contd.*

stolen) after evidence has been recorded: and such estimate cannot retrospectively warrant a mode of trial which was originally illegal. RAM CHUNDER CHATTERJEE *v.* KANYE LAHA **25 W. R. Cr. 19**

6. ——— *Criminal Procedure Code, s. 260—Complaint including charge not summarily triable—Summary jurisdiction not necessarily ousted thereby.* The mere circumstance of a complaint charging an accused person with offences not summarily triable along with other offences so triable would not necessarily oust the summary jurisdiction of a Magistrate under s. 26 of the Criminal Procedure Code. Whether a complaint affords sufficient grounds for a summary trial or requires a trial according to the ordinary procedure, must be left in a great measure to the discretion of the Magistrate, exercised with due the care according to judicial methods with reference to the circumstances of each case. *Ram Chunder Chatterjee* v. *Kanye Laha, 25 W. R. Cr. 19; Chunder Seekar Sookul* v. *Dhuram Nath Tewaree, I. C. L. R. 431; Beputoolla* v. *Najim Sheikh, 2 C. L. R., 474;* and *Empress* v. *Abdool Karim, I. L. R., 4 Calc., 18,* referred to. QUEEN-EMPRESS *v.* JAGJIWAN . . **I. L. R. 10 All. 55**

7. ——— *Value stolen in case of theft as determining jurisdiction to try summarily—Evidence, mode of taking.* In a case in which the accused was charged with theft of a box containing R50 in cash and of the box worth 8 annas 6 pies, the Magistrate considered the box to be of no value, and struck out the 8 annas 6 pies, and thereupon tried the case summarily under s. 222 of the Criminal Procedure Code, 1872. *Held,* that the Magistrate was not at liberty, upon his own authority and without taking evidence, to throw the box entirely out of consideration, as upon that depended his jurisdiction to dispose of the case summarily. Such evidence should have been taken precisely in the same way as evidence upon the merits of the case, and as it was not taken, the Court *held* that the Magistrate had no jurisdiction in this case. QUEEN *v* BUZLEH ALI . . . . . **22 W. R. Cr. 65**

8. ——— **Matters necessary to be stated in the record of a summary trial**—*Criminal Procedure Code, 1882, ss. 260, 263—Offence under Gambling Act (III of 1867), ss. 3 and 4.* Where a Magistrate invested with powers under s. 260 of the Code of Criminal Procedure is trying a case summarily, it is desirable that he should set out under the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that, while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. The record of a summary trial contained in the column corresponding tocl. (*h*) of s. 263 of the Code of Criminal Procedure the following entry: " The police made

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SUMMARY TRIAL—*contd.*

a raid on information received, and caught all the accused gambling. The defence of Mukundi, Mannu, Kali Charan, Ballan, and Gulzari Lal involves the absurdity that the police obtained a warrant to raid a house in which they could have no reason to suppose they would find any one. I convict Mukundi of keeping a common gaming-house—s. 4, Gambling Act. I convict the other six defendants of gaming in a common gaming-house—s. 3, Gambling Act." *Held*, that this entry, though it should have been more explicit, was a sufficient compliance with the requirements of the law. QUEEN-EMPRESS *v.* MUKUNDI LAL
I. L. R. 21 All. 189

9. ——— **Case instituted by Magistrate without complaint**—*Criminal Procedure Code, 1872, s. 222*—Where an accused person has, at the instance of the Magistrate, who had come across him while out walking one morning, encroaching on an embankment, been placed on his defence for mischief, and summarily tried and sentenced to two months' rigorous imprisonment :—*Held*, that, in a case of this kind, where Government had been made prosecutor, but no complaint had been offered to the Magistrate, who had acted on his own impulse, the Magistrate had erred seriously in dealing with the case summarily and sentencing of the accused to imprisonment. *In the matter of the petition of* PRAN NATH SHAHA. *In the matter of the petition of* ROMA NATH BANERJEE . . . . . **25 W. R. Cr. 69**

10. ——— **Criminal trespass and mischief**—*Magistrate, jurisdiction of—Code of Criminal Procedure (Act X of 1882), s. 260.* A person may be tried summarily for criminal trespass and mischief unless there is a *bonâ fide* claim of right depriving the Magistrate of jurisdiction. *Shakur Mahomed* v. *Chunder Mohan Sha, 21. W. R. Cr. 38*, disapproved. *Issur Chunder Mundle* v. *Rohim Sheikh, 25 W. R. Cr. 65*, distinguished. GAMIRULLAH SARKAR *v.* ABDUL SHEIKH
I. L. R. 10 Calc. 408

11. ——— **Mischief combined with theft**—*Criminal Procedure Code, 1872, s. 222.* A charge of mischief, even if combined with one of theft, is triable summarily under Act X of 1872, s. 222. QUEEN *v.* RAMAOTAR PANRE
25 W. R. Cr. 5

12. ——— **Offence under Act XXI of 1856**—*Criminal Procedure Code, 1872, s. 222 and s. 148—Illegal possession of opium.* On a conviction, under Act XXI of 1856, of having in possession opium not supplied from Government stores, the Magistrate tried the case summarily under s. 222, Code of Criminal Procedure, and passed a sentence of fine or imprisonment, and confiscation of the opium. *Held*, that the case could not be tried summarily, the additional sentence of confiscation not coming under s. 148, Code of Criminal Procedure. QUEEN *v.* JODOO NATH SHAHA.
23 W. R. Cr. 33

See *In the matter of the petition of* KHETTER MOHUN CHOWRANGHEE . **22 W. R. Cr. 43**

SUMMARY TRIAL—*contd.*

13. ——— *Illegal possession of opium—Offence punishable by fine and confiscation.* An offence under s. 49 of Act XXI of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 49 being merely a consequence of the conviction and not forming part of the punishment for the offence. EMPRESS *v.* BAIDANATH DASS
I. L. R. 3 Calc. 366 : 1 C. L. R. 442

14. ——— *Criminal Procedure Code, s. 260—Act XIII of 1859, s. 2.* Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the Criminal Procedure Code. QUEEN-EMPRESS *v.* INDARJIT
I. L. R. 11 All. 262

15. ——— **Criminal intimidation**—*Criminal Procedure Code, 1872, s 222.* Where a head constable of police of many years' service was charged with criminal intimidation with a view to prevent a person from giving evidence against serious offenders, and the District Magistrate tried the case summarily under the special power given by s. 222 (*10*) of the Code of Criminal Procedure, 1872 :—*Held* that the case ought not to have been tried summarily. SUBRAMANYA *v.* QUEEN
I. L. R. 6 Mad. 396

16. ——— **Offences one triable summarily and the other not**—*Criminal Procedure Code, 1882, s. 260—Omission of charge so as to give summary jurisdiction.* Where an accused is charged with offences one of which is triable summarily and the other not so triable, it is not open to a Magistrate to discard the latter charge and to proceed to try the case summarily. RAMANUND MAHTON *v.* KOYLASH MAHTON
I. L. R. 11 Calc. 236

17. ——— **Alteration of charge to make it triable summarily**—*Criminal Procedure Code, 1872, ss. 222-230—Power of Magistrate.* The powers conferred upon Magistrates under the 18th Chapter of the Criminal Procedure Code, 1872, were not intended to give them the power of altering a charge brought against an accused person so as to bring his case within the provisions of that chapter ; but when a charge of a serious offence—one which the Magistrate is not competent to inquire into summarily—is preferred, it is the plain duty of the Magistrate to apply the procedure prescribed for such cases, and either to convict or acquit, or commit for trial, the person implicated. The procedure under Ch. XVIII is to be followed when a charge is plainly and directly one of those specified in s. 222. CHUNDER SHEKHUR THAKOOR *v.* NITALOO . . . **22 W. R. Cr. 29**

HARAN SHEIKH *v.* RAMDHAN BISWAS.
24 W. R. Cr. 21

EMARAL SHEIKH *v.* MOHAMMADI SHEIKH.
24 W. R. Cr. 48

See EMPRESS *v.* ABDUL KARIM.
I. L. R. 4 Calc. 18

18. ——— *Alteration of charge for purpose of trying case summarily—*

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SUMMARY TRIAL—*contd.*

Practice condemned. The action of Magistrates in not trying accused persons for offences which the acts attributed to them constitute, but in trying the case as one under s. 143, Penal Code, for the purposes of holding the trial under summary procedure is highly improper. SHEO BHANJUN SINGH *v.* MOSAWI . . . **4 C. W. N. 795**

19. ——— *Alteration of charge of dacoity to one of unlawful assembly.* In a case where the charge was originally one of dacoity, but in the course of the proceedings that charge was ignored and the accused put on their defence on a charge of being members of an unlawful assembly, and the proceedings continued in a summary way :—*Held*, that, the original charge being one of dacoity, the Magistrate had no jurisdiction to alter it and try the case summarily. DWARKANATH MAZOOMDAR *v.* LALU DASS **21 W. R. Cr. 89**

20. ——— *Rioting altered to charge of mischief.* Where a charge of rioting was tried summarily by the Magistrate as one of mischief and unlawful assembly, the Sessions Judge, relying on the case of *Chunder Shekhar Thakoor v. Nitaloo, 22 W. R. Cr. 29*, submitted, at the request of the accused, that the summary order might be set aside and the accused might be tried for rioting under Ch. XVII of the Criminal Procedure Code. The High Court declined to interfere at the instance of the accused persons, and distinguished this from the case cited by the Sessions Judge, as the reference there was made by the Magistrate in the interests of public justice. QUEEN *v.* ABOO SHEIKH **23 W. R. Cr. 19**

21. ——— **Alteration of assault on public servant to one of assault**—*Criminal Procedure Code, 1872, s. 222—Penal Code, ss. 352, 353.* The accused in this case were convicted by the Magistrate summarily of offences under ss. 352 and 341, Penal Code, although it was contended on their behalf that, if guilty, they ought to have been convicted under ss. 353, in respect of which a summary trial could not be held. The Sessions Judge, on the Magistrate's own judgment, recommended that the convictions should be set aside, on the grounds (i) that the facts showed that the accused should have been convicted under s. 353 or under s. 342, and (ii) that the Magistrate had no power to convict of the lesser offence, and so give himself jurisdiction to try the case summarily. *Held*, in concurrence with the Sessions Judge, that the accused ought to have been tried under s. 353 : the Magistrate's summary proceedings were accordingly set aside and a fresh trial directed. QUEEN *v.* BANEE MAHDUB DOSS **23 W. R. Cr. 3**

22. ——— **Alteration of charge from lurking house-trespass or house-breaking at night to receiving stolen property**—*Magistrate, jurisdiction of—Penal Code, ss. 411, 457—Criminal Procedure Code, 1872, ss. 141, 222—Alteration of charge from one offence to another.* A Magistrate, who is otherwise competent, has, under s. 141 of Act X of 1872, a discretion to inquire into and try a person on any charge which he may consider covered by the facts complained of by any person, or reported by the police, without reference to the particular charge that may have been preferred by the complainant or by the police, and without reference to the procedure which, when he has determined the offence with which he will charge the accused, it will be competent to him to adopt. *Held*, therefore, when a person was brought before a Magistrate by the police, charged with an offence under s. 457 of the Penal Code, an offence not triable in a summary way, that the Magistrate was competent to alter the charge to one under s. 411, and to try the accused summarily under the provisions of s. 223 of Act X of 1872. *In the matter of* MEWA . . . **6 N. W. 254**

23. ——— **Appeal from summary trial**—*Insufficiency of evidence—Criminal Procedure Code, 1872, ss. 222 to 230.* If on appeal from a summary trial under Ch. XVIII of the Criminal Procedure Code (Act X of 1872), the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him. QUEEN *v.* KHERAJ MULLAH . . . . **11 B. L. R. 33**

24. ——— **Magistrate, power of, to try case summarily**—*Criminal Procedure Code (Act X of 1882), s. 260.* A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148, and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily and convicted one of the accused. It was contended that he had no power so to try and dispose of the case. *Held*, that that the Magistrate had power to try the case summarily. When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences. GOLAP PANDEY *v.* BODDAM **I. L. R. 16 Calc. 715**

25. ——— *Criminal Procedure Code (Act V of 1898), s. 260—Summary procedure under Penal Code, s. 323, after enquiry into the graver charges under ss. 147 and 324 not triable summarily.* A first class Magistrate took a case on his file and commenced a regular enquiry therein under ss. 147 and 324 of the Indian Penal Code ; but after hearing evidence and being of opinion

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SUMMARY TRIAL—*contd.*

that only an offence under s. 323 of the Indian Penal Code had been made out, he proceeded to deal with the case summarily. *Held*, that, inasmuch as the evidence adduced was not sufficient to justify a committal, but clearly disclosed an offence over which he had summary jurisdiction, the Magistrate was right in acting as he did. Such a course is different to disregarding part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has *bonâ fide* acted in the interests of justice. *Empress* v. *Abdool Karim*, *I. L. R. 4 Calc. 18*, distinguished. QUEEN-EMPRESS *v.* RANGAMANI . **I. L. R. 22 Mad. 459**

26. ——— **Complaint disclosing facts constituting offence of a graver nature**—*Process, issue of—Trial for minor offences—Magistrate, jurisdiction of—Illegality—Criminal Procedure Code* (*Act V of 1898*), *s. 260.* Where the complaint stated that the accused with a large number of other persons armed with swords and other deadly weapons came upon the complainant's land, threatened him, and, in spite of his remonstrances, cut his paddy, and the Magistrate in examining the complainant recorded merely the fact that the complainant stated that his paddy had been cut by the accused, and thereupon tried the accused summarily and convicted them under ss. 143 and 379 of the Penal Code :—*Held*, that, as the petition of complaint disclosed the commission of a much more serious offence than the offences for which the Magistrate had held a summary trial, and the examination of the complainant, which had not been properly recorded, did not show that such offence had not been committed, the Magistrate had acted without jurisdiction, and it was ordered that he should hold a regular trial. BISHU SHEIKH *v.* SABER MOLLAH (1902)
I. L. R. 29 Calc. 409 ; s.c. 6 C. W. N. 713

27. ——— *Jurisdiction—Facts determining jurisdiction to try summarily—Criminal Procedure Code* (*Act V of 1898*) *s. 260—Distraint, legality of— Form of the distress-warrant—Bengal Municipal Act* (*Bengal Act III of 1884*), *s. 122.* It is not the complaint alone, which determines the jurisdiction of the Magistrate to try a case summarily, but the complaint and the subsequent examination of the complainant taken together. Where it appeared from the complaint and the sworn examination of the complainant that the facts amounted to an offence under s. 186 of the Penal Code :—*Held*, that the Magistrate had jurisdiction to try the case summarily. *Bishu Sheikh* v. *Saber Mollah*, *I. L. R. 29 Calc. 409*, referred to. Where the distress warrant authorized the distraint of the moveables of the defaulters wherever found within the Municipality, or any other moveables found within the holding specified, it was *held* that the Tax Daroga was justified in attaching goods proved to belong to the defaulters, which were found within the municipal limits. FANINDRA NATH CHATTERJEE *v.* EMPEROR (1908)
I. L. R. 36 Calc. 67

SUMMARY TRIAL—*concld.*

28. ——— **Record of reasons for conviction**—*Code of Criminal Procedure* (*Act V of 1898*), *s. 263* (*h*)—*Omission of Magistrate to record reasons for conviction.* In a summary trial, the Magistrate is bound to record his reasons for conviction ; and the omission to do so is fatal, especially when the evidence recorded is not such as would enable the Court of Revision to deal with the case on its merits. DINA NATH TALUKDAR *v.* JOGENDRA NARAIN MAJUMDAR (1900)
6 C. W. N. 40

29. ——— **Workmen's Breach of Contract Act (XIII of 1859)**—*Inquiry under the Act—Summary trial not permissible.* An offence under the Workmen's Breach of Contract Act, 1859, cannot be tried summarily. *Emperor* v. *Dhondu Krishna*, *I. L. R. 33 Bom. 22*, followed. EMPEROR *v.* BALU (1908)
I. L. R. 33 Bom. 25

SUMMING UP EVIDENCE.

See ASSESSORS . **7 B. L. R 63, 67 note**
I. L. R. 9 Calc. 875
4 Mad. Ap. 39

See CHARGE TO JURY.

SUMMONS.

See SUMMONS, SERVICE OF.

See INSPECTION OF DOCUMENTS—CRIMINAL CASES . **I. L. R. 19 Calc. 52**

See PRODUCTION OF DOCUMENTS.
W. R. 1864, 164

See WITNESS—

CIVIL CASES—SUMMONING AND ATTENDANCE OF WITNESSES.
I. L. R. 24 Mad. 200

CRIMINAL CASES—SUMMONING WITNESSES.

——— **application for**—

See LIMITATION ACT, 1877, SCH. II, ART. 178 . . **I. L. R. 3 Calc. 312**
I. L. R. 5 Calc. 126

——— **in chambers**—

See COMPANY—WINDING UP—LIABILITY OF OFFICERS
I. L. R. 19 Bom. 88

——— **issue of**—

See PARDANASHIN WOMEN.
I. L. R. 21 Calc. 588

——— **leave to amend**—

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—IMMOVEABLE PROPERTY. **I. L. R. 2 Bom. 91**

——— **not served**—

See PRINCIPAL AND SURETY—DISCHARGE OF SURETY . **I. L. R. 14 Bom. 267**

See WITHDRAWAL OF SUIT.
I. L. R. 15 Bom. 160

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SUMMONS—*contd.*

——— **refusal to grant receipt for—**

See PENAL CODE, s. 173.
5 Bom. Cr. 34
I. L. R. 3 Calc. 621
I. L. R. 20 Calc. 358

——— **to attend taxation—**

See COSTS—TAXATION OF COSTS.
7 B. L. R. Ap. 50

See LIMITATION ACT, 1877, s. 4.
I. L. R. 20 Calc. 899

1. ——— **Issue of summons**—*Issue after period of limitation.* A summons ought not to be ordered to issue after the lapse of the period of limitation prescribed for a suit, unless the plaintiff has, in the meantime, done what he can to prosecute his suit with proper diligence. If a defendant is aggrieved by an order directing a summons to issue in such a case, he ought to apply to set aside the order and the summons under it. GERENDER COOMAR DUTT *v.* JUGGADUMBA DABEE
I. L. R. 5 Calc. 126

2. ——— **Issue of fresh summons**—*Return of old summons.* A fresh writ of summons will not be granted till the old one is returned into Court. ISSURCHUNDER SEIN *v.* ASHUTOSH CHATTERJEE . . . **1 Ind. Jur. N. S. 283**

3. ——— **Application for fresh summons**—*Practice.* An application for a fresh summons to appear, etc., should be issued on petition showing that a fruitless endeavour had been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he had failed. URQUHART *v.* GILBERT
1 Ind. Jur. N. S. 224

4. ——— **Grant of second summons**—*Discretion of Judge—Practice—Rule 12 of High Court Rules, 1st May 1875—Laches.* A Judge has, under rule 12 of the Rules of 1st May 1875, discretion as to granting a second summons, and is bound to inquire into the circumstances under which it is applied for; and when there has been great and unexplained laches, he should refuse it. Unless such discretion is clearly shown to have been improperly exercised, the Court will not interfere on appeal; but under the circumstances of this case, the Court on appeal finding there was no definite rule of practice as to the time within which a second summons might be applied for, allowed a second summons to issue. GOUR CHURN SOOR *v.* PEARY LALL PAUL. . **15 B. L. R. Ap. 12**

5. ——— **Mistake in summons**—*Amendment of summons at hearing—Practice.* The defendant was manager of a joint Hindu family carrying on business ir Bombay, Madras, and other places. In a suit in the High Court of Bombay against him as such manager, a decree was passed on the 11th April 1896, in execution of which on the same day certain property, in which the joint family was interested, was attached. On the 9th April 1896, however, the defendant had been adjudged an insolvent by the Insolvent Court at Madras under s. 9 of the Insolvent Act. On the 6th May 1896 the Official Assignee, Bombay, took out a summons to have the attachment removed. By mistake the summons in this case purported to be taken out by the Official Assignee of Bombay, omitting to describe him as constituted attorney of the Official Assignee of Madras. *Held*, that the summons might be amended at the hearing by substituting the name of the Official Assignee of Madras and disposed of on that basis. SARDAMAL JAGONATH *v.* ARANVAYAL SABHAPATHY MOODLIAR . . . **I. L. R. 21 Bom. 205**

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6. ——— **Irregularity in procedure**—*Summons, issue of—Fresh summons issued on the same information.* Where on an information a summons is issued to the accused, and owing to its disclosing no offence a fresh summons is issued to the accused, without any fresh or supplemental information, the errors, omission or irregularity in the fresh summons is not sufficient under s. 537 of the Criminal Procedure Code to upset the finding and sentence unless it has in fact occasioned "a failure of justice," that is, unless it has unfairly affected the accused's defence on the merits. EMPEROR *v.* JEEVANJI (1907) . . . . **I. L. R. 31 Bom. 611**

SUMMONS, SERVICE OF.

See CIVIL PROCEDURE CODE, 1882, s. 80.
13 C. W. N. 490

See SOLDIER . **I. L. R. 11 Mad. 475**

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 622.
I. L. R. 18 Bom. 606

See TRANSFER OF PROPERTY ACT, s. 132.
I. L. R. 21 Bom. 60

See WITNESS—CRIMINAL CASES—SUMMONING WITNESSES . **5 Bom. Cr. 20**
3 Mad. Ap. 5
6 Mad. Ap. 29

——— **date of service—**

See LIMITATION ACT, 1877, SCH. II, ART. 159 . . **I. L. R. 23 Calc. 573**

——— **fine for avoiding—**

See WITNESS—CIVIL CASES—DEFAULTING WITNESSES . **1 B. L. R. A. C. 186**

——— **on juror—**

See JURY—JURY IN SESSIONS CASES.
6 C. W N. 887

——— **on wrong person—**

See COSTS—SPECIAL CASES—SERVICE OF SUMMONS BY MISTAKE.
I. L. R. 4 Bom. 619

1. ——— **Proof of service**—*Presumption—Objection taken on appeal.* No legal decree can be passed *ex parte* without a Court being satisfied of the due service of the summons. From the mere fact of the plaintiff obtaining an *ex parte*

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SUMMONS, SERVICE OF—*contd.*

decree, it is not to be presumed that the service of summons was proved. To satisfy a Court of appeal if the objection is raised, there must be proof that the service of summons was actually made. RAM LOCHUN SOOR *v.* NITTYA KALLEE DEBIA . . . . . **12 W. R. 211**

2. ——— *Onus probandi—Civil Procedure Code, 1859, s. 119.* Under Act VIII of 1859, s. 119, the onus of proving non-service of summons was on the party claiming the benefit of that section. TORAB ALI *v.* CHOORAMUN SINGH CHOWDHURY . . **24 W. R. 262**

3. ——— **Omission to serve summons**—*Appearance of defendant.* Where a summons has not been issued to a defendant, the defect is cured by his appearance. KHALUT CHANDER GHOSE *v.* SARODA SUNDARI DOSSEE **Bourke O. C. 244**

4. ——— **Mode of service—Personal service.**—*Act XIX of 1853, s. 26, Suit under.* To maintain an action under Act XIX of 1853, s. 26, it was necessary that the summons to attend should have been personally delivered. DHUNPUT SINGH *v.* PREM BIBEE . . . . **24 W. R. 72**

5. ——— **Substituted service.**—*Civil Procedure Code, 1859, s. 57—Application to set aside ex parte decree.* Substituted service if duly effected under the provisions of the law is as valid as personal service ; and therefore, where substituted service had been effected under s. 57 of Act VIII of 1859, an *ex parte* judgment would not be set aside on an allegation of no notice, and of good defence on the merits. KISSUR CHUND *v.* BHOOBUNESSUR CHUNDER **Bourke O. C. 25 : Cor. 151**

6. ——— *Practice—Setting aside ex parte decree—Civil Procedure Code, 1877, ss. 82, 84.* Where substituted service of the summons is ordered under s. 82 of the Civil Procedure Code (Act X of 1877), a sufficient time ought, under s. 84, to be given for notice of the fact to reach the defendant, wherever he may be ; and, if an *ex parte* decree be obtained by the plaintiff, the Court on being satisfied that the time fixed was insufficient, will set aside the decree. ALLY DEBANEE *v.* HYDER HOOSEIN **I. L. R 2 Bom. 449**

7. ——— *Procedure in case of non-service.* Every summons not actually served on a defendant or respondent, or his recognized agent, must be stuck up on the house in which the defendant or respondent is dwelling. If the defendant or respondent cannot be found, the summons should be returned to the Court and an order obtained from the Court as to the mode of service. GOPAUL DOSS *v.* GREEDHAREE DOSS **6 W. R. 13**

8. ——— *Civil Procedure Code (Act XIV of 1882), ss. 78, 80, 82—Substituted service—Duty of process-server.* Mere temporary absence of a person to be served does not justify the process-server in fixing the summons

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to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected. SUBRAMANIA PILLAI *v.* SUBRAMANIA AYYAR . . . . **I. L. R. 21 Mad. 419**

9. ——— *Service of summons on minors carrying on partnership business with others—Affixing summons on house in which business is carried on—Civil Procedure Code (Act XIV of 1882), ss. 74, 76, and 443.* In a suit for the enforcement of an equitable mortgage of certain property belonging to a partnership buisness, brought against certain minors and other persons who constituted a firm carrying on business within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction, the summonses were neither served upon the minors nor upon their guardian personally, but were affixed on the house in which the business was carried on. *Held*, that there was no service of summons, either personal or substituted, upon the minors either under s. 74 or under s. 76 of the Code of Civil Procedure, even assuming that those sections can apply to a case in which some of the defendants who were interested in the partnership or buisness are minors. *Held*, also, that ss. 74 and 76 of the Code of Civil Procedure are controlled by s. 443 of the said Code. JATINDRA MOHAN PODDAR *v.* SRINALH ROY **I. L. R. 26 Calc. 267 3 C. W. N. 261**

10. ——— *Affixing copy of summons to door of defendant's residence—"Dwelling."* Service of a copy of the summons on the door of the house in which the defendant is dwelling is one of the modes of service provided in lieu of personal service, but it is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. There may be a dwelling sufficient to give jurisdiction, and yet not the kind of dwelling necessary to make a good service. ANANTHA NARAYANA *v.* PERIYANA KONE . **5 Mad. 101**

It should be shown he was dwelling in the house, and that he could not after diligent search be found. KHUDEERUN LALL *v.* CHUTTERDHAREE LALL **21 W. R. 242**

11. ——— *House service—Civil Procedure Code, 1882, ss. 80-82—Practice.* Where a defendant is temporarily absent from home, and is not represented at his house by an agent or male member of his family, a Judge is not justified in treating the fixing of a summons to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there. The Civil Procedure Code (Act XIV of 1882) in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant

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of what takes place in his absence. BHOMSHETTI JINAPPASHETTI *v.* UMABAI
I. L. R. 21 Bom. 223

12. ——— *Civil Procedure Code (Act XIV of 1882), s. 80—Ex parte decree—Substituted service of summons.* A decree was passed *ex parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civil Procedure Code, s. 101, to be heard in answer to the suit, now preferred a petition under s. 108 that the decree be set aside. This application was dismissed. On an appeal by one the defendants :—*Held*, as it appeared from the serving officer's return, that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house. SANKARALINGA MUDALI *v.* RATNASABHAPATI MUDALI
I. L. R. 21 Mad. 324

13. ——— *Substituted service—House—Dwelling-house.* A mofussil Judge stated, in his return to the Sheriff of Calcutta, that substituted service had been effected by fixing a copy of the summons to the "house" of the defendant. *Held*, that the return was insufficient, and that the word "dwelling-house" must be expressly mentioned. BUDDOO BABOO *v.* LAMBODAR MULLICK . . **1 Hyde 132**

14. ——— *Substituted service—Defendant not found and not heard of for some years.* In an application for substituted service it was shown that diligent inquiries and attempts to find the defendant had proved futile; that at the house where the defendant had last ordinarily resided his relatives informed the serving officer that the defendant had left the house some years ago, and they did not know where he was residing; and that the defendant had not been heard of for two years. JENKINS, *J.*, and SALE, *J.*, followed the procedure in the English case of *Wolverhampton and Staffordshire Banking Co.* v. *Bond, 29 W. R. (Eng.) 599,* and ordered substituted service to be made by affixing a copy of the summons on the notice board of the Court-house, by affixing another copy on the outer door of the house in which the defendant was known to have last resided, and by advertising the summons in such of the newspapers as the registrar should direct. RAJNARAIN GHOSE *v.* TEKH LAL SHAHA
1 C. W. N. 104

15. ——— *Substituted service—Persons not found, but serving officer saying he knew where he was—Civil Procedure Code, 1882, s. 80.* Where the return of the peon of the service of a summons upon a witness was in these terms: "The remaining witness No. 1 being in Calcutta, the copy of summons in his name has been hung upon the mat wall of the kutchery house of the defendant's residence,"—*Held*, that the circumstance that the peon could not find the witness when he says he knew where the witness was, is not sufficient *per se* to warrant the peon in affixing a copy of the summons to the house of the witness, so as to constitute good substituted service under s. 80, Civil Procedure Code. KALINARAIN ROY CHAUDHURI *v.* BAJOO **3 C. W. N. 307**

16. ——— **Service on railway company.** For the purposes of summons a railway company must be deemed to dwell at its principal office. HANLON *v.* INDIA BRANCH RAILWAY COMPANY . . . **1 Hyde 197**

17. ——— **Service in foreign territory.**—*Act VIII of 1859, ss. 60 and 66.* A summons cannot be sent by post to any place to which letters are not registered by a post office. A special bailiff cannot be sent to serve civil process in a foreign territory. KASIM AJIM DUPLAY *v.* KASIM MOHAMMED BARUCHA
2 B. L. R. A. C. 59

S. C. KASSIM AZIM DOOPLAY *v.* CASSIM MAHOMED BAROOCHA . . . . **10 W. R. 349**

18. ——— **Service by post**—*Return through the post of packet containing the summons endorsed "refused"—Civil Procedure Code, 1882, s. 82.* A Small Cause Court having forwarded the summons to the defendant in a registered packet through the post office, the packet was returned endorsed "refused." The Small Cause Court held the service of the summons to be good service and passed an *ex parte* decree against the defendant. *Held*, that the delivery of the summons by the post to a person who was not shown to be the defendant was not good service. JAGANNATH BRAKHBHAU *v.* SASSOON. **I. L. R. 18 Bom. 606**

19. ——— Where a summons was sent by the Sheriff by registered letter to the defendant at Colombo, Ceylon, and delivered by the postman in the presence of a witness who knew the defendant and his address, and who saw the letter delivered to the defendant who refused it, it was *held* a sufficient service of the summons. ABDUL ALI *v.* CORUNJEE JAFFERJEE
1 C. W. N. 56

20. ——— **Affixing summons to place of business**—*Civil Procedure Code, 1859, s. 55. Quære :* Whether the affixing of a summons, to the outer door of the place of business of a defendant was good service upon him under s. 55 of the Code of Civil Procedure. CHANBASAPPA BIN SANGAPPA *v.* MAINABA BIN MAHADSHET
7 Bom. A. C. 138

21. ——— **Service on Agent**—*Civil Procedure Code, 1877, s. 37, cl. (a)—Non-resident—Recognized agent.* The term "non-resident" in s. 37, cl. (*a*), of the Code of Civil Procedure (Act X of 1877), covers every absence which may reasonably be supposed to have been within the contemplation of the Legislature in using that term: thus, where a Marwadi had resided for forty years at Pen, and had also a place of business there, but who had gone to his native country to get his sisters married, and had been absent upwards of four months, it was *held* that he was "non-resident" within

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the local limits of the jurisdiction of the Pen Court and that a person holding a general power of attorney from him was a recognized agent within the meaning of the section. RAMCHANDRA SAKHARAM *v.* KESHAV DURGAJI
I. L. R. 6 Bom. 100

22. ——— *Service on agent—Suit to obtain relief respecting immoveable property—Civil Procedure Code (Act XIV of 1882), ss. 16 and 77.* In a suit for foreclosure or sale of immoveable property, it appeared that the mortgagee had conveyed the mortgaged premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises. *Held*, that the service was sufficient, the suit being one to obtain "relief respecting immoveable property" within the meaning of s. 16 of Act XIV of 1882. MICHAEL *v.* AMEENA BIBI
I. L. R. 9 Calc. 733 : 13 C. L. R. 161

23. ——— *Service of summons on agent—Principal and agent—Civil Procedure Code (Act X of 1877), ss. 76 and 37, cl. (c)—Carrying on business.* To satisfy the conditions of s. 76 of the Civil Procedure Code (Act X of 1877) as to service of summons on an agent there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager or agent, and sued on account of of such work, that is, business either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transactions to the management of which he has been duly appointed. S. 76 and s. 37, cl. (c), are to be construed together, and are intended to carry out the scheme of relief which rests upon the idea that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceedings that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code is one who has an initiative and independent discretion, albeit subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent. The firm of *G S* carried on business at Agra. It had no place of business in Bombay, but it employed *G* as its agent in Bombay, in certain dealings which it had with the plaintiff. The letters and telegrams of the firm to *G* were sent to the plaintiff's place of buisness, or addressed to *G* as an individual, not in the name of the firm. *G* did not himself initiate any business or in any way stand between his employers' firm and the plaintiff. *Held*, that *G* was not the defendants' manager or agent within the meaning of the Civil Procedure Code, s. 76, and that in an action against

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the defendants service of summons upon him was not due service. *G* in particular instances drew hundis on the firm of *G S* which that firm duly accepted and paid. *Held*, that he might reasonably be deemed their agent or manager for this particular kind of business, if for no other, and service on him might probably suffice in the case of a plaintiff suing on hundi transactions as with the firm through him. Service unduly made under s. 76 does not become effectual by reason of the fact of service being subsequently notified to the parties really interested as defendants. *Semble :* Service duly effected under s. 76 is effectual without reference to the circumstances of its being or not being communicated to the real defendants. GOKULDAS *v.* GANESHLAL. **I. L. R. 4 Bom. 416**

24. ——— *Agent to whom ship is consigned—Matters connected with ship.* Service of summons on an agent to whom a ship is consigned is good service on the owner in respect of matters connected with such ship. RAJARAM GOVINDRAM *v.* BROWN . . **7 Bom. O. C. 97**

25. ——— *Civil Procedure Code, 1859, s. 17—Recognized agent—Carrying on business in name of principal—Ship's agents.* Messrs. *R S & Co.*, European merchants, carrying on business in Bombay, received a letter from the owner of the ship *Rialto* by which Messrs. *R S & Co.* were constituted agents to obtain freight for the *Rialto* on a voyage from Bombay to Liverpool, the ship being placed in their hand for that purpose. Acting on this letter, Messrs *R S & Co.* obtained freight for the *Rialto*, signing the shipping orders in their own name as agents for the master of the *Rialto*. Messrs. *R. S. &. Co.* held no other authority from the owner of the *Rialto* than that contained in the above letter. *Held*, that Messrs. *R S & Co.* did not carry on business for, and in the name of, the owner of the *Rialto*, and were not therefore his recognized agents within the meaning of s. 17, cl. 2, of the Code of Civil Procedure, to accept service of a summons on his behalf in respect of a cause of action that arose out of the loading of the *Rialto*. Whether, in order to constitute a recognized agent within the meaning of the above section, the business carried on by him must be continuous, and not an occasional or desultory business. *Semble :* A Bombay firm simply employed by the owners of ship visiting Bombay to procure freight for her for a particular voyage cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners of such ship. RATANSI PANCHAM *v.* SAUNDERS . **8 Bom. O. C. 159**

26. ——— *Civil Procedure Code, 1859, s. 49—Agent.* Persons merely looking after the affairs of a defendant are not agents on whom service of summons will be sufficient under s. 49, Act VIII of 1859. RAM SOONDUREE DASSIA *v.* SURUT SOONDUREE DEBIA . **17 W. R. 33**

27. ——— **Service on co-partner for partner.** Service of a summons intended for one partner upon another partner of the same

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firm is not a sufficient service. Partners are not the recognized agents of each other within the meaning of cl. 2, s. 17, Act VIII of 1859. LUCHMEPUT DOGARE *v.* SIBNARAIN MUNDLE . **1 Hyde 97**

28. ——— *Services on partner for co-partner—Agent—Act VIII of 1859, s. 17, cl. 2.*—Service of summons on one partner for his co-partner is a good service. *Luchmeput Dogare* v. *Sibnarain Mundle, 1 Hyde 97*, dissented from. RAMCHANDRA BOSE *v.* SNEADE **7 B. L. R. Ap. 58**

29. ——— *Service on partner for co-partner.* Service of summons on one partner for his co-partner is not sufficient service unless the service is effected at the place where the partnership business is carried on. KUSTOOR MULL *v.* JOKEERAM . **11 B. L. R. Ap. 26**

30. ——— **Brothers living in the same house.** Where an *ex parte* decree had been given against three brothers, and it was shown that there had been only one summons, and that the serving officer had merely posted the summons on the door of one of them without attempting to serve it personally on him :—*Held*, that the notice had not been properly served even on the one brother, still less on the two others ; and that the defendants were entitled to have the suit restored on their application. SHIBOO ROY *v.* KASHEE ROY **25 W. R. 394**

31. ——— **Summons transmitted to local Court for service**—*Issue of summons—Return of local Court when sufficient evidence of service— Form of return to be made by Civil Court.* Where the service of summons has been effected on a defendant by affixing a copy of the summons on the door of his dwelling-house, the Court must decide whether the summons has been duly served by such affixing or not, and if it decides in the negative, a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service, it must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service. Where a summons has been transmitted by one Court to another for service by the latter, the transmitting Court is not bound, in every case, to satisfy itself that the law as to service has been strictly followed. The presumption in favour of the proceedings of a Court of justice is that everything has been duly performed, and if the return made by the Court serving the summons states that the summons has been duly effected, that presumption must prevail, unless the return discloses some patent irregularity or clear divergence from the law. As a rule, on a return from a competent Court that summons has been duly effected it may be presumed that either personal service has been effected, or substituted service under s. 82, or under ss. 80 and 82 combined, of the Civil Procedure Code (Act XIV of 1882). As proof of due service of summons, a return from the Court of Small Causes at K was relied upon in the High Court. The return was in the following

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words : " Read balliff's endorsement on the back of the process stating that the summons has been affixed to the defendant's house on the 22nd December 1884, at 9 A.M.; and proof of the same having been duly taken by me, it is ordered that the summons be returned." *Held*, that there was no sufficient service. The return itself proved the insufficiency. There was no statement, under the hand of the Judge, that the summons had been duly effected, and did not appear that anything had been done beyond fixing the summons on the defendant's door. That affixing was not sanctioned after inquiry by the local Court, as required by s. 82. All that appeared to have been done was the affixing prescribed by s. 80, which was insufficient until confirmed under s. 82. *Reg.* v. *Tukaya, I. L. R. 1 Bom. 214* NUSUR MAHOMED *v.* KAZBAI **I. L. R. 10 Bom. 202**

32. ——— *Summons transmitted to local Court for service—Question of sufficiency or otherwise of service of summons—Civil Procedure Code, 1882, s. 85—Practice.* When a summons is issued by one Court to persons resident outside its jurisdiction, and is sent to another Court for service to be effected, it is for the Court from which the summons originally issued to determine whether the service of summons by the Court to which it has been sent for service is sufficient or not. *Nusur Mahomed* v. *Kazbai, I. L R. 10 Bom. 202*, distinguished. ROMANATH BURAL *v.* GUGGODONANDAN SEN **I. L. R. 22 Calc. 889**

33. ——— **Sufficiency of service**—*Evidence of service—Substituted service—Evidence of serving peon.* The evidence of the serving peon that he endeavoured to serve the summons on the defendants, and that, not being able to serve them personally, he affixed a copy of the summons on the outer door of their dwelling-house if believed by the Judge, is perfectly legal evidence of the fact that these defendants were served. RAMCOOMAR SINGH *v.* RAMSOONDUR SINGH **17 W. R. 362**

34. ——— *Evidence of service—Peons' return of service.* A Collectorate peon's return of service is not admissible as legal evidence. MOINOOLLAH *v.* GOLUCK MONEE CHOWDRAIN . . . . . **15 W. R. 270**

35. ——— **Service on military officer**—*Army Act of 1881, ss. 114, 151—Civil Procedure Code, s. 468.* In a suit against a soldier to recover a debt not amounting to £30, *semble :* The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him. MAHOMED *v.* AGGAS. **I. L. R. 10 Mad. 319**

36. ——— *Military officer.* Service of summons on a military officer was effected by transmitting a copy by post to the Commanding Officer at Secunderabad, where the defendant was stationed, and it was returned with the defendant's acknowledgment endorsed on it, and with a certificate that it had been duly served,

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SUMMONS, SERVICE OF—*contd.*

but there was no affidavit of service : service was *held* to be sufficiently proved. HARRISON *v.* HOPE . . . . . **11 B. L. R. Ap. 43**

37. ——— *Army Act, 1881, s. 144—Sub-Conductor, Ordnance Department, is a soldier—Civil Procedure Code, s. 468.* A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881. In a suit to recover R183-7-0, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, as his reason for such action. *Held*, that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881. ABRAHAM *v.* HOLMES **I. L. R. 11 Mad. 475**

38. ——— **Return by Nazir**—*Proof of service of notice.* A return by the Nazir to the effect that the peon swears that a notice has been served is insufficient in law to proof the service without the deposition on oath of the serving peon taken before a competent authority. RAJ KISHORE DUTT, *v.* BYDONATH SHAHA **12 W. R. 365**

39. ——— *Nazir's report.* A Nazir's report of service of summons or of issue of proclamation is not legal evidence on which to punish a witness failing to attend a Court of justice when duly summoned. *In the matter of the petition of* NILKANT BHATTACHARJEE **W. R. 1864, Mis. 9**

OKHOY CHUNDER DUTT *v.* ERKSINE. **3 W. R. Mis. 11**

SREENATH THAKOOR *v.* WATSON. **4 W. R. Mis. 4**

RAM SOONDUR CHUCKERBUTTY *v.* KALEE KOMUL DUTT . . . . . **6 W. R. Act X, 92**

KOONDUN LALL *v.* NOOR ALI . **10 W. R. 3**

See MEAH KHAN *v.* NARAIN CHUNDER CHOWDHRY . . **18 W. R. 197**

40. ——— **Affidavit of service of summons**—*Civil Procedure Code, 1882, s. 80———Practice.* An effidavit in support of service of a writ of summons under s. 80 of the Civil Procedure Code should show that proper efforts have been made to find out when and where the defendant is likely to be found. COHEN *v.* NURSING DASS AUDDY . . . . **I. L. R. 19 Calc. 201**

41. ——— *Civil Procedure Code (Act XIV of 1882), ss. 79, 80—Affidavit of service of summons, sufficiency of.* Where a defendant cannot be found, the affidavit of service must show (i) that proper efforts were made to find him, and (ii) that the copy of the summons was affixed on the door of the house in which the defendant

SUMMONS, SERVICE OF—*contd.*

ordinarily resided at the time of service. Whether or not these conditions are established to the satisfaction of the Court must in each case depend on its own particular circumstances. RAJENDRO NATH SANYAL *v.* JAN MEAH **I. L. R. 26 Calc. 101 2 C. W. N. 574**

42. ——— **Discretion to issue second summons**—*Absence of return to first summons.* When there is no return of service to a summons, the law gives a Court full discretion either to issue a second summons or to take or not take stronger measures. It is not imperative on one Court to take measures to expedite the service in another Court, but it is the business of the party interested to move the Court to do what is necessary. DOWLUT MUNDUR *v.* OMRAO SINGH RANA **14 W. R. 336**

43. ——— *Civil Procedure Code, 1882, ss. 99A and 72—Application for fresh summons—Limitation.* An application for a fresh summons to a defendant, the summons originally issued having been returned unserved, is within the period prescribed by s. 99 A of the Civil Procedure Code (Act XIV of 1882), if made within one year from the date of the Nazir's countersignature below the bailiff's endorsement of non-service, the nazir being the proper officer of the Court to whom under s. 72 of the Code the summons is delivered for service and who is to return it tc the Court if unserved. PARSOTAM VITHAL *v.* ABDUL REHMANBHAI **I. L. R. 13 Bom. 500**

44. ——— **Irregular service**—*Ground for objecting to decree—Joint promissory note.* An irregular service of summons on two out of three defendants to an action brought on a joint promissory note does not give the third defendant, who has been properly served, grounds for objecting to a decree which has been passed against him under Act V of 1866. EWING *v.* GOSAI DAS GHOSE . . . . . **2 B. L. R. Ap. 7**

45. ——— *Mad. Act III of 1869, ss. 2, 3.* Where a summons to a witness, issued under Madras Act III of 1869, was shown to a person and taken back :—*Held*, that the summons had not been served. *In re* KUPPAN **I. L. R. 11 Mad. 137**

46. ——— *Defendant resident in another district—Act X of 1859, ss. 47, 56.* In a suit for rent under Act X of 1859, service of summons on a defendant, whose abode in is another district by a peon from the Court of the Collector of the district in which the suit is brought, instead of through the Collector of the district in which the defendant resides, as required by s. 47 of the Act, is not such an irregularity as vitiates the whole proceedings and renders the decree, and a sale in execution thereof, void. *Per* JACKSON, *J.*—The words in s. 56 "upon proof that the summons or proclamation has been duly served according to the provisions of this Act," refer to the mode in which a summons is to be served, and not to the

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SUMMONS, SERVICE OF—*concld.*

agency by which it is to be served. MACKINTOSH *v.* KALLY DOSS MULLICK
11 B. L. R. 1 : 19 W. R. 234

47. ——— *Service on wrong person—Erroneous description of defendant in plaint—Dismissal of suit.* In a suit brought by the plaintiffs against *A*, the summons was by mistake served upon *B*, who thereupon filed a written statement denying his liability and alleging that he was erroneously described in the title to the plaint. On the day of the hearing of the case the plaintiff's agent saw *B* for the first time and ascertained that he was not the real defendant in the suit. *Held*, that the case having come on for hearing, and there being nothing to show that the plaintiff's had been in any way deceived by *B*, the proper order to be made was for the dismissal of the suit. LONDON, BOMBAY, AND MEDITERRANEAN BANK *v.* MAHOMED IBRAHIM PARKAR . . . . **I. L. R. 4 Bom. 619**

48. ——— **Ex parte decree**—*Civil Procedure Code, ss. 89, 100, 104—Appeal—Service of summons on defendant residing out of British India—Burden of proof.* Where a defendant, against whom an *ex parte* decree has been passed, appeals against that decree, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree the necessary proof of service of summons on the defendant was not given by the plaintiff. It is not incumbent on the appellant to show that the summons was in fact not duly served. Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof of service to show that the summons was posted, but there must be some evidence of its having been received by the defendant. S. 100 of the Code of Civil Procedure is not limited in its application to defendant's residing within British India. FAKHR-UD-DIN *v.* GHAFUR-UD-DIN (1900)
I. L. R. 23 All. 99

49. ——— *Civil Procedure Code, ss. 80, 108—Application to set aside a decree passed ex parte—Irregular service of summons.* Where a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service. SAKINA *v.* GAURI SAHAI (1902) . **I. L. R. 24 All. 302**

SUMMONS CASES.

——— **trial of—**

See JURISDICTION **I. L. R. 36 Calc. 869**

SUNDAY.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 578 **I. L. R. 30 All. 136**

SUNDAY—*concld.*

——— **arrest on—**

See ARREST—CIVIL ARREST.
4 Mad. Ap. 62

See LORD'S DAY ACT.

——— **delivery of goods on—**

See CONTRACT—CONSTRUCTION OF CONTRACTS . . **I. L. R. 15 Bom. 338**

——— **disposal of suit on—**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 578 . **I. L. R. 29 All. 562**
I. L. R. 30 All. 136

——— **presentation of plaint on—**

See HOLIDAY.
3 B. L. R. Ap. 72 ; 11 W. R. 537
16 W. R. 231

——— **time expiring on—**

See LIMITATION ACT, 1877, S. 5.
See WRITTEN STATEMENT . **Cor. 39**

——— **trial on—**

See HOLIDAY . **8 B. L. R. Ap. 12**
W. R. 1864, Cr. 2
17 W. R. 230

See LORD'S DAY ACT . **6 N. W. 177**

SUNDERBUNS BOUNDARY.

——— **Beng. Reg. III of 1828, s. 13.** S. 13, Regulation III of 1828, was intended to make provision for the immediate settlement of the limits of the Sunderbuns ; hence it fixed peremptorily a period after which the demarcation of those limits, made by the special Commissioner to that end appointed, should be final. No person could come in after that period (namely, three months from the date of the Commissioner's proceeding fixing boundary) pleading infancy or other ground for re-opening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Even within the period of limitation allowed, no one could be heard to object to the line, unless he declared and offered proof that at the time of the survey he was in the occupation of a definite quantity of land cleared and under cultivation within the line. After the line had once become final, no party could be heard to say that even cultivated lands within it were part of his settled zamindari. BARADAKANT ROY *v.* COMMISSIONER OF THE SUNDERBUNS
2 B. L. R. P. C. 33 : 11 W. R. P. C. 14

SUNDERBUNS ESTATE.

See BENGAL ACT VII OF 1864, S. 1.
I. L. R. 14 Calc. 440

See SALE FOR ARREARS OF REVENUE—INCUMBRANCES—ACT XI OF 1859.
I. L. R. 14 Calc. 440

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SUNDERBUNS SETTLEMENT REGULATION (BENG. REG. III OF 1828).

——— **Lease granted by duly constituted Revenue authority, Effect of settlement on.** *Per* BANERJEE, *J.*—Though certain provisions of Regulation III of 1828 go to show that the Sunderbuns, up to that date, continued the property of the State and had not been permanently settled with any one, that was intended to be said generally with regard to the tract of country known as the Sunderbuns as a whole, and it could not have been intended to undo the effect of any lease granted by any duly constituted Revenue authority. TAMASHA BIBI *v.* ASHUTOSH DHUR . . **4 C. W. N. 513**

SUNNI LAW.

See MAHOMEDAN LAW.
I. L. R. 32 Calc. 982
I. L. R. 31 All. 136

SUPERINTENDENCE OF HIGH COURT.

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1. ACT XXIII OF 1861, S. 35 . . 12276
2. BOMBAY REGULATION II OF 1827 . 12281
3. CHARTER ACT (24 & 25 VICT., c. 104), s. 15—
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I. L. R. 26 Calc. 74
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See CRIMINAL PROCEDURE CODE, s. 145.
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See HIGH COURT, JURISDICTION OF—BOMBAY—CIVIL . **9 Bom. 249**

See LAND ACQUISITION ACT, 1870.
15 B. L. R. 197

See REVISION—CIVIL CASES—SMALL CAUSE COURT CASES.

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6 C. W. N. 593

——— **Charter Act (24 & 25 Vict. c. 104), s. 15—Criminal cases—**

See CRIMINAL PROCEDURE CODE, s. 146.
I. L. R. 29 Calc. 382

See POSSESSION, ORDER OF CRIMINAL COURT, AS TO—LIKELIHOOD OF BREACH OF THE PEACE. **I. L. R. 28 Calc. 416**

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——— **Charter Act (24 & 25 Vict, c. 104), s. 15—Criminal cases**—*concld.*

See WITNESS—CRIMINAL CASES—SUMMONING WITNESSES.
I. L. R. 30 Calc. 508

——— **Civil Procedure Code, 1882, s. 622—**

See APPEAL—ARBITRATION.
I. L. R. 29 Calc. 167

See ATTACHMENT—SUBJECTS OF ATTACHMENT—TRUST PROPERTY.
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See CALCUTTA MUNICIPAL CONSOLIDATION ACT (BEN. ACT II OF 1888), s. 135.
6 C. W. N. 480

See COMPROMISE—CONSTRUCTION, ENFORCING, EFFECT OF, AND SETTING ASIDE, DEEDS OF COMPROMISE.
I. L. R. 30 Calc. 613

See DECREE—ALTERATION OR AMENDMENT OF DECREE.
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See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES
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See SPECIAL OR SECOND APPEAL—ORDER SUBJECT OR NOT TO APPEAL.
6 C. W. N. 614

——— **criminal cases—**

See REVISION—CRIMINAL CASES.

1. ACT XXIII OF 1861, S. 35.

1. ——— **Exercise of superintendence** —*Orders of Court of first instance and Appellate Court.* The High Court could interfere, under s. 35, Act XXIII of 1861, with the order of the Court of first instance, as well as of the Appellate Court where the orders of both the Courts appeared to be without jurisdiction. SHEO DYAL SINGH *v.* MAHOMED KAMIL . . **3 Agra Mis. 2**

2. ——— *Case tried in two Courts without jurisdiction.* Where a case properly cognizable by a Small Cause Court had been heard and determined by the Subordinate Judge, and on appeal by the District Judge, the High Court, in the exercise of its extraordinary jurisdiction, annulled the proceedings of the two lower Courts. BHIMRAV JIVAJI *v.* BHIMRAV GOVIND . **11 Bom. 194**

3. ——— *Trial with jurisdiction—Error in decision on facts.* The High Court cannot, where an inferior Court has jurisdiction to try a case, and has tried it, merely because there is an error apparent in the decision on the facts alter, that decision, where the law allows no appeal. *In the matter of the petition of* PEAREE LALL SAHOO . . . . **7 W. R. 130**

4. ——— *Courts of Revenue officers—Courts acting without jurisdiction.* The

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SUPERINTENDENCE OF HIGH COURT—*contd.*

1. ACT XXIII OF 1861, S. 35—*contd.*

provisions of s. 35 of Act XXIII of 1861 extended to the Courts of Revenue officers acting without jurisdiction under Act X of 1859. HURPERSHAD *v.* LALU.

3 N. W. 60 : Agra F. B. Ed. 1874, 246

5. ——— *Act X of 1859 s. 108—Sale by Deputy Collector—Appeal.* A Deputy Collector sold an under-tenure in execution of a decree for rent. An appeal was made to the Collector on the ground that the tenure could not be sold unless execution had been previously issued against the moveable property of the judgment-debtor. The Collector affirmed the decision of the Deputy Collector, but on review set aside his former order, on the ground that he had no jurisdiction, the sale having taken place under the provisions of Act X of 1859. An application was made to the High Court under s. 35 of Act XXIII of 1861 to set aside the order of the Collector, on the ground that the Collector had no power to review his own judgment, and consequently his first order stood, which the High Court ought to set aside, and pass such order as it might think right, and reverse the order of the Deputy Collector. The question was referred to a Full Bench whether s. 35 applied to the order of the Collector. The Full Bench refused to consider the question referred, on the ground that it was the intention of Act X of 1859 that the sale by the Deputy Collector should be final. *In the matter of the petition of* DOCOWRI KAZI

B. L. R. Sup. Vol. 517
8 W. R. Act X, 53

6. ——— *Order illegally made—Appeal entertained without jurisdiction.* In execution of a decree, the District Munsif made an order which he was not legally authorised to make at the instance of the purchaser of the property sold in execution. No appeal could be made against the order, but the Civil Judge entertained an appeal and reversed the order of the District Munsif. The High Court set aside the order of the Civil Judge under s. 35, Act XXIII of 1861, but, by virtue of the powers given by the section, the order of the District Munsif was also annulled. SUBRAYA GOUNDEN *v.* VENKATAGIRI AIYAR

6 Mad. 22

7. ——— *Court exceeding its jurisdiction—Appeal heard without jurisdiction.* The true construction of s. 35 of Act XXIII of 1861 was, that the High Court might call for the record in any case in which a subordinate Court exercised a jurisdiction when it had none, or exceeded it when it had jurisdiction. The words in s. 35, "the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right," meant that, where a Court exceeds its jurisdiction, the High Court may set aside that part of the order which is in excess of jurisdiction, and that, where the decision of the subordinate Court is made on appeal in a case in which it has no appellate jurisdiction, the proper order is to set aside the decision altogether. If an appeal be heard by a subordinate Court which has no jurisdiction to hear it, when it ought to be heard by another subordinate Court which has jurisdiction to hear it, the Court may set aside the decision of the Court which had no jurisdiction, and may, if it think right, refer the case to the Court which had jurisdiction, even if it be too late to prefer a fresh appeal to that Court. The Judge having entertained an appeal where none lay, is no ground for interfering with a decision which the legislature intended to be final. JACKSON, *J.*, differed. *In the matter of the petition of* SUBJAN OSTAGUR

B. L. R. Sup. Vol. 531 : 6 W. R. Mis. 77

8. ——— *Power to call for record—Discretion of Court.* Under s. 35 of Act XXIII of 1861, there was a discretion in the Court to call for the record or not; and in cases where the application was made a considerable time after the decree, the Court refused to call for it BOODHEE *v.* ALLEE HYDER

1 N. W. Ed. 1873, 271

9. ——— *Appeal from order refusing to rectify a decree.* The general powers of the High Court do not enable it to hear an appeal from an order of a Zillah Judge refusing to rectify a decree. MAHOMED BUSHEEROOLLAH CHOWDHRY *v.* RAMKANT CHOWDHRY . . **9 W. R. 394**

10. ——— *Application to transfer appeal—Laches.* An application to the High Court, under s. 35 of Act XXIII of 1861, to order a subordinate Court to receive an appeal, which in ordinary course ought to have been received within fifteen days of the original decision (in this case to transfer an appeal from a Court which had dealt with it without jurisdiction) ought to be made either immediately upon the quashing of the order of the subordinate Appellate Court, or promptly and without any avoidable delay. *In the matter of* RUSSICK LALL CHATTERJEE

15 W. R. 518

11. ——— *Appeal preferred in Court having no jurisdiction—Extension of time for appealing.* When an appeal had been preferred by the plaintiff to the Judge which ought to have been preferred to the Collector, the Court made an order giving the plaintiff thirty days within which to prefer his appeal to the Collector instead. ADHIRANI NARAIN KUMARI RAJRANI OF BURDWAN *v.* PURIKHIT RAWTRA

7 B. L. R. Ap. 15 : 15 W. R. 426

12. ——— *Decision by Collector as to genuineness of deed.* Where a Collector decided upon the genuineness of a deed of sale, he was *held* to have exceeded his authority, and his order could be set aside by the High Court under s. 35, Act XXIII of 1861. TOYLUCKONATH SIRDAR *v.* BALUCKRAM DOSS . **W. R. 1864, Act X, 26**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

1. ACT XXIII OF 1861, S. 35—*contd.*

13. *Illegal order of Deputy Collector.* Where a Deputy Collector, who had decreed a suit for ejectment on proof of arrears due, held afterwards in execution that as the arrear had been paid up within fifteen days the tenant could not be ejected in accordance with s. 78, Act X of 1859, his order in execution was declared to be *ultra vires* and illegal, and was set aside by the High Court under its general powers of revision. DEEN DYAL PURAMANICK *v.* RAMCOOMAR CHOWDHRY . . . **10 W. R. 345**

14. *Order of Collector ejecting gantidar.* Where a gantidar on the suit of the patnidar was ejected from his holding, notwithstanding a right of occupancy independent of his ganti, an appeal lay to the Collector, whose order could only be questioned by a civil suit, and not under s. 35, Act XXIII of 1861. RUGHOONATH MITTER *v.* WOOMANATH CHOWDHRY **W. R. 1864, Act X, 47**

15. *Extraordinary jurisdiction of High Court—Power to deal with order staying execution.* Where a Subordinate Judge, in consequence of a fresh suit by the plaintiff, stayed the execution of a decree which was passed in the defendants' favour for costs, the High Court, in exercise of its extraordinary jurisdiction, reversed the stay order. GAMBHIRMAL *v.* CHEJMAL JODHMAL . . . . . **11 Bom. 151**

16. *Refusal to set aside Collector's order made without jurisdiction, where it reversed an illegal order.* A rule having been issued calling on a judgment-debtor to show cause why an order of the Collector in appeal, reversing an order made by a Deputy Collector in execution, should not be set aside, the rule was discharged with costs, inasmuch as, although the Collector had no jurisdiction to make the order which he made, the Deputy Collector's order was wrong, being a violation of the provisions of s. 92 of Act X of 1859, and could not be upheld. TARACHUND MUNDUL *v.* BHYRUB CHUNDER CHUCKERBUTTY **15 W. R. 551**

17. *Right of appeal—Sale for arrears of rent, irregularity in.* A Civil Court had no power, under s. 35 of Act XXIII of 1861, to reverse a sale for arrears of rent under Act X of 1859 on account of irregularity or damage, without the aggrieved party having first appealed to the Commissioner of Revenue. Act XXIII of 1861 gave no power to the High Court to consider the legality or otherwise of the Collector's order without such appeal. SUDDER GOLAB SINGH *v.* RAM BUDDUL SINGH **1 Ind. Jur. N. S. 1 : 4 W. R. Act X, 28**

18. *Setting aside sale in execution—Courts exceeding jurisdiction.* If the Judge exceeded his jurisdiction in hearing the appeal from the order of the Sudder Ameen setting aside a sale in execution on the ground of the non-payment of the purchase-money within the proper time:—*Held*, that it was competent for the High Court, exercising its power under s. 35, Act XXIII of 1861, to set aside the order of the Sudder Ameen. AMANEE BEGUM *v.* KOORBAN ALI **3 Agra 204**

MAHESH PANDEY *v.* BALDUT PANDEY **3 Agra Rev. 10**

19. *Act XXIII of 1861, s. 35—Order made without jurisdiction—Interference with order of lower Courts.* Petitioner bought at a Court-sale certain property which had been attached in O. S. No. 30 of 1860 on the file of the District Munsif's Court. Before, however, the sale certificate was issued to him, the plaintiff in O. S. No. 79 of 1866 presented a petition praying for a re-sale of the property, on the ground that it had been sold at an undervalue. On this petition the Munsif cancelled the former sale and ordered a re-sale. Before this re-sale took place, the property was sold in execution of the decree in suit No. 3 of 1866 on the file of the Civil Court, and purchased by the plaintiff in that suit. Thereupon petitioner applied to the Munsif to re-sell the property in satisfaction of his claim. The Munsif refused to do so, and the Civil Judge, upon appeal, confirmed the Munsif's order. *Held*, on special appeal, that the Munsif's first order, annulling the sale, was a nullity, and the subsequent attachment and sale under the decree in O. S. No. 3 of 1866 was inoperative against the property; that consequently the appellant was entitled to have these proceedings set aside and the validity of his sale upheld, if the respondent's objection that the orders were not open to question in the High Court should not prevail. Upon the latter point:—*Held*, that no right of appeal existed, but that therefore the Civil Court had no jurisdiction to entertain the appeal to the Court, and, giving effect to the petition of special appeal as a petition under s. 35 of Act XXIII of 1861, that the orders of the lower Courts should be annulled and the petitioner declared entitled to an order and certificate perfecting his title. ANNAMALAI CHETTI *v.* MUTHULINGA PILLAI . **6 Mad. 360**

20. *Order remanding suit—Application to set aside order from which appeal could have been brought.* Where a Judge on regular appeal by a defendant had remanded a case for re-trial to the Court of first instance:—*Held*, on a miscellaneous petition to the High Court, that, as it was competent to the petitioner to have presented an appeal from the order of the Judge remanding the suit, the High Court had no power under s. 35, Act XXIII of 1861, to entertain a miscellaneous application to set aside the Judge's order. TUKEE ALI *v.* SAADUT ALI . **5 N. W. 14**

21. *Power of Judge to interfere with order sanctioning complaint in offence against public justice.* The District Judge having reversed on appeal the order of the Subordinate Judge sanctioning the prosecution of the defendant

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SUPERINTENDENCE OF HIGH COURT—*contd.*

1. ACT XXIII OF 1861, S. 35—*concld.*

in a suit in his Court for an alleged false statement, the High Court set aside the Judge's order under the provisions of s. 35 of Act XXIII of 1861. *In the matter of the petition of* BULWUNT RAI
6 N. W. 124

22. ——— *Power of High Court.* Under this section, the High Court should not only reverse the illegal order, but pass the order that should have been made. ADURMONEE DOSSEE *v.* KAMINEE SONDUREE DEBIA
3 W. R. Act. X, 145

RAJ CHUNDER ROY CHOWDHRY *v.* GREESH CHUNDER ROY . . . **5 W. R. Mis. 45**

2. BOMBAY REGULATION II OF 1827.

——— *Plaint, presentation of—Return of plaint for presentation to proper Court — Jurisdiction of Subordinate Judge—High Court, power of, to interfere under Bom. Reg. II of 1827, s. 5, cl. 2.* A second class Subordinate Judge returned a plaint for presentation in the proper Court on the ground that the subject-matter exceeded his pecuniary jurisdiction. The first class Subordinate Judge, to whom the plaint was then presented, also returned it for presentation in the proper Court on the ground that the subject-matter was below his pecuniary jurisdiction. The plaintiff thereupon presented the plaint to the successor of the second class Subordinate Judge who had originally returned the plaint. That Judge held that he had no jurisdiction to review the order passed by his predecessor. The plaintiff appealed, and the Judge rejected the appeal, holding that no appeal lay against an order refusing to grant a review. The plaintiff applied to the High Court under its extraordinary jurisdiction. *Held*, that the case was one in which the High Court ought to interfere under cl. 2, s. 5 of Bombay Regulation II of 1827. The order of the second class Subordinate Judge was set aside with a direction that he should admit the plaint as of the date of its original presentation. GIRDHARLAL HARGOVANDAS *v.* LALLU JAGJIVAN
I. L. R. 20 Bom. 50

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15.

(*a*) CIVIL CASES.

1. ——— **Functions of High Court under s. 15 of the Charter Act**—*Nature of superintendence. Held* (*per* STUART, *C.J.*), that under s. 15 of 24 & 25 Vict., c. 104, the power of superintendence to be exercised by the High Court is not merely administrative or ministerial, but also judicial. BIJEE KOOER *v.* DAMODUR DASS
5 N. W. 55

2. ——— *Object of superintendence.* It was not the intention of s. 15 of the Charter Act to confer any rights upon litigant praties, its whole object being to give the High

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—*contd.*

(*a*) CIVIL CASES—*contd.*

Court some control over the Courts subject to its appellate jurisdiction. DOSSEE *v.* SRINIBASH DEY
12 W. R. 74

3. ——— *Beng. Act VIII of 1869, s. 102.* The Court held that in a suit for rent, even if no appeal lay under s. 102, Bengal Act VIII of 1869, the Court on special appeal could interfere under s. 15 of Act 24 & 25 Vict., c. 104. On appeal under the Letters Patent:—*Held*, that the power conferred by that section ought not to be exercised in such a way as to do indirectly that which the law forbids to be done directly. KARIM SHEIKH *v.* MUKHODA SOONDERY DASSEE
15 B. L. R. 111 : 23 W. R. 268

Reserving decision in MOKHODA SOONDUREE DASSEE *v.* KUREEM SHAIKH . **23 W. R. 11**

4. ——— *Existence of remedy by suit.* Where the applicant has a remedy by regular suit, the Court is reluctant to interfere. MADHUB CHUNDER GIREE *v.* SHAM CHAND GIREE. *In the matter of the petition of* MADHUB CHUNDER GIREE . **I. L. R. 3 Calc. 243**

MAHASANKAR HARISANKAR *v.* VALIBHAI UMANJI
6 Bom. A. C. 174

BISHNO CHUNDER BHUTTACHARJEE *v.* SHOSHEE MOHUN PAL CHOWDHRY **22 W. R. 277**

HUREEHUR MOOKERJEE *v.* NOBIN CHUNDER DOSS
20 W. R. 202

5. ——— *Existence of remedy by suit.* The High Court cannot interfere under s. 15 of the High Court Act where the lower Court has not acted without jurisdiction, or where there is a remedy by a regular suit. KHORSHED ALI *v.* CHOWDHRY WAHID ALI . **15 W. R. 170**

DOORGA SOONDUREE DEBIA *v.* KASHEE KANT CHUCKERBUTTY . . . **14 W. R. 212**

6. ——— *Existence of other remedy.* Where a petitioner had his remedy under s. 269, Act VIII of 1859, and the Munsif had, whether right or wrong, acted within his jurisdiction, the Court *held* it had no power to interfere under s. 15 of the Charter Act. HUR KISHORE AUDHICARY *v.* SUDOY CHUNDER NUNDEE
17 W. R. 80

7. ——— *Existence of remedy by regular suit.* *S* was adjudicated an insolvent in the Insolvent Court, Calcutta. *R* thereupon deposited in the Court at Shahabad a sum for which *S* had obtained a decree against him. This decree had been attached by *T* under a decree obtained by him against *S*, and they applied to the Shahabad Court for satisfaction of their decree out of the money deposited by *R*. The Official Assignee opposed the application, which was granted. The Official Assignee petitioned the High Court to interfere under s. 15, 24 & 25 Vict., c. 104,

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

but the Court refused to interfere, on the ground that there was a remedy by suit for injunction and application for a preliminary order under s. 92, Act VIII of 1859. *In re* MILLER
4 B. L. R. A. C. 72 note : 12 W. R. 103

8. ——— *Delay in making application.* The Court refused to extend assistance by the exercise of its extraordinary powers under the High Court Act, s. 15, to parties who were chargeable with great and unexplained delay. RADHA MOHUN ROY *v.* RAJ CHUNDER SHAH
22 W. R. 522

BHUGGOBUTTY KOWAR *v.* MONEY.
2 C. L. R. 545

9. ——— *Laches of appellant—Power of High Court.* Where the Court below adopted a different procedure, and, after partitioning the property, put up for sale the divided share of the execution-debtor, the High Court in the exercise of its extraordinary jurisdiction refused to interfere, in consequence of the laches of the applicant in neglecting to avail himself of an opportunity which the lower Appellate Court had given him, of showing that the partition which had been made was injurious to him. MATHURADAS GOVARDHANDAS *v.* FATMA ULKA BEGAM
5 Bom. A. C. 63

10. ——— *Order of Judge under s. 269, Civil Procedure Code, 1859—Resistance to delivery of possession in execution of decree.* The Court declined to interfere under s. 15 of the Charter Act in order to set aside an order lawfully made by a Judge under s. 269, Act VIII of 1859, upon a complaint made to him of resistance or obstruction to the delivery of possession under s. 264, and stated that it would not have interfered even if the order had been made without jurisdiction after the delay that had taken place, the petitioner's remedy being a regular suit to establish their right. ZUHOORUN BEGUM *v.* MAHOMED WAJED
18 W. R. 87

11. ——— *Laches—Existence of another remedy.* Petitioner, a decree-holder, allowed another decree-holder to obtain a decree upon a regular suit declaring him entitled to follow the properties in dispute in execution of his decree, and did nothing even after that decree was obtained until another decree-holder applied for the attachment and sale of the properties in execution of his decree, and the lower Court having all the parties arrayed before it, and having passed an order rejecting the petitioner's application, petitioner, after more than ninety days (the period limited for an appeal) had elapsed, invoked the aid of the High Court under s. 15 of the Charter Act, but the Court declined to exercise that jurisdiction, leaving the petitioner to his remedy in a regular suit. KALEE KISHORE SEN *v.* WISE . . **17 W. R. 477**

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

12. ——— *Order rejecting claim of attorney to lien on document for his costs—Existence of other remedies.* A firm of solicitors, having been summoned to produce certain documents before the Court, objected to do so claiming a lien upon them for costs due to them from the party at whose instance the documents were called and their objection having been overruled, they moved the High Court under s. 15 of the Charter Act. *Held*, that the High Court is not compelled to use the power of superintendence created by the Charter Act unless, in the interests of justice, it finds it necessary to do so, and that in the present case there is no danger of any such failure of justice as would render it necessary for the High Court to interfere, specially having regard to the fact that the loss of this particular remedy, assuming the attorney to be entitled to it, does not involve the loss of his costs, as he still has all the other remedies for the recovery of his claim. *Semble :* The power of superintendence under s. 15 would be exercised by the High Court to correct judicial errors where, in the interest of justice, it is necessary to do so. SWINHOE & CHUNDER *v.* HERA LAL SIRKAR
2 C. W. N. 727

13. ——— *Effect as to merits of case of rejection of claim to exercise of extraordinary jurisdiction.* The extraordinary powers conferred on High Court by s. 15 are only exercised when firstly, there has been a capital error in the judgment of the lower Court ; or secondly, the plaintiff has entitled himself to special interference. The rejection of an application under s. 15 does not necessarily amount to a decision on the merits. Where a suit for rent was thrown out by a Munsif and subsequently thrown out by a Small Cause Court and in either case the High Court refused to interfere under s. 15, but a different Munsif interpreted the second order of the High Court as a variation of the first and entertained the suit:—*Held*, that, though the action of the High Court did not affect the merits, yet, as plaintiff had a substantial claim, the second Munsif did right in receiving it. SHOOVANKURRY DABEE *v.* DWARKA NATH MOOKERJEE . . **25 W. R. 344**

14. ——— **Exercise of jurisdiction—***Giving appeal where none lies.* The High Court cannot admit an appeal which Act VIII of 1859 and s. 11, Act XXIII of 1861, do not allow. S. 15 of the Charter Act *held* not to apply to the question. GOBINDNATH SANDYAL *v.* RAM COOMAR GHOSE
9 W. R. 115

15. ——— *Giving appeal where none lies—Order doing injustice.* The High Court should not, in the exercise of its extraordinary powers, give an appeal in a case where the law provides none. Nor should the Court in the exercise of those powers interfere when such interference

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

would have the effect of working an injustice. NARAYANBHAI LALBHAI *v.* GANGAKRISHNA BALKRISHNA . . . . **4 Bom. A. C. 87**

16. ——— *Party bringing appeal without right of appeal. Per* BIRCH, *J.*— A party who has preferred an appeal to the High Court when the law gave him no right of appeal is not entitled upon the hearing to ask the Court to treat it as an application for the exercise of its extraordinary jurisdiction under s. 15 of 24 & 25 Vict., c. 104. *In the matter of the petition of* SOORJA KANT ACHARJ CHOWDHRY **I. L. R. 1 Calc. 383**

17. ——— *Admission of appeal after time—Appeal—Delay in filing—Act X of 1859, s. 25.* The High Court, under its general power of superintendence, set aside an order of a lower Appellate Court admitting an appeal filed beyond time, on the ground that the lower Appellate Court had no jurisdiction to entertain an appeal passed by the Collector under s. 25, Act X of 1859. AMRA NASHYA *v.* GAGAN SHUTAR **2 B. L. R. Ap. 35**

S.C. OMRA NUSHYO *v.* GUGUN SHOOTUR **11 W. R. 130**

18. ——— *Appeal withdrawn without authority—Application to set aside order refusing to restore appeal.* An appeal which had been preferred to the Judge was withdrawn the next day through another pleader. Shortly after an application was made to have the appeal restored, on the ground that the second pleader had no authority to withdraw the appeal. The Judge refused the application. *Held*, that no appeal lay from that order and the High Court refused to interfere under s. 15, 24 & 20 Vict., c. 104, as under the circumstances they thought the Judge should not be directed to take further action in the matter. MUDHOOMUTTY DEBIA *v.* DHUNPUT SINGH **13 W. R. 167**

19. ——— *Order releasing property from attachment.* An order of competent Court releasing property from attachment after investigation of a claim put forward ought not to be interfered with on any ground of mere irregularity unless a failure of justice has occured. BISHNO CHUNDER BHUTTACHARJEE *v.* SHOSHEE MOHUN PAL CHOWDHRY . . . . **22 W. R. 277**

20. ——— *Illegal arrest in Court of Magistrate*—The High Court declined to exercise the extraordinary powers described in s. 15 of the High Courts Act, where a Magistrate did not interfere with the arrest in his Court, under a civil process, of a person who had been accused before the Magistrate, but was acquitted at the time of his arrest. *In the matter of the petition of* GUZEREE LALL . . . . . **13 W. R. 393**

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

21. ——— *Award under the Nawab Nazim's Debts Act, 1873, on matter already decided by decree.* Where certain judgment-creditors submitted a decree of Court to the Commissioners appointed under the Nawab Nazim's Debts Act, 1873, as if it were a new and unascertained claim and the Commissioners expressed their opinion on the matter involved in it (although it has been already determined), the High Court *held* it had no authority to inquire into their award. OMRAO BEGUM *v.* COMMISSIONERS UNDER ACT XVII OF 1873 **24 W. R. 394**

22. ——— *Power over Collectors.* Under s. 15 of the High Courts Act, the High Court had a power of superintendence over Collector's Courts, and could interfere to restrain a Collector from exercising a jurisdiction which properly belongs to a Zillah Judge. BHYRUB CHUNDER CHUNDER *v.* SHAMA SOONDEREE DEBIA **6 W. R. Act X, 68**

(*Contra*) HURO MOHUN MOOKERJEE *v.* KEDARNATH DOSS . . . **5 W. R. Act X, 25**

23. ——— *Setting aside decree made ultra vires.* Where a decree is *ultra vires*, the debtor's remedy is either by an application for review or by an application to the High Court to exercise its powers under the Charter Act, s. 15. DOORGA DOSS SANDYAL *v.* PANCHOO RAM MUNDUL **23 W. R. 271**

24. ——— *Refusal of application under Act VIII of 1859, s. 119—Ex parte decree.* Judgment was passed *ex parte* against a defendant who had not appeared. The defendant failed to show cause for setting aside the judgment under s. 119 of Act VIII of 1859. He then applied to the High Court under s. 15 of 24 & 15 Vict., c. 104, to set aside a portion of the decree as having been passed without jurisdiction. The Court refused to intefere. *In the matter of the petition of* LESLIE . **10 B. L. R. 68 : 18 W. R. 474**

25. ——— *Discretion of Municipality—Rates for cleaning tank.* Case in which the Munsif held that the Municipality had expended more money than was necessary in cleaning the petitioner's tank, and the Judge on appeal set aside Munsif's decision and gave the Municipality a decree, on the ground that under the law the matter was purely within the discretion of the Municipality. *Held*, that, even though the rates charged by the Municipality where higher than those which could be obtained by other persons, that was no ground for the interference of the High Court. *In the matter of* JOGESH CHUNDER DUTT **16 W. R. 285**

26. ——— *Exercise of discretion under Act XX of 1863, ss. 4 and 5—Refusal of jurisdiction.* Where an application by a peti-

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—*contd.*

(*a*) CIVIL CASES—*contd.*

tioner under Act XX of 1863, s. 5, to be appointed manager of a religious endowment, was rejected by the Judge after hearing both sides, on the ground that there had been no transfer of the property by the Local Government under s. 4, the Court refused to interfere under s. 15 of the Charter Act, holding that the Judge had not declined to accept jurisdiction in the case, and that he was right in refusing to exercise the jurisdiction vested in him by s. 5. ASHRUF HOSSEIN *v.* HAZARA BEGUM
18 W. R. 396

27. ——— *Order rejecting document under s. 129, Civil Procedure Code, 1859.* The High Court refused to interfere under s. 15 of the Charter Act to set aside an order rejecting a document made by a Court under Act VIII of 1859, s. 129, an appeal from such order being barred by s. 363. *In the matter of* ERSKINE
18 W. R. 511

28. ——— **Error of law.**—*Quære:* Is a conflict between a Judge's order and a direction of law ground for the High Court to exercise its powers of interference? DOSSEE *v.* SREENIBASH DEY . . **12 W. R. 74**

29. ——— *Error of law—Case where no appeal lies to High Court.* Mere errors of law committed by a lower Appellate Court in cases in which the High Court has no appellate jurisdiction do not give the latter Court power to interfere under s. 15 of the Charter Act, its interference being restricted to cases in which the lower Court exercises a jurisidiction which it has not, or refuse to exercise a jurisdiction which it has. KALEE HUR DASS *v.* ROODRESSUR CHUCKERBUTTY
15 W. R. 90

ISSUR CHUNDER PODDAR *v.* SHOSHEE DHUR SEN
18 W. R. 289

30. ——— *Court acting without jurisdiction—Error in law.* The interference of the High Court under s. 15, 24 & 25 Vict., c. 104, should be confined to cases in which the lower Court has acted without jurisdiction, or has improperly declined jurisdiction, and should not be extended to cases in which the Court, though competent in respect of the subject-matter, has misconceived the law in deciding a case. *In re* KASINATH ROY CHOWDHRY
7 B. L. R. 146 note

s. c. KASHEENATH ROY CHOWDHRY *v.* SHABITREE SOONDUREE DOSSEE . **11 W. R. 402**

31. ——— *Error in law—Injustice, Prevention of.* Where there has been a manifest error of law, and to prevent manifest injustice, the High Court in the exercise of its extraordinary jurisdiction will remand a case to the lower Court, though the value of the claim may be

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—*contd.*

(*a*) CIVIL CASES—*contd.*

under R500 and the case may be one in which a special appeal is not allowed. RAMABAI *v.* TRIMBAK GANESH DESAI . . **9 Bom. 283**

32. ——— *Erroneous order in law made in consequence of false statement of party.* The High Court will interfere, under s. 15 of the Charter Act with an order made by a lower Court which is merely contrary to law, when that order has been passed in consequence of a wilfully false statement made by the opposite party. ROGHO NUNDUN LALL *v.* MOHESH LALL
3 C. L. R. 137

33. ——— *Wrong decision where no special appeal lay.* Where the lower Court's decision was fundamentally wrong in law, and the liability of the defendants in the essential matter of the suit had not been properly tried, the High Court, although not warranted in interfering in special appeal (by reason of the suit being a money claim under R500), was justified in interfering under its general powers of supervision. SHAMDANEE *v.* BHOJOO RAM . **22 W. R. 44**

34. ——— *Refusal of order of confirmation of sale—Error of law.* A certified purchaser of property sold in execution of a decree applied to the Judge for an order of confirmation of sale, and was refused. *Held*, that the High Court had no power to interfere with the Judge's decision, even though erroneous on a point of law, upon a matter entirely within his jurisdiction, and from which there was no appeal. *In the matter of the petition of* DURGA CHARAN SIRKAR
2 B. L. R. A. C. 165

s. c. DOORGA CHURN SIRCAR *v.* DOORGA CHURN GHOSSAL **11 W. R. 23**

35. ——— *Error of law.* The High Court will not, under s. 15 of 24 & 25 Vict., c. 104, interfere with judgments, decrees, or orders of lower Court on the bare ground that they are erroneous at law, or are based upon a wrong conclusion of facts; there must be some special ground justifying the High Court to exercise such powers. MADHUB CHUNDER GIREE *v.* SHAM CHAND GIREE. *In the matter of the petition of* SHAM CHAND GIREE . **I. L. R. 3 Calc. 243**

36. ——— *Error of law—Revision of judicial proceedings—Jurisdiction.* The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s. 15 of 24 & 25 Vict., c. 104, to interfere with the order of a Court subordinate to it, on the ground that such order has proceeded on an error of law or an error of fact. Where, therefore, on appeal by the judgment-debtor against an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale on a ground not provided by law, and the auction-purchasers applied

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

under the abovementioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere. TEJ RAM *v.* HARSUKH **I. L. R. 1 All. 101**

37. ——— *Revision of judicial proceeding—Jurisdiction of High Court —Civil Procedure Code, s. 622. Held* by EDGE, *C.J.*, and OLDFIELD and BRODHURST, *JJ.*, that under s. 15 of 24 & 25 Vict., c. 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction. *Held*, by STRAIGHT and TYRRELL, *JJ.*, that the word "superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or quasi-judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last-mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. *Tej Ram* v. *Harsukh, I. L. R., 1 All. 101*; *Girdhari Singh* v. *Hardeo Narain Singh, L. R. 3 I. A. 230*; and *In the matter of the petition of Mathra Parshad, I. L. R. 1 All. 296*, referred to. The judgment of PETHERAM, *C.J.*, in *Badami Kuar* v. *Dina Rai, I. L. R. 8 All. 111*, explained. MUHAMMAD SULEMAN KHAN *v.* FATIMA . . **I. L. R. 9 All. 104**

38. ——— *Civil Procedure Code, 1882, s. 622—Failure of duty by a Subordinate Court.* Where a subordinate Court had signally failed to do its duty, and there had been no patent neglect on the part of the petitioner:—*Held*, on an application for revision, that it is competent for the High Court under the general powers of supervision vested in it by s. 15 of 24 & 25 Vict., c. 104, to direct the subordinate Court to do its duty, and complete the case according to law. *Muhammad Suleman Khan* v. *Fatima, I. L. R. 9 All. 104*, referred to. ABDULLAH *v.* SALARU **I. L. R. 18 All. 4**

39. ——— *Error of law —Rejection of claim to attached property without decision on necessary questions.* Where it was found that the Court below was wrong in disallowing the claim without determining certain questions of law which it should have determined, the error was held to be not such that it ought to be rectified by the High Court in the exercise of its power of revision under s. 15 of the Stat. 24 & 25 Vict., c. 104, or under s. 622, Civil Procedure Code. S. 15 of the Stat. 24 & 25 Vict., c. 104, gives the High Court, in general terms, power of "superintendence over all Courts which may be subject to its appellate jurisdiction." The law having advisedly and wisely left this power unlimited, it is not desirable to limit it by any hard-and-fast rule, and it is not every error of law that would be a ground for the exercise of this power, and a party's claim to the interference of the High Court is very much weakened when he has another remedy provided for him by law. *Madhub Chunder Giree* v. *Sham Chand Giree, I. L. R. 3 Calc. 243*, and *Tejram* v. *Harsukh, I. L. R. 1 All. 101.* BHAGWAN RAMANUJ DAS *v.* KHETTER MONI DASSI . **1 C. W. N. 617**

40. ——— **Execution-proceedings** —*Supervision as to execution of order.* The High Court has jurisdiction to direct a lower Court in what manner its own (the High Court's) decree or order shall be carried into effect by that Court, and to see that the lower Court does not pervert the order or do that which was not intended to be done, even when such order constitutes a part of the order in execution of a decree which the lower Court ought to have passed. KALEE DOSS SANDYAL *v.* ROY LUCHMEEPUT DOOGUR . . **14 W. R. 145**

41. ——— *Act X of 1859, s. 151—Execution-proceedings.* Where a Deputy Collector refused to entertain an application by a defendant for realization of costs awared by a Court of appeal, and for refund of the amount which the plaintiff had realized from the defendant in execution of the decree of the lower Court, but which had been disallowed by the Court of appeal, and where, on appeal, the Judge held that no appeal lay under s. 151 of Act X of 1859:—*Held*, that the High Court had power, under 24 & 25 Vict., c. 104, s. 15, to order the Deputy Collector to enforce restitution of the amount realized from the defendant in excess of the amount allowed by the Court of appeal, and also to execute that part of the decree which awarded costs to the defendant. *In the matter of the petition of* GOBIND KOOMAR CHOWDHRY . **B. L. R. Sup. Vol. 714 Ind. Jur. N. S. 199 : 7 W. R. 520**

42. ——— *Order of Collector giving possession, reversal of.* Where a Collector, having passed an order for possession of a certain tenure in favour of the applicant on his purchase thereof at a sale for arrears, reversed such order at the instance of an objector who had already purchased the same at a sale under Bengal Act VIII of 1865 for arrears of rent due upon it, and

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

had been put in possession, the High Court refused to exercise its powers under s. 15 of the Charter Act. NARAYANI DAYI DEBI *v.* CHANDI CHARAN CHOWDHRY . . . **3 B. L. R. Ap. 65**

NARAINEE DABEE *v.* CHUNDEE CHURN CHOWDHRY . . . . . **11 W. R. 512**

43. ——— *Letters Patent, cl. 16—Release of person imprisoned in execution of decree.* Where, in execution of a summary decree for rent obtained under Regulation VII of 1799 in 1851 against the father of the petitioner and another, the petitioner was arrested and lodged in jail in January 1867 :—*Held*, by the majority of the Court (NORMAN, *J.*, dissenting) that the High Court could not, under the general powers of superintendence vested in it by s. 15 of the High Courts Act or s. 16 of the Letters Patent, interfere to order the release of the petitioner. GOPAL SINGH *v.* COURT OF WARDS . . . **7 W. R. 430**

44. ——— *Assignment of decree—Civil Procedure Code, 1859, ss. 246, 265—Duty of Judge.* Where a judgment-creditor seeks to attach and sell a decree on the allegation that the assignment of it was not a *bonâ fide* conveyance, and the conveyance purports to be one of property specified in s. 265, Act VIII of 1859, it is the duty of the Judge under s. 246 to enquire whether the assignee of the decree was or was not in *bonâ fide* possession of the property. If the Judge inquires into the facts, no appeal lies from his order ; but if he refuses an inquiry, the High Court, under its general powers of superintendence, can and ought to require the Judge to make the inquiry. GREESH CHUNDER LAHOREE *v.* KASHEESSUREE DEBIA **8 W. R. 26**

45. ——— *Execution of decrees for rent—Act X of 1859, ss. 23, 77, and 160.* Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 & 25 Vict., c. 104, s. 15. NILMONI SINGH DEO *v.* TARANATH MUKERJEE **I. L. R. 9 Calc. 295 : 12 C. L. R. 361 L. R. 9 I. A. 174**

46. ——— *Acting in excess of, or refusal of, jurisdiction.* A party dissatisfied with a legitimate finding under s. 15, Act XIV of 1859, has a special remedy by a suit in a Civil Court, and cannot claim the High Court's interference under s. 15, 24 & 25 Vict., c. 104, except where the Judge has exercised a jurisdiction which he has not, or has refused to exercise a jurisdiction which he has. DOORGA SOONDUREE DEBIA *v.* KASHEE KANT CHUCKERBUTTY **14 W. R. 122**

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

47. ——— *Order exempting debtor from liability on ground of limitation.* S. 15 of the 24 & 25 Vict., c. 104, does not enable the High Court, by way of motion, to deal with an order made by a lower Appellate Court in cases where the latter has jurisdiction, and the law declares that its order should be final. An order exempting a debtor from liability on the question of limitation, even though erroneous, is an exercise of jurisdiction. SHOWDAMINEE DOSSEE *v.* MANICK RAM CHOWDHRY . . **9 W. R. 386**

KALEE PERSAUD CHOWDRY *v.* RAM SOONDUR SIRCAR **12 W. R. 129**

48. ——— *Postponement of execution sale without taking security.* Where, in a case under Bengal Act VIII of 1869, a Munsif, on a claim being preferred to property attached in execution, postponed the sale of it without taking security or having the amount of the decree deposited :—*Held*, that his proceeding, though erroneous, was in a case in which he had exercised jurisdiction, and that his decision ought not to be set aside under the 15th section of the Act 24 & 25 Vict., c. 104. *In the matter of the petition of* BAGRAM **20 W. R. 10**

49. ——— *Execution of decree, refusal to stay—Allegation of fraud and finding against it.* *W* got a decree against *M* in the Court of the Sudder Ameen, and in execution attached certain property of the judgment-debtor *J*, who had a decree against the same judgment-debtor in the Court of the Principal Sudder Ameen, to stay its proceedings, on the ground that *W's* decree had been obtained by fraud. The Sudder Ameen refusing the application, *J* appealed to the Judge, who saw no ground for the imputation of fraud. *Held* (by HOBHOUSE, *J.*), that the Judge's judgment was on the face of it good and in a case within his jurisdiction, and that it did not call for an exercise of the extraordinary power given to the High Court by s. 15 of the Charter Act. JUMAL ALI *v.* WAHED ALI . . . **11 W. R. 97**

50. ——— *Order within jurisdiction—Suit for arrears of rent and ejectment.* A suit for arrears of rent, where the plaint contained also a prayer for ejectment, having been dismissed by the first Court, an appeal was preferred to the Collector, who heard the case without any objection as to jurisdiction, and decreed it solely upon the question of the extent and character of the land and the arrears of rent thereupon. *Held*, that, as the Collector exercised a jurisdiction which he had no question of ejectment having been decided by the first Court, and no appeal having been made to him upon the point, the High Court refused to exercise the power they had to interfere under s. 15 of 24 & 25 Vict., c. 104. DURSUN BHUGUT *v.* MAHOMED ALI . . . **13 W. R. 438**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

51. ——— **Order made without jurisdiction.** The High Court exercised its powers of superintendence to set aside a judgment of a Judge reversing a judgment of a Munsif passed in accordance with the award, the Judge's order being without jurisdiction. *In the matter of* ILAHI BUX **5 B. L. R. Ap. 75**

S.C. ELAHEE BUKSH *v.* HAJOO . **14 W. R. 33**

52. ——— *Suit brought in wrong Court.* The plaintiff brought a suit, which was cognizable by a Small Cause Court, in a Munsif's Court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court. He obtained a decree, but the decree was reversed on appeal. On special appeal the Court, though holding that no special appeal would lie, set aside the decrees of both the lower Courts as having been passed without jurisdiction. TARINI CHARAN MOOKERJEE *v.* PURNA CHANDRA ROY **6 B. L. R. 717 : 15 W. R. 397**

53. ——— *Order made without jurisdiction—Appeal in rent suit to wrong Court.* A suit to recover R254 as arrears of rent having been decreed by the Deputy Collector for R49, the defendant appealed to the Judge, but plaintiff appealed to the Collector. The Judge dismissed the defendant's appeal, and the Collector gave plaintiff a decree for the full amount originally claimed. The High Court, under s. 15 of the Charter Act, set aside the Collector's decree as made without jurisdiction. ROOKNEE ROY *v.* AMRITH LALL . . . **14 W. R. 254**

54. ——— *Order of Collector made without jurisdiction.* *N* sued his gomashta *M* and *M's* surety *C* under s. 24, Act X of 1859, and got a decree *ex parte* as against the surety. Upon *N's* proceeding to execute the decree, *C* applied for a revival of the suit, which was granted and a re-hearing was appointed for the 4th May 1869, but subsequently postponed to the 8th, on which date the case was struck off by the Deputy Collector, under the provisions of s. 54. Subsequently *N* applied for a fresh execution of his original decree to the Collector, who sent the record to the Deputy Collector, with instructions to carry out the execution. Thereupon *C* obtained a rule from the High Court calling on *N* to show cause why the Collector's order should not be set aside. *Held*, that the Deputy Collector's order striking the case off the file annulled the decree so far as *C* was concerned, and that the Collector's order directing execution was without jurisdiction and the High Court would set it aside under their powers of superintendence. GUDADHUR CHATTERJEE *v.* NUNDLALL MOOKERJEE . . **12 W. R. 406**

55. ——— *Order contrary to law from which no appeal lay—Civil Procedure Code, 1859, s. 246.* Where an order was made by a Munsif under s. 246 of Act VIII of 1859, and a regular appeal was preferred, and then a special appeal to the High Court, that Court, while refusing to entertain the appeal, on the ground that the Munsif's order was final, or to set aside the order under s. 15 of 24 & 25 Vict., c. 104, expressed an opinion that the order was contrary to law, and left it to the Munsif to act upon such opinion. KALI CHURN GIR GOSSAIN *v.* BANGSHI MOHAN DAS **6 B. L. R. 727 : 15 W. R. 339**

56. ——— *Order contrary to law—Civil Procedure Code, 1859, s. 246—Want of jurisdiction—Act VIII of 1859, s. 246, order under.* In a case decided by the Munsif, in which it was found by the High Court that there was no appeal to the Judge, the Judge's order was set aside as passed without jurisdiction, and the Munsif's order was also set aside as not having been passed under s. 246, Act VIII of 1859, under which section the objection had been perferred. HARRIS CHUNDRA GUPTO *v.* SHASHI MALA GUPTI **6 B. L. R. 721 : 15 W. R. 163**

57. ——— *Order passed without jurisdiction—Claim overvalued for purpose of giving jurisdiction.* The plaintiff brought a suit in the Court of the Subordinate Judge of Dacca, under s. 15, Act XIV of 1859. The defendant pleaded that the Judge had no jurisdiction, inasmuch as, if the suit had been properly valued, it was one cognizable by the Munsif. The Judge found that the value of the property did not exceed R500, and that the plaintiff had over-estimated the value of the claim in order to exceed the jurisdiction ; but instead of returning the plaint, he proceeded to try the case on its merits, and dismissed the suit. On an application on behalf of the plaintiff to set aside the judgment as passed without jurisdiction, the High Court refused to interfere under s. 15 of 24 & 25 Vict., c. 104. *In the matter of the petition of* WISE . . **10 B. L. R. Ap. 20**

58. ——— *Order passed without jurisdiction—Revival of suit—Act X of 1859, ss. 54, 55, and 58.* A suit for arrears of rent was dismissed by the Deputy Collector for default under s. 54, Act X of 1859. Thereupon a fresh suit was brought by the same plaintiff for the recovery of the said arrears, and a decree was obtained. On appeal, the Judge reversed the decision of the Deputy Collector and dismissed the suit. The plaintiff then applied under s. 58, Act X of 1859, for revival of the former suit, but the Deputy Collector rejected the application. On appeal, the Judge held that the suit might be revived, and remanded the case for trial. The High Court, under its general power of superintendence, set aside the order of the Judge as passed without jurisdiction, holding that, although the Deputy

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

Collector had formerly struck off the case under s. 54, yet it was in fact an order under s. 55, and therefore under s. 58, Act X of 1859, no appeal lay to the Judge. HABIB SOBHAN *v.* MAHENDRA NATH ROY . **2 B. L. R. Ap. 32 : 11 W. R. 129**

59. ——— *Order made without jurisdiction—Omission to object to illegal proceeding.* Where a respondent in a Collector's Court applied in special appeal to the High Court to exercise the general powers of supervision vested in it by s. 35, Act XXIII of 1861, and s. 15 of 24 & 25 Vict., c. 104, to set aside the Collector's proceedings as without jurisdiction, it was *held* that, as he had allowed the appeal to be heard without objection, he was not entitled to the relief sought. DROBO MOYEE DABEE *v.* BIPIN MUNDUL . **10 W. R. 6**

60. ——— *Error in reversing judgment for want of jurisdiction.* Where the District Judge reversed the decree of the Munsif for want of jurisdiction, although the amount of the claim was under R500, the Court, in the exercise of its extraordinary jurisdiction, interfered. RATANSHANKAR REVASHANKAR *v.* GULABSHANKAR LALSHANKAR . . . . **4 Bom. A. C. 173**

61. ——— *Judge exceeding his powers under s.* 246, *Act VIII of 1859.* Where a Subordinate Judge, under Act VIII of 1859, s. *246*, declared that the decree-holder was entitled to enforce his mortgage lien against certain attached property, although that property was in the possession of the claimant on his own account, and not on behalf of the judgment-debtor, inasmuch as the claimant professed to derive his title under a *ladavee* executed in his favour by the judgment-debtor :—*Held*, that the Subordinate Judge had proceeded beyond the authority given him by the section, and the High Court would therefore exercise the extraordinary jurisdiction given by s. 15 of the Charter Act, by setting aside the Judge's order and directing the property to be released. *In the matter of* KHELLAT CHUNDER GHOSE *v.* GOURCHURN MOJOOMDAR . . **18 W. R. 402**

62. ——— **Improper exercise or improper refusal to exercise jurisdiction.** The High Court will not exercise its extraordinary powers under the Charter Act, s. 15, except where jurisdiction has been either exercised or refused improperly : it will not interfere under that section even where a wrong decision has been arrived at, if the Court which arrived at such decision exercised a jurisdiction which it properly possessed. KHOWAZ RAM BUX SINGH *v.* BISHENDHAREE GEER **23 W. R. 402**

63. ——— *Refusal to entertain suit by Court from which there is an appeal.* When a Court, subject to the appellate jurisdiction of the High Court, refuses to entertain a suit over which it has jurisdiction, the High Court may, under its general power of superintendence, order the Court below to entertain such suit, notwithstanding that no appeal would lie to the High Court from the decree in such suit. HARDAYAL MANDAL *v.* TIRTHANAND THAKUR **4 B. L. R. Ap. 28 : 13 W. R. 34**

64. ——— *Refusal to make inquiry as to possession in claim under s. 246, Civil Procedure Code, 1859.* In a case of a claim to attached property where the Subordinate Judge did not consider himself competent to make the inquiry as to the nature of the possession necessary under s. 246, Act VIII of 1859, the High Court declined to interfere under the special provisions of the Charter Act, because the decree-holder had a remedy by regular suit. *In the matter of* HUREEHUR MOOKERJEE. HUREEHUR MOOKERJEE *v.* NOBIN CHUNDER DOSS . . . **20 W. R. 202**

65. ——— *Decision on irregular procedure under s. 230, Civil Procedure Code, 1859.* A decree-holder in execution having got possession of certain property, application was made for an investigation under s. 230, Act VIII of 1859. The Munsif, without going into evidence, rejected the application, and the Judge, in the same manner, reversed the Munsif's judgment and gave the applicant possession. The High Court on application set aside both decisions as not being decisions on the investigation of a suit within the section. The question still remained for decision whether the property was *bonâ fide* in the possession of the applicant on his own account or on account of some person other than the defendant. WOOMESH CHUNDER ROY *v.* BIDHOO MOOKHEE DOSSEE . . . . **.11 W. R. 197**

66. ——— *Order rejecting application by party dispossessed in execution of decree—Act VIII of 1859, s. 230.* Whether or not an appeal lies from the decision of a lower Court rejecting an application by a party other than a defendant, under s. 230, Act VIII of 1859, disputing the right of the decree-holder to dispossess him, the High Court may, under the 15th section of the Charter, compel the lower Court to exercise its jurisdiction. *Golucknarain Dutt* v. *Bistooprea Dossee, 1 W. R.* 140, referred to and questioned. COLLECTOR OF BOGRA *v.* KRISHNA INDRA ROY **2 B. L. R. A. C. 301 : 11 W. R. 191**

67. ——— *Denial of jurisdiction—Act X of 1859, s. 77. A* sued *B*, a rayiat, for arrears of rent. *C* was added as a party under s. 77, Act X of 1859. The Collector on appeal refused to try *C's* claim under s. 77, because she had not produced her title-deeds. *Held*, that the refusal to try *C's* claim by the Collector was a denial of jurisdiction on his part, and the High Court sent

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

back the case to the Collector for trial of *C's* claim. *In the matter of the petition of* NASSIR JAN
7 B. L. R. 144 : 15 W. R. 418

68. ——— *Refusal to attach property—Refusal of jurisdiction.* Where a Munsif refuses to attach property in execution which he is bound to attach, he may be compelled to do so by the High Court in the exercise of its powers of supervision. MUNOHUR PAUL *v.* WISE
15 W. R. 246

69. ——— *Refusal to execute decree—Refusal of jurisdiction.* Where a Deputy Collector who had passed an informal decree refused to execute it on application, the decree-holder was *held* to be entitled to an order from the High Court, in the exercise of the powers it possesses under s. 15 of the High Courts Act directing the Deputy Collector to do his duty. KHEMUNKUREE DABEE *v.* SHURUT SOONDUREE DABEE
14 W. R. 9

70. ——— *Refusal of Deputy Collector to sell in execution of decree where plaintiff has obtained declaration of his right in Civil Court.* If a decree of a Civil Court declares that the plaintiff has a right to bring certain property to sale in a Deputy Collector's Court, and the Deputy Collector, at the instigation of the defendant, declines to proceed with the sale, his declining to do his duty does not give a fresh cause of action for the purpose of obtaining a second declaration, though it may be a good ground for asking the High Court to use its extraordinary powers to put the Deputy Collector right. RUGHOONUNDUN SINGH *v.* COCHRANE . . . 20 W. R. 16

71. ——— *Refusal to consider grounds—Review of judgment of predecessor.* Where a Court subordinate to the High Court rejected an application for a review of judgment, refusing to consider the grounds of the same, because the decree of which a review was sought was given by its predecessor, the High Court, in the exercise of its powers of superintendence under s. 15 of the High Courts Act, directed such a Court to consider the grounds. *In the matter of the petition of* MATHRA PARSHAD . I. L. R. 1 All. 296

72. ——— *Refusal to grant application for review of judgment of predecessor—Refusal to exercise jurisdiction.* Forty-six suits were brought against the defendants and dismissed by the Munsif of B. The plaintiffs in each case appealed to the District Judge, who reversed the decision of the Munsif. In both Courts all forty-six cases were disposed of in one judgment. Six of the cases being appealable, special appeals in such cases were preferred to the High Court, and pending such appeals an application for a review of the remaining forty cases was made to the

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

District Judge, who ordered that the petition for review should stand over until the result of the special appeal should be known. The High Court having on special appeal restored the decision of the Munsif dismissing the suits, the application for review was renewed before the successor of the former District Judge. He refused to admit the application. *Held*, that the District Judge had not declined jurisdiction or acted beyond his jurisdiction, and that the High Court had therefore no power under s. 15 of the Charter Act to interfere. RAM LALL SINGH *v.* JANKI MAHATOON
4 C. L. R. 14

73. ——— *Wrongly declining to exercise jurisdiction.* Where a Judge declined jurisdiction on a wrong ground, as that of a question of title having arisen, when even if that were the case he had jurisdiction, the High Court interfered under s. 15 of the Charter Act. RAM JEEBUN KOYEE *v.* SHAHAZADEE BEGUM
9 W. R. 336

74. ——— **Orders of Courts established under Land Acquisition Act (X of 1870).** The Courts established under Act X of 1870 are subject to the appellate jurisdiction of the High Court, and not the less so because an appeal lies to the High Court from their decisions in certain cases only. The High Court consequently has the power of superintendence over those Courts under s. 15 of the Charter Act. *In the matter of the petition of* ABDOOL ALI . . . 15 B. L. R. 197

75. ——— **Dismissal of ministerial officer.** With reference to the rule that its extraordinary powers of superintendence should not be exercised except for the purpose of protecting a complainant in a matter wherein otherwise he would not be able to obtain redress, and where the applicant showed himself worthy of its interference, the High Court declined to interfere on behalf of a party who complained that a District Judge had acted *ultra vires* in dismissing him from the post of serishtadar of the Munsif's Court, seeing that it was open to the applicant, under the Civil Courts Act, to seek his remedy from the Local Government. *In the matter of the petition of* AKBAR ALI
19 W. R. 148

76. ——— *Dismissal of ministerial officer.* A Munsif, having charged his serishtadar with carelessness and irregularities, recommended his transfer to some other Munsif. The Judge, after calling for and receiving an explanation from the serishtadar, dismissed him from office. The High Court refused to interfere in the exercise of its general power of superintendence, holding that, although the Judge had exercised an original power where he had only an appellate jurisdiction, he had done so on a complaint made by the Munsif, and the petitioner, if aggrieved, had

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

a remedy under Act VI of 1871 in an application to the Local Government. *In the matter of* FAKEER CHAND LALL . . **20 W. R. 470**

77. ——— **Parties, addition of**—*Dismissal of suit in absence as original plaintiff, after adding third party of plaintiff. Per* NORMAN, *J.* (SETON-KARR, *J.*, dissenting). Where a Court added a third party as a plaintiff, and, in the absence of the original plaintiff, improperly dismissed the suit, it was *held* that the suit was still pending, and undisposed of by the lower Court as regards the plaintiff; and the lower Court was ordered, under the High Court's power of superintendence vested in it by the 24 & 25 Vict., c. 204, s. 15, to take up and try the case accordingly. CHUNDER KANT BHUTTACHARJEE *v.* BINDABUN CHUNDER MOOKERJEE . . . **7 W. R. 277**

s.c. *In the matter of the petition of* CHUNDER KANT BHUTTACHARJEE **B. L. R. Sup. Vol. Ap. 43**

78. ——— *Erroneous order —Putting on the record party not a legal representative.* Where a decree had been obtained against a British subject domiciled in India, who subsequently died intestate, and an order was made reviving the decree against one of his children, and ordering execution to proceed before letters of administration to his state had been taken out, and without inquiry being made as to who were his legal personal representatives:—*Held*, that, although no appeal lay against the order, yet that, as it was clearly erroneous and as, under the circumstances of the case, it must lead to the greatest confusion and injury to the interests of the parties if the execution was proceeded with, the Court was justified in interfering under s. 15 of the Charter Act. POGOSE *v.* CATCHICK **I. L. R. 3 Calc. 708 : 2 C. L. R. 278**

But *See* POGOSE *v.* AHSANOOLLAH **I. L. R. 3 Calc. 710 note**

79. ——— **Order substituting name of purchaser instead of plaintiff**—*Jurisdiction of Civil Court.* A Civil Court is not competent to order the name of a purchaser of the rights of the plaintiff in a suit to be substituted for that of the plaintiff, or, upon the application of the party so substituted, to allow the suit to be withdrawn. Such an order, if made, is made without jurisdiction, and is not an order of the description in respect of which the legislature intended either to give or to deny the right of appeal. But the order is one which the High Court may set aside in the exercise of the superintendence vested in it by s. 15 of 24 & 25 Vict., c. 104. JUDOOPUTTEE CHATTERJEE *v.* CHUNDER KANT BHUTTACHARJEE . . . . . **9 W. R. 309**

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*contd.*

80. ——— **Recorder of Moulmein** —*Act XXI of 1863, ss. 16 and 17—Suspension of pleader.* The High Court has, under s. 15 of 24 & 25 Vict., c. 104, general superintendence over the Court of the Recorder of Moulmein established under Act XXI of 1863. An order passed by the Recorder of Moulmein under s. 16 or 17 of Act XXI of 1863, granting or withdrawing a license to practise as a pleader in the Small Cause Courts of Moulmein, is an exercise of power which comes under the superintendence of the High Court. *In the matter of* THOMSON **6 B. L. R. 180 : 14 W. R. 257**

81. ——— **Pauper, rejection of application to sue as**—*Civil Procedure Code, 1859, s. 304—Case where there is no appeal.* Where a decision (*e.g.*, the rejection of an application under Act VIII of 1859, s. 304) is declared by law not to be subject to appeal, the High Court cannot interfere under 24 & 25 Vict., c. 104, s. 15. BABUR ALI *v.* GOKUL LALL **24 W. R. 62**

82. ——— *Refusal of original Court to entertain application for review—Refusal of leave to sue in formâ pauperis.* Under s. 15 of 24 & 25 Vict., c. 104, the High Court set aside an order of a Court of original jurisdiction, refusing to entertain an application to review an order refusing a petition for leave to sue *in formâ pauperis*, on the ground that the Court had no jurisdiction to entertain it. *In the matter of the petition of* UMASUNDARI DEBI **5 B. L. R. Ap. 29**

83. ——— **Review, admission of, after prescribed time.** The High Court refused to interfere with the order of a Court granting a review of its judgment, although the application for review was not made until three years after the date of the decree, the party who preferred the application for the review having satisfied such lower Court of the existence of just and reasonable cause for his not having preferred his application for review within ninety days. AJONNISSA BIBEE *v.* SURJA KANT ACHARJI **2 B. L. R. A. C. 181 : 11 W. R. 56**

84. ——— *Review, admission of, after prescribed time.* The lower Appellate Court admitted a petition for a review of its judgment after a lapse of ninety days from the date of the decision without recording that just and reasonable cause for the delay had been shown. On an application under s. 15 of the Charter Act to the High Court to set aside the order of the lower Court, on the ground that that Court had no jurisdiction to entertain an application for review after a lapse of ninety days without recording that there was just and reasonable cause for the delay, the High Court refused to interfere. ASRAFANNISSA BEGUM *v.* INAET HOSSEIN **5 B. L. R. 316 : 13 W. R. 439**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—*contd.*

(*a*) CIVIL CASES—*contd.*

98. ———— *Want of jurisdiction to determine part of case.* In a suit of a Small Cause Court nature (to recover the value of produce) which had been decided upon the real issues between the parties, the High Court refused to exercise its extraordinary powers under s. 15 of the Charter, merely on the ground that the Civil Court had no jurisdiction to determine a part of the dispute, which was whether the land whose produce was claimed was or was not in the British territory. BHYRUL SINGH *v.* JHOGRU PATNEE **11 W. R. 506**

99. ———— **Stay of suit in India against company being wound up in England.** The High Court will, in the exercise of its general power, stay the proceedings in a suit in India against a company which is being wound up by order of the Court of Chancery in England under the Companies Act, 1862, where the circumstances are such as to render it proper to do so. BANK OF HINDUSTAN, CHINA, AND JAPAN *v.* PREMCHAND RAICHAND. AHMEDBHAI HABIBHAI *v.* PREMCHAND RAICHAND . . . **5 Bom. O. C. 83**

100. ———— **Recorder of Rangoon, errors in trial before**—*Decision against validity of will.* The mere fact of errors of procedure having been committed in a trial before a Recoder would not warrant the High Court in saying that in pronouncing against the validity of a will after investigation he had acted without jurisdiction or in interfering with his decision. *In the matter of* MEE TSEE . . **15 W. R. 351**

101. ———— **Order passed without legal evidence**—*Civil Procedure Code, 1859, s. 246.* A party to a certain proceeding instituted under s. 246, Act VIII of 1859, having been summoned to give evidence did not attend. The Court, considering that his absence was without lawful excuse, decided the matter before it with reference to the provisions of s. 170 of the Civil Procedure Code. It was then attempted to move the High Court under s. 15 of 24 & 25 Vict., c. 104, to set aside the order as passed without legal evidence. *Held*, that such action would be substantially a special appeal, which could not be allowed with reference to s. 246. DHUNPUT SINGH *v.* INDURCHUNDER DOOGUR . . **13 W. R. 121**

102. ———— **Execution-proceedings**—*Refusal of party to attend as witness.* A Principal Sudder Ameen ordered the attendance as a witness of a person seeking by his vakil to enforce the execution of a decree, and, on his refusal to attend, sent him to the Magistrate. On an application to have the order set aside, a Division Bench of the High Court was of opinion that under the circumstances the order of the Principal Sudder Ameen was arbitrary, vexatious, and unnecessary; but being doubtful, in the absence of any provision

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—*contd.*

(*a*) CIVIL CASES—*contd.*

in the Civil Procedure Code, of its powers of interference under the Charter, referred the point to a Full Bench. *Held*, that the Principal Sudder Ameen had power to make the order, and that the High Court ought not to interfere with it. *In the matter of the petition of* JANKEE BULLUB SEN **B. L. R. Sup. Vol. 716**

S.C. JANOKEE BULLUB SEIN *v.* DUKHINA MOHUN CHOWDHRY . . . . **7 W. R. 519**

103. ———— **Orders under Legal Practitioners' Act**—*Improper exercise of judicial powers under Legal Practitioners' Act (XVIII of 1879), as amended by Act XI of 1896, s. 36—Nature of proof required.* Where a District Judge relying upon an unverified report purporting to come from the Secretary of a Bar Association framed and published the name of the petitioner in the list of touts:—*Held*, that the words "proved to his or their satisfaction" in s. 36 of Act XI of 1896 (amending the Legal Practitioners' Act XVIII of 1879) refer to proof by any of the means known to the law of the fact upon which the Court is to exercise its judicial determination, and the Judge had acted without having before him any legal evidence as required by s. 36 of the Legal Practitioners' Act. In such a case the High Court may interfere under the wide powers of superintendence given by s. 15 of the Charter Act. *In re* SIDDESHWAR BORAL . . **4 C. W. N. 36**

104. ———— *Order under Legal Practitioners' Act, XVIII of 1879, s. 36—Order including a person's name in the list of touts. Held*, that in the case of an order passed under s. 36 of Act XVIII of 1879 the High Court could only interfere in the exercise of the powers of superintendence conferred upon it by s. 15 of the High Courts Act, 1861, and that it would not interfere even then, where the sole ground upon which its interference was asked for was that the decision of the District Judge was against the weight of the evidence. *In the matter of the petition of* MADHO RAM . . **I. L. R. 21 All. 181**

105. ———— **Order for rateable distribution**—*Sale of property to satisfy order for rateable distribution—Rate varied on appeal—Application for restitution of property sold—Appeal—Revision—Restitution.* Petitioner and counter-petitioners held decrees against the same judgment-debtor. Petitioner having realized a large sum in execution, the District Court held that petitioner and counter-petitioners were each entitled, on a rateable distribution to about one-half of the entire sum realized. The District Court realized from petitioner the amount ordered to be paid to counter-petitioners, six items of property being attached and sold, counter-petitioners being the purchasers, and the sale being subsequently confirmed. The High Court then

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*a*) CIVIL CASES—*concld.*

decided an appeal, which had meanwhile been pending, the result of which was that counter-petitioners were held to be entitled to much less than they had been awarded by the District Court and had received from petitioner. This sum was also less than had been realized by the sale of the six items of property. Petitioner, in consequence, applied to the District Court for restitution of the six items of property, which had been sold by the Court and for other relief. The District Court held that the sale could not be set aside as a nullity and that the petitioner was only entitled to receive back the balance, which had been paid in excess. On an appeal being preferred to the High Court :— *Held*, (i) that no appeal lay from the order of the District Court. The order was not a decree ; the parties were not parties to a suit ; and the order was not one from which a special right of appeal was allowed by the Code. The right of appeal must not be assumed to exist in every matter, which comes under the consideration of a Judge, but must be given by statute or by some authority equivalent to statute. Nor does s. 647 of the Code of Civil Procedure confer any right of appeal not expressly given elsewhere by the Code ; (ii) that the High Court had no power to revise the order. The District Court had jurisdiction to decide the matter and had done so, though perhaps wrongly ; (iii) that petitioner should have been held entitled to some restitution. The principle, which should have been followed, was : "The Court in making restitution is bound to restore the parties, so far as they can be restored, to the position, which they were in at the time when the Court, by its erroneous action, had displaced them from it." Inasmuch as the property sold had realized more than was due under the Court's order, the sale was illegal at any rate in so far as it was unnecessary ; and *semble :* that it was entirely illegal. PARASURAM AYYAR *v.* SESHIER (1904) . . **I. L. R. 27 Mad. 504**

106. ——— **Review of judgment**— *Revision—Application for revision of an order rejecting an application for review. Semble :* that it was the intention of the legislature that the Court, which originally heard a case, should be the Court to decide whether an application to review its former judgment should or should not be granted and where that Court rejects such an application, its decision should not be open either to appeal or to revision by a higher Court. RAM LAL *v.* RATAN LAL (1904) **I. L. R. 26 All. 572**

(*b*) CRIMINAL CASES.

107. ——— *Refusal of High Court to interfere where right of appeal exists. Held per* AINSLIE and MCDONELL, *JJ.*, that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who, having a right of appeal to the Sessions Court, instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to. EMPRESS *v.* RAJCOOMAR SINGH **I. L. R. 3 Calc. 573**

s.c. RAJCOOMAR SINGH *v.* DINONATH GHUTTUCK **1 C. L. R. 352**

108. ——— *Setting aside valid conviction in case wrongly instituted. Per* MACLEAN, *J.*—The High Court may without reference to the Local Government set aside a conviction made upon a trial improperly originated. *In the matter of* NOBIN CHUNDER BANIKYA. EMPRESS *v.* NOBIN CHUNDER BANIKYA **I. L. R. 8 Calc. 560**

s.c. NOBIN CHUNDER BANIKYA *v.* EMPRESS. **10 C. L. R. 369**

109. ——— *Order of discharge—Presidency Magistrates' Act (IV of 1876), s. 168—Case in which there is no appeal.* The only course to be pursued where it is sought to set aside an order of discharge made by a Presidency Magistrate is that laid down in s. 168 of Act IV of 1877 ; and as by that section there is no appeal allowed to a complainant who is a private individual, it is not open to him, by invoking the aid of the High Court under s. 15 of the Charter, to obtain under the Court's extraordinary powers that which he might obtain had he a right of appeal. *In the matter of* POONA CHURN PAL **I. L. R. 7 Calc. 447**

110. ——— *Error in law— Offence not constituted on facts proved in non-appealable case.* Where the High Court was of opinion (in a case in which no appeal lay to it) that the facts found by the Court that tried the prisoners, and the Court of appeal from such Court did not constitute the offence of cheating of which the prisoners had been convicted, the High Court in the exercise of its extraordinary jurisdiction reversed the conviction and sentence. REG. *v.* HARGOVANDAS . . . . **9 Bom. 448**

111. ——— *Act V of 1861, s. 17—Order of executive nature.* The High Court, while considering that an order by a Magistrate professing to act under s. 17 of Act V of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature. *In the matter of the petition of* RAHOMAN SIRKAR **10 B. L. R. Ap. 4 : 18 W. R. Cr. 67**

112. ——— *Orders under Criminal Procedure Code, 1872, s. 518—Nuisance.* The extraordinary powers conferred on the High Court by s. 15 of the Charter Act extend to the

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*b*) CRIMINAL CASES—*contd.*

revising of orders passed under the Code of Criminal Procedure, s. 518. GHOSHAIN LUCHMUN PERSHAD POOREE *v.* POHOOP NARAIN POOREE **24 W. R. Cr. 30**

113. ——— *Order under Criminal Procedure Code (Act X of 1872), s. 518—Nuisances.* The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code. *In the matter of the petition of* CHUNDER NATH SEN . . **I. L. R. 2 Calc. 293**

114. ——— *Orders under Criminal Procedure Code, 1872, s. 518—Criminal Procedure Code, 1872, s. 297—Orders in judicial proceeding. Held*, that, orders legally made under s. 518 of the Code of Criminal Procedure not being orders made in a judicial proceeding, the High Court had no power to deal with them under s. 297 of the Code of Criminal Procedure; but where an order under that section was illegal, the High Court set it aside under s. 15 of the Charter Act, 24 & 25 Vict., c. 104. *In the matter of the petition of Chunder Nath Sen, I. L. R. 2 Calc. 293*, followed. BRADLEY *v.* JAMESON . **I. L. R. 8 Calc. 580**

CHUNDER COOMAR ROY *v.* OMESH CHUNDER MOJOOMDAR . . . **22 W. R. Cr. 78**

BANEE MADHUB GHOSE *v.* WOOMANATH ROY CHOWDHRY **21 W. R. Cr. 26**

SREENATH DUTT *v.* UNNODA CHURN DUTT **23 W. R. Cr. 34**

115. ——— *Order of Magistrate under s. 518, Criminal Procedure Code, 1872.* The High Court, in the exercise of the jurisdiction given to it by s. 15 of the Charter Act, issued a rule *nisi* at the instance of the party aggrieved calling upon the opposite party to show cause why an order made by a Magistrate which was complained of should not be set aside for want of jurisdiction, although the matter had already been brought to the notice of the Court on a reference made by the Sessions Judge. KALI NARAIN ROY CHOWDHRY *v.* ABDOOL GUFFOOR KHAN **22 W. R. Cr. 24**

116. ——— *Criminal Procedure Code (Act X of 1882), s. 144—Order to abstain from certain act.* A Deputy Commissioner passed an order under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the raiyats of two specified pergunnahs; and also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any adda or kuchari in such pergunnahs for a period of two months. Upon an application to set aside such order:—*Held*, that the High Court had jurisdiction under s. 15 of the Charter Act to set it aside if it were made without jurisdiction. ABAYESWARI DEBI *v.* SIDHESWARI DEBI . . . . **I. L. R. 16 Calc. 80**

117. ——— *Criminal Procedure Code (Act V of 1898), ss. 145, 435—Power of local Legislature—Power of revision by High Court—Order concerning a ferry purporting to be made under s. 145.* The local Legislature has power to overrule a statutory power conferred on the High Court; but this was not the object and result of the legislation expressed in s. 435 of the Criminal Procedure Code of 1898. *Empress* v. *Burah, I. L. R. 4 Calc., 172: L. R. 5 I. A. 178*, referred to. The terms of s. 435 mean that orders under the exempted sections mentioned in cl. (3) must have been passed with jurisdiction. If such orders are challenged as made without jurisdiction, the mere fact of their purporting to be passed under the exempted sections would not bring them within those sections so as to debar the exercise of powers by the High Court under s. 15 of the Charter Act. *Abayeswari Debi*, v. *Sedheswari Debi, I. L. R. 16 Calc. 80; Ananda Chandra Bhuttacharjee* v. *Stephen, I. L. R. 19 Calc. 127; Roop Lal Das* v. *Manook, 2 C. W. N. 572*; and *Queen-Empress* v. *Pratap Chunder Ghose, I. L. R. 25 Calc. 852*, followed. HURBULLUBH NARAIN SINGH *v.* LUCHMESWAR PROSAD SINGH **I. L. R. 26 Calc. 188 3 C. W. N. 49**

118. ——— *Criminal Procedure Code, 1898, ss. 145, 439—Dispute as to ownership of land—Non-joinder of necessary parties—Alteration of proceedings by succeeding Magistrate—Addition of parties during proceedings—Matter of jurisdiction of Magistrate.* Where there was a dispute as to the ownership of the lands between certain zamindars and their tenants on the one side and other zamindars and their tenants on the other, and the real matter for determination was not merely which of the two parties of zamindars were entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands and in a proceeding under s. 145 of the Code of Criminal Procedure the zamindars only were made parties and not the tenants. *Held* (AMEER ALI and STANLEY, *JJ.*), that the tenants were necessary parties to the proceeding, and the omission to make them parties went to the root of the case and was an illegality affecting jurisdiction which would justify the High Court in setting aside the order. PRINSEP, *J.*—The omission to join the tenants could not vitiate an order as between the zamindars on an objection that it was without jurisdiction, and that no question of jurisdiction arose in the matter. The High Court's powers are under the Charter Act, and these could be exercised only in respect of jurisdiction. Where a Magistrate recorded proceedings under s. 145 of the Code of Criminal Pro-

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*b*) CRIMINAL CASES—*contd.*

cedure and his successor on the same materials revised those proceedings altering their entire character, converting the dispute, which was originally stated to be a dispute regarding the actual possession of the land, into a dispute regarding the collection of rent between the persons named therein,—*Held* (AMEER ALI and STANLEY, *JJ.*), that it was an abuse of jurisdiction on the part of the Magistrate so to alter the proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter. AMEER ALI, *J.*—The High Court has the power to interfere both under its revisional jurisdiction as also under cl. 15 of the Charter. *Hurbullubh Narain Singh* v. *Lachmeswar Prosad Singh, I. L. R. 26 Calc. 188,* referred to. LALDHARI SINGH *v.* SUKDEO NARAIN SINGH **I. L. R. 27 Calc. 892 4 C. W. N. 613**

119. ——— *Order of remand —Criminal Procedure Code* (*Act XXV of 1861*), *s. 224.* Where a Magistrate had adjourned an inquiry for a cause not contemplated by s. 224 of the Criminal Procedure Code, the High Court, in exercise of the power of superintendence conferred by s. 15 of 24 & 25 Vict., c. 104, set aside the order of remand. *In the matter of the petition of* MATHURANATH CHUCKERBUTTY **9 B. L. R. 354 : 17 W. R. Cr. 55**

120. ——— *Order by Judge of High Court in its original criminal jurisdiction.* A Judge of the High Court making an order in the original criminal jurisdiction of the Court is not a Court subject to the control of the High Court under s. 15, 24 & 25 Vict., c. 104. *In re* GOVERNMENT OF BENGAL. QUEEN *v.* AMEER KHAN **7 B. L. R. 250 note : 15 W. R. Cr. 60**

121. ——— *Order by Judge of High Court in its original criminal jurisdiction.* Where an application was made to the Judge sitting on the original side of the High Court to transfer a case from Patna in the exercise of the extraordinary jurisdiction of the High Court, and the application was adjourned, and an order made calling on the Government to show cause why it should not be removed, the High Court on the appellate side, on a petition setting forth that the order was without jurisdiction, as the rules of the High Court had appointed a particular Bench to hear cases from Patna, refused to interfere. *In re* GOVERNMENT OF BENGAL. QUEEN *v.* AMEER KHAN . . . . **7 B. L. R. 244 note**

122. ———*Order of Magistrate for warrant without jurisdiction.* The High Court has power under its general powers of superintendence to quash an order made by a Magistrate without jurisdiction for the issue of a warrant. *In the matter of* BANKA BEHARI GHOSE **2 B. L. R. A. Cr. 17 : 11 W. R. 26**

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*b*) CRIMINAL CASES—*contd.*

123. ——— *Power of High Court to revise an order as to sanction under s. 197 of the Criminal Procedure Code—Criminal Procedure Code* (*Act V of 1898*), *s. 197 and s. 439.* A pleader applied to the Chief Presidency Magistrate for sanction under s. 197 of the Criminal Procedure Code to prosecute an Honorary Magistrate for using insulting and defamatory language towards him in the course of the trial of a case and sanction was refused. On application to the High Court,—*Held*, under the revisional powers conferred by the Criminal Procedure Code, the High Court has no authority to interfere with an order made by a Subordinate Court granting or refusing sanction under s. 197 of the Code, but it has sufficient authority for that purpose under s. 15 of the Charter Act (24 & 25 Vict., c. 104). NANDO LAL BASAK *v.* MITTER **I. L. R. 26 Calc. 852 3 C. W. N. 539**

124. ——— *Power of High Court to revise order of Presidency Magistrate dismissing complaint—Letters Patent, High Court, cl. 28—Order for further enquiry.* The High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate, by reason not of cl. 28 of the Letters Patent, 1865, but of s. 15 of the Charter Act (24 & 25 Vict., c. 104). That section has always been interpreted in a very extended meaning so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts. But the High Court has no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal passed by a Presidency Magistrate. *Colville* v. *Kristo Kishore Bose, I. L. R. 26 Calc. 746,* dissented from. *Opoorba Kumar Sett* v. *Probod Kumari Dassi, 1 C. W. N. 49,* referred to. A Presidency Magistrate acting under s. 203 of the Criminal Procedure Code dismissed a complaint of the report of the police without examining the complaint and without finding that there was no sufficient ground for proceeding. The High Court acting under s. 15 of the Charter Act ordered a further inquiry to be made into the matter of the complaint. CHAROOBALA DABEE *v.* BARENDRA NATH MOZUMDAR **I. L. R. 27 Calc. 126 3 C. W. N. 601**

OPOORBA KUMAR SETT *v.* PROBOD KUMARI DASSI **1 C. W. N. 49**

125. ——— *Criminal Procedure Code, ss. 145 and 435 (3)—High Court's powers of revision. Held,* that s. 15 of the Charter Act, 24 & 25 Vict., Cap. CIV, does not override s. 435 of the Code of Criminal Procedure, so as to enable the High Court in the exercise of its powers of superintendence to interfere with an order passed

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*b*) CRIMINAL CASES—*contd.*

by a Court having jurisdiction under Cap. XII of the Code, interference with which in revision is excluded by s. 435 (*3*). *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh, I. L. R. 26 Calc. 188,* and *Mahadeo Kunwar* v. *Bisu, I. L. R. 25 All. 537,* referred to. MAHARAJ TEWARI *v.* HAR CHARAN RAI (1904) . . **I. L. R. 26 All. 144**

126. ——— *Charter Act—Revocation of sanction—Power of High Court.* Under sub-s. (*6*) of s. 195 of the Code of Criminal Procedure a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court subordinate to it, within the meaning of sub-s. (*7*) (*a*), gives or refuses a sanction, whether in respect of an offence committed before it or of one committed before a Court subordinate to it, and, in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such Court. Under cls. (*b*) and (*c*) of sub-s. (*1*), the sanction may be accorded in the first instance by the Court to which the Court in which the offence was committed is subordinate, even though no application for sanction has been made to the latter Court. For the purposes of cls. (*b*) and (*c*) of sub-s. (*1*), a sanction accorded by the High Court would operate as a sanction accorded by a Court subordinate to it, such as the District Court. An order passed by an Appellate Court is, in law, the order which ought to have been passed by the Subordinate Court, and will in consequence, have the same efficacy and operation as the order which ought to have been passed by the latter. S. 439 of the Code of Criminal Procedure provides that the High Court, as a Court of revision, may exercise the powers conferred on a Court of Appeal by s. 195. In a case in which both the Original Criminal Court and the Appellate Criminal Court refuse sanction, the High Court, as a Court of revision, may call for the record and if the refusal proceeds on an error of law, it may accord the sanction which ought to have been granted by the Appellate Criminal Court and such sanction will be operative for the purposes of cls. (*b*) and (*c*) of sub-s. (1). A plaintiff in a suit applied for attachment before judgment and filed an affidavit in support of that application, in which he stated that the defendants intended to alienate their properties with *mala fide* intentions. He did not state in the affidavit that this statement was based on what he had been told. He was, however, orally examined, and then deposed that he had heard that the defendants were intending to alienate property. The petition was dismissed. Thereupon sanction was asked for, the Subordinate Judge according sanction only for an offence under s. 199 of the Penal Code, and refusing sanction for offences under ss. 193, 196 and 200. The sanction accorded was not based on the oral evidence, but on the statement in the affidavit. The defendants appealed (under s. 195 of the Code of Criminal Procedure) against the refusal to grant sanction for offences, under ss. 193, 196 and 200, to the District Judge who accorded sanction for the prosecution of the petitioner under those sections also. *Held,* on revision, that the District Judge had not exercised a sound discretion in according the sanction, for although the petitioner had not stated in his affidavit that the statements therein were made on hearsay, he had stated so in his oral evidence and the affidavit was not inconsistent with that evidence. *Quære :* Whether a Village Magistrate is a Magistrate within the meaning of s. 197, cl. (*a*) of the Code of Civil Procedure, as that expression is defined in the Imperial General Clauses Act. PALANIAPPA CHETTI *v.* ANNAMALAI CHETTI (1904) **I. L. R. 27 Mad. 223**

127. ——— *Penal Code (Act XLV of 1860), s. 193—Extension of time under s. 195—Judge on Criminal Side is "High Court," within the meaning of s. 195, sub-s. (6).* A Judge sitting on the Original Side, who granted sanction to prosecute under s. 193 of the Penal Code, is a "High Court" within the meaning of sub-s. (*6*) of s. 195 of the Criminal Procedure Code. *Fakiruddin* v. *G. L. Garth, 3 C. W. N. 91,* referred to. He may, therefore, extend the time for such prosecution, if good cause be shown. *Darbari Mandar* v. *Jogoo Lal, I. L. R. 22 Calc. 573,* dissented from. *Joydeo Singh* v. *Harihar Parshad Singh, I. L. R. 11 Calc. 577 ; Mangoram* v. *Behari, I. L. R. 18 All. 358; Karuppana* v. *Sinna Gounden, I. L. R. 26 Mad. 480 ; In re Muthu Kudum, I. L. R. 26 Mad. 191,* refered to. DINOBANDHU NANDY *v.* HURRY MUTTY DASSEE (1904) **8 C. W. N. 797**

128. ——— *Power of superior Court to revoke sanction after complaint lodged.* *P* obtained sanction from a Stationary Sub-Magistrate to prosecute *S* for offences under ss. 211 and 193, Penal Code, alleged to have been committed before that Magistrate. *P* did not prefer any complaint in pursuance of the sanction, but the police, relying on it, preferred a charge sheet to the Joint Magistrate against the accused in respect of all alleged offences under s. 211. The Joint Magistrate struck the case off his file, giving as his reason for so doing that the *suo motu* quashed the Sub-Magistrate's sanction under s. 195 (*b*) of the Code of Criminal Procedure. *Held,* that the Joint Magistrate's action in striking the case off his file was legal and proper, though the reason given by him for so doing was erroneous and his act in quashing the sanction *ultra vires.* A Joint Magistrate, though authorised under s. 407 (*2*) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate, is not the Court to which appeals from the Court of the Stationary

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SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15 —*contd.*

(*b*) CRIMINAL CASES—*contd.*

Magistrate ordinarily lie, within the meaning of s. 195 (*7*). The Court, to which the Court of the Stationary Magistrate is, within the meaning of s. 195 (*6*) and (*7*), subordinate is that of the District Magistrate. *Eroma Variar* v. *Emperor, I. L. R. 26 Mad. 656*, and *Sadhu Lall* v. *Ram Churn Pasi, I. L. R. 30 Calc. 394*, followed. The Joint Magistrate could not, therefore, revoke the sanction given by the Stationary Sub-Magistrate, the District Magistrate alone having the power to revoke or grant a sanction given or refused by the Stationary Sub-Magistrate. Nor was it competent to a District Magistrate, under s. 407, to direct that applications for revoking or granting a sanction given or refused by a Sub-Magistrate may be presented to the Joint Magistrate. Whether the Court authorised to exercise such a power under sub-s. (*6*) can exercise it *suo motu*, as if it were a Court of revision, where no application has been made to it either to give a sanction, which has been refused or to revoke a sanction, which has been given. *Quære :* The course pursued by the police in sending a police report in respect of the offence was contrary to law ; but whether, on the strength of the sanction accorded to *P*, a police officer or other stranger might have preferred a complaint against *S*. *Quære :* The mere fact that a complaint has been made, in pursuance of sanction, will be no bar to a Court competent under sub-s. (*6*) to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself. *In the matter of* SUBBAMMA (1904)

I. L. R. 27 Mad. 124

129. ——— *Sanction—Notice to accused—Reference to High Court—Revisional power.* S. 215 of the Code of Criminal Procedure is not applicable to a case in which a commitment in question has not been made under any one of the four sections therein specified, but has been made under the directions of the High Court under s. 526 (*1*) IV. An order of a Sessions Judge or District Magistrate passed under s. 436, directing commitment, may be quashed by the High Court in the exercise of its revisional powers, though not under s. 215. But an order passed by the High Court itself under s. 526 cannot be so revised. Sanction accorded by Government under s. 197 is not null and void for the reason that no notice was given to the accused to show cause, why it should not be given. It is a matter left to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution. There is a marked distinction between the classes of offences dealt with in s. 195, cls. (*b*) and (*c*), and those dealt with in s. 197. A Court granting sanction under s. 195 (*b*) and (*c*) does so in connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore acts in its judicial capacity in granting the sanction on legal evidence. But the Government in according or withholding sanction under s. 197 (for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant), acts purely in its executive capacity and the sanction need not be based on legal evidence. The Criminal Procedure Code does not prescribe any particular form for the sanction required by s. 197 as it does in the case of sanction accorded under s. 195. *In the matter of* KALAGAVA BAPIAH (1904)

I. L. R. 27 Mad. 54

130. ——— *Sanction to prosecute—Revision—Appeal—Penal Code (Act XLV of 1860), s. 211. Held*, that an application made under cl. 6 of s. 195 of the Code of Criminal Procedure may properly be regarded as an application by way of appeal, though it is not material by what name the application is called in pursuance of which the appellate Court revokes (or grants) a sanction granted (or refused) by a subordinate Court. *Mehdi Hasan* v. *Tota Ram, I. L. R. 15 All. 61*, discussed. *Held*, also, that to constitute the offence provided for by s. 211 of the Penal Code is sufficient that a false complaint should be made against any person. It is not necessary that a summons should be issued upon such complaint. HARDEO SINGH *v.* HANUMAN DAT NARAIN (1904) . . . **I. L. R. 26 All. 244**

131. ——— *High Court's powers of revision—Criminal Procedure Code, s. 195 —Sanction to prosecute—Sanction granted by a Civil Court.* Where sanction to prosecute in respect of several offences under various sections of the Penal Code was granted by a Munsif, and his order was upheld by the District Judge in revision, it was *held* that the High Court had jurisdiction to interfere in revision under s. 439 of the Code of Criminal Procedure. *In re Chennanagoud, I. L. R. 26 Mad. 139*, dissented from. *Held*, also, that it is not expedient that a sanction to prosecute should be given to a debtor to use against his creditor. NAZIR HASAN *v.* DOST MUHAMMAD (1904)

I. L. R. 26 All. 1

132. ——— *Sanction to prosecute, power of Appellate Court to grant—Rule on District Magistrate to show cause—Right of opposite party to be heard—Criminal Procedure Code (Act V of 1898), ss. 195, 438.* The power of granting sanction by an Appellate Court ought to be exercised carefully, especially when sanction is refused by the Court of first instance. Where sanction had been granted by the Sessions Judge to prosecute the petitioner for the purpose of public justice, and a rule had been issued by the High Court upon the District Magistrate only to show cause why the sanction should not be set aside, it was *held* at the hearing of the rule that the opposite side had

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SUPERINTENDENCE OF HIGH COURT—*contd.*

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no *locus standi* and should not be heard. JHALAN JHA *v.* BUCHAR GOPE (1904) I. L. R. 31 Calc. 811

133. ——— *High Court's powers of revision—Order passed by a Munsif directing the prosecution of a party to a civil suit.* Where a Munsif acting under s. 476 of the Code of Criminal Procedure directed the prosecution of a party to a civil suit pending before him, it was held by STANLEY, *C.J.*, and BLAIR, *J.*, that the High Court had no jurisdiction in the exercise of its revisional powers of the criminal side under s. 439 of the Code of Criminal Procedure to interfere with such order. *Eranholi Athan* v. *King-Emperor, I. L. R. 26 Mad. 8* ; *Kali Prosad Chatterjee* v. *Bhubon Mohini Dasi, 8 C. W. N. 73*, and *Emperor* v. *Mohammad Khan, All. Weekly Notes, (1902), 202*, referred to. *Per* BANERJEE, *J.*, (*contra*).—The High Court has power under s. 439 of the Code of Criminal Procedure to revise an order made under s. 476 of the Code, whether such order be made by a Civil, Criminal, or Revenue Court. *Emperor* v. *Muhammad Khan, All. Weekly Notes, (1902), p. 202 ; In the matter of the petition of Mathura Das, I. L. R. 16 All. 80 ; In the matter of the petition of Alamdar Hussain, I. L. R. 23 All. 249 ; Khepu Nath Sikdar* v. *Gris Chunder Mookerjee, I. L. R. 16 Calc. 730 ; Chudhura Mahomed Isarul Hug* v. *Queen-Empress, I. L. R. 20 Calc. 349 ; Queen-Empress* v. *Srinivasalu Naidu, I. L. R. 21 Mad. 124 ; Queen-Empress* v. *Rachappa, I. L. R. 3 Bom. 109 ; In re Bal Gangadhar Tilak, I. L. R. 26 Bom. 785 ; Eranholi Athan* v. *King-Emperor, I. L. R. 26 Mad. 98 ;* and *Kali Prosad Chatterjee* v. *Bhubon Mohini Dasi, 8 C. W. N. 73*, referred to. BHUP KUNWAR, *In the matter of the petition of.* (1904) I. L. R. 26 All. 249

134. ——— *Sessions Court—Charge, power to amend—Amendment not to go beyond subject-matter of indictment—Remand order by High Court, effect of—Discretion of Sessions Judge—Jurisdiction.* The Sessions Court is not a Court of Original Jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment. Where a remand order of the High Court directed the accused to be tried under s. $\frac{4}{5}\frac{1}{1}\frac{7}{1}$ of the Penal Code and the Sessions Judge altered the charge to one under s. $\frac{4}{5}\frac{2}{1}\frac{0}{1}$: *Held*, that the Order of the High Court was not intended to fetter the discretion of the Sessions Judge, and he had the power to alter the charge. It was found, however, that these charges related to events, which did not form the subject-matter of the complaint as originally lodged and the Magistrate also did not commit the case with reference to them : *Held*, that the Sessions Judge should not try the accused on the amended charge, notwithstanding the remand order of the High Court, this objection not having been raised and dealt with, when that order was made. BIRENDRA LAL BHADURI *v.* KING-EMPEROR (1904) . . 8 C. W. N. 784

SUPERINTENDENCE OF HIGH COURT—*contd.*

3. CHARTER ACT (24 & 25 VICT., C. 104), S. 15—*concld.*

(*b*) CRIMINAL CASES—*concld.*

4. CIVIL PROCEDURE CODE, 1882, S. 622.

1. ——— *Order made by High Court, application to review.* S. 622 of the Civil Procedure Code (XIV of 1882) does not apply to a case where the order, of whith review is sought, is made by the High Court. The Court referred to in s. 622 is a Court other than the High Court. *In re* PREMJI TRIKUMDAS I. L. R. 17 Bom. 514

2. ——— *Application where it was found an appeal lay—Application treated as appeal.* Where an application was made for the exercise of its superintendence under s. 622 of the Civil Procedure Code, and the Court found that an appeal lay in the case, and that therefore it ought not to exercise such superintendence, the application was allowed to be treated as an appeal (the appeal from its value lying to the High Court and the application under s. 622 having been made before expiry of the time allowed for an appeal) on the proper Court-fees being paid. *Mahomed Wahiudin* v. *Hakiman, I. L. R. 25 Calc., 757*, referred to. SRIDHARAU SOMAYAJIPAD *v.* PURAMATHAN SOMAYAJIPAD . I. L. R. 23 Mad. 101

3. ——— *Delay in moving Court.* Where an auction-purchaser applied to the High Court to set aside, in the exercise of its powers under s. 622 of the Civil Procedure Code, an order setting aside a sale of immoveable property in execution of a decree, on the ground that such order was illegal, such application being made nearly seventeen months after the date of such order, the Court, having regard to the time that had elapsed before such application was made, refused to interfere. *In the matter of the petition of* DURGA PRASAD . . . I. L. R. 4 All. 154

4. ——— On the question whether the High Court should refrain from exercising its powers under s. 622 by reason of the long time which had elapsed from the date of the decree, —*Held*, that the petitioner was not fairly chargeable with laches. BALMAKUND *v.* SHEO JATAN LAL I. L. R. 6 All. 125

5. ——— *Interference without application by a party to suit.* A High Court can interfere under s. 622 of the Code of Civil Procedure without an application made to it by a party to the suit. ANTHONY *v.* DUPONT I. L. R. 4 Mad. 217

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

6. ——— *Interference without application by party to suit—Reference from District Judge.* It is only on the application of a party interested that the High Court can act as a Court of revision under s. 622 of the Civil Procedure Code. Accordingly, where a Munsif, considering that the Subordinate Judge had acted without jurisdiction in setting aside on appeal certain orders made by him, brought the matter to the knowledge of the District Judge, who took the same view, and the latter referred the case to the High Court under that section, it was *held* that the Court had no power to interfere. MAHOMED FOYEZ CHOWDHRY *v.* GOLUCK DASS . . **7 C. L. R. 191**

7. ——— *Revision of order of lower Court—Power of High Court, on the application of a third party—Original order passed for delivery of possession to auction-purchaser—Dispossession of auction-purchaser by a claimant—Order for registration of name of claimant—Jurisdiction of Court to re-open execution-proceedings.* On a dispute arising between two contending parties, *A* and *B*, for registration of their names, a reference was made to the District Judge under s. 55 of the Land Registration Act, and a decision was passed in favour of *A*, the petitioner, who was put in possession of the property notwithstanding the objection of one *C*, the opposite party, that he held possession of the village as a permanent tenure-holder, having acquired a title by auction-purchase in execution of a mortgage decree. No steps were taken by *C* to obtain any recognition of his title from the District Judge, but some time after he applied to the Subordinate Judge for an amendment of his safe certificate, and having obtained an order of the Court re-opening the execution-proceedings he applied for a fresh writ of possession in pursuance of the amended sale certificate. The Subordinate Judge issued a fresh writ of possession but *A* resisted the execution of that writ and possession, could not be given without complaining of the resistance to the Subordinate Judge. *C* applied for and obtained a fresh writ for possession. Before any action could be taken upon that writ, the petitioner presented an application to the Subordinate Judge representing his right in and possession of the property, but the Subordinate Judge declined to take any action upon it. Several resistances were made to the delivery of possession to the opposite party, and several successive writs of possession were issued by the Subordinate Judge. *Held*, that, under the above circumstances, *A* had sufficient interest in the orders complained against to justify him in moving the Court under s. 622, Civil Procedure Code. *Semble :* Under certain circumstances, the High Court can act under s. 622, otherwise than on the application of a party to the proceedings against which revision is sought to be taken. *Mahomed Foyez Chowdhry* v. *Goluck Dass, 7 C. L. R. 191,* explained and distinguished. *Raghu Nath Gujrati* v. *Rai Chatraput Singh, 1 C. W. N. 633,* referred to. That it was not open to the Subordinate Judge to make the original order for delivery of possession over again, and the proceedings of the Subordinate Judge were bad *ab initio.* GOLAM MAHAMMAD *v.* SARODA MOHAN MOITRA . **4 C. W. N. 695**

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

8. ——— *Case where other specific remedy exists—Bom. Reg. II of 1827, s. 5—Certiorari—Mandamus—Prohibition—Specific Relief Act (I of 1877) Ch. VIII.* A Division Bench (PINHEY and NANABHAI HARIDAS, *JJ.*) of the High Court referred the following question for the determination of the Full Bench : "Whether the High Court should exercise its extraordinary jurisdiction under s. 622 of the Code of Civil Procedure, or otherwise, on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases in which it appears the law has specifically prescribed another remedy by suit or otherwise ?" *Held*, that the question did not admit of a precise categorical reply ; that the High Court could not impose on itself limitations without regard to circumstances ; but that the general principles governing the exercise, by the High Court, of its visitatorial or superintending powers to be deduced from a general survey of the authorities on the subject might be reduced to the form of the following seven propositions, the fifth of which would ordinarily govern in the class of cases alluded to in the question ; (i) The visitatorial or superintending power of the High Court is so necessary and almost indispensable, that it is not to be wholly excluded even by a clause in a statute withdrawing cases under the statute from its control. When such a statute has been made a mere pretext, or has been wholly misapplied, the case will be treated as one not really arising under the statute, but on an evasion or perversion of the statute, and as such subject to the general control of the Court. (ii) The Court having called up the record or proceedings of a subordinate Court, will itself investigate the fact on which a jurisdiction has been assumed or declined ; on which it depends whether the subordinate Court could or could not legally deal with the matter in question, either at all or on the principle to which it has referred the case ; or according to which its mode of inquiry or of action may or may not have been in contradiction rather than obedience to the rules of procedure, or the principles implied in them, to such a material extent as to defeat the purpose of the law. (iii) If the Court finds that the external conditions of jurisdiction, of investigation, and of command, have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court in any matter committed by the Legislature to the discretion of such Court. (iv) Where an appeal is provided, the Court will not.

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure. (v) Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should, in such cases, be in some measure accepted instead of juridical perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that by the ordinary and prescribed method an adequate remedy, or the intended remedy, cannot be had. (vi) The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of the particular case, or of the principle involved in it of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for or against the Court's intervention, due weight is to be given to them, regard being always had to the principles already enunciated. (vii) The Court will "sedulously abstain" from making any order or refusing to make it on grounds the appreciation of which is exclusively assigned by law to some other authority, provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range. SHIVA NATHAJI *v.* JOMA KASHINATH
I. L. R. 7 Bom. 341

9. ——— *Cases in which appeal lies—"Decree"—Order rejecting memorandum of appeal.* An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2 of the Civil Procedure Code; it is therefore appealable, and not open to revision by the High Court under s. 622 of the Code. GULAB RAI *v.* MANGLI LAL . **I. L. R. 7 All. 42**

10. ——— *Civil Procedure Code, 1882, s. 381—Order dismissing suit on failure to give security for costs. Held* by the Full Bench, that an order passed under s. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code. WILLIAMS *v.* BROWN . . **I. L. R. 8 All. 108**

11. ——— *Order amending decree under s. 206, Civil Procedure Code, 1882—High Court's powers of revision.* A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment. *Per* OLDFIELD, *J.*—That the order passed by the Judge under s. 206 could not be made the subject of revision by the High Court under s. 622 of the Civil Procedure Code, because there was an appeal from the amended decree, which became the decree in the suit, and superseded the original decree. *Per* MAHMOOD, *J.*—That an order passed under s. 206 of the Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismissed" his predecessor meant "decreed," the Judge had altered the decree in a manner not warranted by the terms of s. 206; that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622 of the Code; and that the Court was consequently competent to revise his order. *Raghunath Das* v. *Raj Kumar, I. L. R. 2 All. 276*, referred to. SURTA *v.* GANGA
I. L. R. 7 All. 411

S.C. on appeal under the Letters Patent reversing the judgment of OLDFIELD, *J.*, and affirming that of MAHMOOD, *J.* SURTA *v.* GANGA
I. L. R. 7 All. 875

12. ——— *Civil Procedure Code, s. 206—Order amending decree in respect of Court-fee in pre-emption suit.* An order as to costs contained in a decree for pre-emption directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code, passed an order directing the amendment of the decree by calculating the pleader's fees upon the actual value of the property. *Held per* OLDFIELD, *J.*—When an original decree is amended under s. 206 of the Civil Procedure Code, it, as amended, is the decree in the suit; and an appeal therefore lies from it under the provisions of s. 540, when the validity of the amendment can be questioned. The matter of amending a decree under s. 206 does not by itself constitute a "case" within the meaning of s. 622 of the Civil Procedure Code, but forms part of the proceedings in the suit in which the decree is made. *Held*, therefore, *per* OLDFIELD, *J.*, that where an original decree, which was appealable, was amended by the Court of first instance, under s. 206 of the Civil Procedure Code, the High Court had no power to revise such amendment under s. 622 of the Code. *Per* MAHMOOD, *J.* (*contra*). RAGHUNATH DAS *v.* RAJ KUMAR . **I. L. R. 2 All. 276**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

Held, on appeal under the Letters Patent, that the alteration of the decree was improper, and was not an amendment of the kind authorised by s. 206 of the Civil Procedure Code. An order passed under s. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and such an order is not appealable under s. 588 of the Code. Such an order therefore can be revised by the High Court under s. 622. The judgment of OLDFIELD, *J.*, reversed, and that of MAHMOOD, *J.*, affirmed. RAGHUNATH DAS *v.* RAJ KUMAR
I. L. R. 7 All. 876

13. ——— *Civil Procedure Code, s. 206—Amendment of decree—Munsif acting illegally but in exercise of jurisdiction.* The holder of a decree passed in a suit on a hypothecation-bond applied under the Civil Procedure Code, s. 206, to have the decree amended by bringing the description of the land contained therein into accordance with that contained in the hypothecation-bond, and the Court made an order accordingly. On a revision petition preferred under the Civil Procedure Code, s. 622, by the judgment-debtor :—*Held* (reversing the judgment of PARKER, *J.*, but on different reasoning by the two learned Judges constituting the Court), that the High Court had no power to interfere on revision. NARAYANASAMI *v.* NATESA . . **I. L. R. 16 Mad. 424**

14. ——— *Civil Procedure Code, 1882, s. 44—Order refusing leave to join claims—Rejection of plaint.* In a plaint filed in the Court of a Subordinate Judge, the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave, under s. 44, rule (*a*), of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave and returned the plaint, with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively, in the Court of the Munsif :—*Held*, that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property ; that, although this might have been a misapplication of s. 44, rule (*a*), of the Code, its effect was to reject the plaint ; that such an order was a decree with reference to the definition in s. 2, and was appealable as such to the District Judge, and that therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s. 622. BANDHAN SINGH *v.* SOLHU . **I. L. R. 8 All. 191**

15. ——— *Case in which appeal lies.* A tenure having been sold in execution of an *ex parte* decree for rent due in respect of it, the judgment-debtor made an application, to which the purchaser was not made a party, to set aside the decree, and the decree was set aside. The decree-holder thereupon applied under s. 622 of the Civil Procedure Code to set aside the order of the Munsif. *Held*, that, inasmuch as an appeal lay, under s. 558 (cl. 6), from the order of the Munsif, the court ought not to interfere under s. 622. RAM KRISTO ROY *v.* NAIK TARA DASS
12 C. L. R. 449

16. ——— *Case in which no appeal lies—Calling for record in case—Per* PEARSON, *J.*, OLDFIELD, *J.*, and STRAIGHT, *J.*— When, under s. 622 of Act X of 1877, the High Court has called for the record of a case in which no appeal lies to it, it may, under that section, pass any order in such case which it might pass if it dealt with the case as a second appeal under Ch. XLII of that Act. *Per* STUART, *C.J.*—The High Court may, under that section, pass in such case any order, whether in regard to fact or law, as it thinks proper. *In the matter of the petition of* MUHAMMAD *v.* HUSAIN . **I. L. R. 3 All. 203**

17. ——— *Interference of High Court where no appeal lies.* Where an appeal preferred to the Distict Court against an order refusing an application for execution of a decree for costs was allowed, the High Court, on a second appeal being instituted, *held* that no appeal lay, either to the District Court or to the High Court, but entertained the matter under s. 622 of the Civil Procedure Code, and upheld the order of the District Court. BHOYRUB CHUNDER DOSS *v.* WAJEDUNNISSA KHATOON . **6 C. L. R. 234**

18. ——— *Objection to attachment of property—Objection allowed—Costs —Suit to establish right—Appeal—Refund of costs —Civil Procedure Code, 1882, ss. 244, 280, 283.* An objection to the attachment of property attached in execution of a decree was allowed, the decree-holder being ordered to pay the costs of the objector. The decree-holder thereupon brought a suit to contest the order allowing the objection. He did not seek in this suit relief in respect of the costs. He obtained a decree setting aside the order allowing the objection. He then applied to the Court which had made the order to order a refund of the amount of the costs which had been paid to the objector. *Held*, that, the application regarded as one with regard to a portion of an order made under s. 280 of the Civil Procedure Code, the Court was *functus* in the matter, and could not make or enforce such an order as was sought for ; and that its order disallowing the application was not appealable as it was not one made under s. 244, and if taken to be one passed with reference to s. 280, an appeal was barred by s. 283 : the Court therefore would interfere under s. 622 of the Civil Procedure Code. *In the matter of the petition of* RAGHU NATH DAS. RAGHU NATH DAS *v.* BADRI PRASAD . . **I. L. R. 6 All. 21**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

19. ——— *Arbitration—Illegal procedure on arbitration—Invalid award.* Where two of five arbitrators nominated by the parties to a suit and appointed by the Court had not consented before, and, after appointment, declined to act, and the Court appointed two arbitrators in their place against the consent of one of the parties to the suit, and the appointment of the new arbitrators was not warranted by the provisions of s. 510 of the Code of the Civil Procedure, and the order of reference to such arbitrators, the award made by them and the decree passed upon the award were consequently illegal:—*Held*, that the High Court could set aside the decree under the powers given by s. 622 of the Code of Civil Procedure. PUGARDIN RAVUTAN *v.* MOIDINSA RAVUTAN **I. L. R. 6 Mad. 414**

20. ——— *Arbitration—Order refusing to file an award.* Where an order is made refusing to file an award, no appeal lies from it, but the High Court can interfere under s. 622 of the Civil Procedure Code. MANA VIKRAMA *v.* MALLICHERRY KRISTNAN NAMBUDRI **I. L. R. 3 Mad. 68**

21. ——— *Arbitration—Order setting aside award for misconduct of arbitrator.* An order under s. 521 of the Civil Procedure Code, setting aside an award, made on a reference to arbitration in the course of a suit, under Ch. XXXVIII of the Code, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the powers conferred on it by s. 622 of the Code. CHATTAR SINGH *v.* LEKHRAJ SINGH **I. L. R. 5 All. 293**

22. ——— *Arbitration—Act VIII of 1859, s. 318—Award made after time allowed by Court.* An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May, the Court refused to give judgment in accordance with it under s. 522 of the Code of Civil Procedure, on the ground that it was not valid. The plaintiffs then petitioned the High Court under s. 622 of the Code of Civil Procedure:—*Held*, that the award was invalid, and the Court had not failed to exercise jurisdiction within the meaning of s. 622 of the Code of Civil Procedure. SIMSON *v.* VENKATAGOPALAM **I. L. R. 9 Mad. 475**

23. ——— *Arbitration—Award—Error of procedure—Relief refused on equitable grounds.* *R M*, party to a sait, having authorised his agent to conduct the suit, the agent consented to the case being referred to arbitration by the Court. The arbitration was carried on to the knowledge and with the assent of *R M*. On an application by *R. M*, under s. 622 of the Code of Civil Procedure, to set aside the award mads by the arbitrators, on the grounds (i) that his pleader had not been authorized in writing, as required by s. 506 of the Code, to apply for arbitration; and (ii) that he himself had not consented to the reference.—*Held*, that, under the circumstances, *R M* was not entitled to relief. UNNIRAMAN *v.* CHATHAN . . **I. L. R. 9 Mad. 451**

24. ——— *Arbitration—Award—Application to file award, objection to—Decree on award, finality of—Private arbitration—Revisional powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 520, 521, 525, 526, and 622.* Certain disputes between parties were referred under a written agreement to an arbitrator, who, in due course, made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds: (i) That the value of the property in suit was R500 only, and therefore that the application should have been made in the Munsif's Court and not in that of the Subordinate Judge. (ii) That the agreement of submission was vague and indefinite, and did not clearly set out the matters in dispute. The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed thereon. The plaintiff appealed. The defendants contended that no appeal lay, and that, if it did, it lay to the District Judge, and not to the High Court. *Held*, that, assuming that on a proceeding under ss. 525 and 526 the Court has power to consider such objections as are mentioned in ss. 520 and 521, the above objections did not fall under either section, but that the Subordinate Judge, before entertaining the application, was bound to satisfy himself that he had jurisdiction to entertain it, and for that purpose to take evidence regarding the value of the property; and that, even if no appeal lay, the High Court could interfere under its revision powers, because the Subordinate Judge had acted in the exercise of his jurisdiction illegally in assuming jurisdiction without taking such evidence. BINDESSURI PERSHAD SINGH *v.* JANKEE PERSHAD SINGH . . . **I. L. R. 16 Calc. 482**

25. ——— *Attachment—Power to set aside order for attachment by another Court.* No Court, other than a Court of appeal or a High Court acting under s. 622 of the Code of Civil Procedure, can discharge an order of attachment issued by another Court. KOLASHERRI ILLATH NARANIAN *v.* KOLASHERRI ILLATH NILAKANDAN NAMBUDRI . **I. L. R. 4 Mad. 131**

26. ——— *Commission, Order refusing issue of—Civil Procedure Code, ss. 130, 387—Interlocutory orders.* Under s. 622

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

of the Code of Civil Procedure, interlocutory orders passed under s. 367, refusing applications for the issue of a commission to examine witness, or under s. 130, directing the production of documents, cannot be revised. *In re* NIZAM OF HYDERABAD **I. L. R. 9 Mad. 256**

27. ——— *Decree, construction of—Order misconstruing decree.* Where in a case of the execution of a decree in which no second appeal lay to the High Court, the Appellate Court held, on the construction of the decree, that it awarded interest on the principal amount of the decree, the High Court, under s. 622 of Act X of 1877, holding that the Appellate Court had misconstrued the decree, and that the decree did not award such interest, modified the order of the Appellate Court accordingly. *In the matter of the petition of* MUHAMMAD *v.* HUSAIN **I. L. R. 3 All. 203**

28. ——— *Decree—Order reversing refusal to set aside ex parte decree.* After a decree had been made *ex parte*, the defendant applied to have it set aside. The Subordinate Judge refused the application, but his order was reversed by the District Judge. *Held*, that no appeal lay, nor would the Court interfere under s. 622 of the Civil Procedure Code. AUBINASH CHUNDER MOOKERJEE *v.* MARTIN **I. L. R. 8 Calc. 832**

29. ——— *Discretion, interference with exercise of—Collector—Hereditary Offices Act (Bom. III of 1874), s. 10—Collector's certificate.* The Collector, when granting a certificate under s. 10 of the Bombay Hereditary Offices. Act (Bom. III of 1874), exercises a judicial function, and is subject to the supervision of the High Court ; but the High Court will not interfere with his discretion, unless there is violent misuse of authority, obvious bad faith, or reckless disregard or wanton perversion of the law on his part. COLLECTOR OF THANA *v.* BHASKAR MAHADEV SHETH **I L. R. 8 Bom. 264**

30. ——— *Suit for arrears of rent—Decision of Collector on appeal from Assistant Collector—N.-W. P. Rent Act (XII of 1881), ss. 183, 199.* The High Court has no power to revise, under s. 622 of the Civil Procedure Code, an order passed by a Collector under s. 183 of the N.-W. P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. *Hur Pershad* v. *Lalu, 3 N. W. 60*, distinguished. RAM DAYAL *v.* RAMADHIN **I. L. R. 12 All. 198**

31. ——— *Discretion, interference with exercise of—Refusal to grant certificate of sale under Madras Rent Recovery Act—Civil Procedure Code, 1882, s. 4.* A sale of the tenant's interest in certain land having taken place under ss. 39 and 40 of the Rent Recovery Act, the Deputy Collector refused to issue a sale-certificate to the purchaser, on the ground that the sale had been irregularly conducted. *Held*, that the High Court had no power to review the proceedings of the Deputy Collector under s. 622 of the Code of Civil Procedure. VELI PERIYA MIRA RAVUTHAN *v.* MOIDIN PADSHA RAVUTHAN **I. L. R. 9 Mad. 332**

32. ——— *Discretion, interference with exercise of—Admission by District Court of appeal presented out of time.* Where a District Court admitted an appeal presented out of time, on the ground that the appellant, having filed an application for review within the time allowed for an appeal, was entitled to exclude the time occupied in prosecuting the review :—*Held*, that the High Court could not interfere on revision. VASUDEVA *v.* CHINNASAMI **I. L. R. 7 Mad. 584**

33. ——— *Madras Rent Recovery Act (Mad. Act VIII of 1865), ss. 10 and 76.* The defendant in a suit under the Madras Rent Recovery Act was evicted in pursuance of an order made under s. 10. That order having been reversed on appeal, he applied to be replaced in possession, but the Sub-Collector dismissed that application. *Held*, that the High Court could not interfere in revision under the Civil Procedure Code, s. 622. APPANDAI *v.* SRIHARI JOISHI **I. L. R. 16 Mad. 451**

34. ——— *Madras Rent Recovery Act (Mad. Act VIII of 1865), s. 76.* Orders passed by a Collector under the Madras Rent Recovery Act are not open to revision under s. 622 of the Civil Procedure Code. *Velli Periya Mira* v. *Moidin Padsha, I. L. R. 9 Mad. 332*, followed. VENKATANARASIMHA NAIDU *v.* SURANNA **I. L. R. 17 Mad. 298**

35. ——— *Error in law—Civil Procedure Code, 1882, s. 32—Interpleader suit, application to be made a party to—Power of High Court on revision—Erroneous construction of Act.* A merely erroneous construction of the provisions of an Act is not a ground for relief under s. 622 of the Civil Procedure Code. *M J* instituted an interpleader suit against two rival claimants, *N* and *A*, in respect of a sum of R20,000. *R*. subsequently claimed a portion of the money and applied to be made a party to the suit, but was opposed by *M J* and *N*. The Subordinate Judge refused the application, on the ground that, though it was probably made under s. 32 of the Civil Procedure Code, *R's* right or claim not having been admitted by the plaintiff, nor asserted to his knowledge, she was not a necessary party under the special provisions of Ch. XXXIII of the Civil Procedure Code, and referred her to a regular suit. *Held*, that the order, though based upon an erroneous construction of the provisions of s. 32 of the Code, did not come within the scope of s. 622, inasmuch as it could not be said that the Subordi

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

nate Judge had failed to exercise a jurisdiction vested in him by law. RABBABA KHANUM *v.* NOORJEHAN BEGUM *alias* DALIM SHAHIBA **I. L. R. 13 Calc. 90**

36. ——— *Error in law—Dismissal of suit by Small Cause Court—Legal Practitioners' Act.* A Small Cause Court having dismissed a suit brought by a pleader to recover from his client a fee cliamed for the conduct of a suit, on the ground that such a suit would not lie, because it was based on an oral contract, and such contract could not be enforced by reason of the provisions of the Legal Practitioners' Act, the High Court, under s. 622 of the Code of Civil Procedure, reversed the decree of the Small Cause Court. RAMA *v.* KUNJI **I. L. R. 9 Mad. 375**

37. ——— *Error of law—Application to bring decree into conformity with judgment.* A Small Cause Court rejected an application made under s. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under s. 622 of the Code to set aside this order :—*Held*, that the High Court could not interfere. JIVRAJI *v.* PRAGJI **I. L. R. 10 Mad. 51**

38. ——— *Court acting without jurisdiction—Suit for rent entertained by Small Cause Court under erroneous impression it was due under a contract.* A Small Cause Court, which had jurisdiction under Act XI of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay the rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears :—*Held*, that under s. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree. *Amir Hassan Khan* v. *Sheo Baksh Singh*, *I. L. R. 11 Calc. 6*, discussed and explained. MANISHA ERADI *v.* SIYALI KOYA . **I. L. R. 11 Mad. 220**

39. ——— *Material irregularity—Small Cause Court, motion for new trial of case in.* The defendant contracted to sell to the plaintiffs a quantity of rapeseed, April-May delivery. On the 23rd of April the defendant endorsed over to the plaintiffs a delivery order for the seed given him by *L M & Co.*, which plaintiffs presented to *L M & Co.* On the 26th April and on three or four subsequent occasions, *L M & Co.* refused to deliver, on the ground that they had till the 31st May for delivery. On the 15th May *L M & Co.* failed, and then, but not before, plaintiffs informed the defendant that they had not had delivery from *L M & Co.*, and demanded it of him.

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

The defendant failing to deliver, the plaintiffs sued for damages as of the 31st May. The learned Judge of the Small Cause Court, on this statement of facts, and before evidence was gone into, ruled that the damages were assessable as of the 25th April, on which day it was admitted the market rate was as high or higher than the contract rate. The plaintiffs, on this ruling, without going into their case further, accepted judgment for nominal damages, and took out a rule for a new trial on the ground that the Judge was in error in assigning the 25th April, and not the 31st May, as the date which ruled the question of damages. On the argument of the rule, the Full Court decided against the plaintiffs, not on this point, which they did not decide one way or the other, but on another point altogether, *viz.*, that the plaintiffs ought to have given defandant notice of *L M & Co.'s* refusal to give delivery on the 25th April, and, not having done so, could not call on the defendant to deliver. The plaintiffs now moved the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882) to set aside the order of the Full Court of the Small Cause Court as one which at that stage of the proceedings that Court had no right to make. *Held*, that in making the order in question under the circumstances of the case, and the state of the record, the Full Court had acted with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and that the case must be remanded to be dealt with according to law. RALLI *v.* PARMANAND JEWRAJ **I. L. R. 13 Bom. 642**

40. ——— *Execution of decree—Application for execution of decree—Civil Procedure Code, 1877, s. 244—Registration Act, 1866, s. 53.* An application was made to a District Munsif on the 16th July 1877 to issue execution on a decree, dated 6th November 1869, obtained on a bond registered under s. 53 of the Registration Act of 1866. He made an order refusing execution, the decree being one passed, not in a regular suit, but in a summary suit, and governed by the period of limitation prescribed by Art. 166, Sch. II, Act IX of 1871. On appeal the Subordinate Judge reversed the order of the Munsif, holding that Art. 167, Sch. II of Act IX of 1871, applied. *Held*, that under s. 622 of Act X of 1877, the High Court could not interfere, as the Subordinate Judge had jurisdiction to hear the appeal. SURYAPRAGASA RAU *v.* VAISYA SANNYASI RAZU **I. L. R. 1 Mad. 401**

41. ——— *Execution of decree—Civil Procedure Code, 1882, s. 335—Resistance to execution of decree.* An order under s. 335 of the Civil Procedure Code is subject to revision by High Court under s. 622 of that Code. *Shiva Nathaji* v. *Joma Kashinath*, *I. L. R. 7 Bom. 341*, followed. SHEORAJ SINGH *v.* BANWARI DAS . . . . **I. L. R. 6 All. 172**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

42. ——— *Order for possession on application by usufructuary mortgagee ejected by auction-purchaser to be restored to possession—Civil Procedure Code, 1882, s. 335.* In a suit for sale upon a mortgage the plaintiff, having obtained a decree, assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit, and in whose favour the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon the assignee, auction-purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside. *Held*, that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure, and, being unappealable, an application for revision thereof might lie. See *Sheoraj Singh* v. *Banwari Das, I. L. R. 6 All. 172.* SABHAJIT *v.* SRI GOPAL . **I. L. R. 17 All. 222**

43. ——— *Jurisdiction, exercise of—Erroneous decision in suit tried with jurisdiction—Act XII of 1879, s. 92.* A court that has decided a suit over which it had jurisdiction cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally, or with material irregularity, within the meaning of s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879. AMIR HASSAN KHAN *v.* SHEO BAKSH SINGH **I. L. R. 11 Calc. 6 : L. R. 11 I. A. 237**

44. ——— *Discretion of Court exercised with jurisdiction.* S. 622 of the Code is one of very limited operation ; and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* followed. KRISHNA MOHINI DOSSEE *v.* KEDERNATH CHUCKERBUTTY **I. L. R. 15 Calc. 446**

45. ——— *Decision by competent Court.* A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code. MUHAMMAD YUSUF KHAN *v.* ABDUL RAHMAN KHAN . . . **I. L. R. 16 Calc. 749 L. R. 16 I. A. 104**

46. ——— *Jurisdiction, interference with exercise of—Civil Procedure Code, 1882, s. 320—Transfer of decree to Collector for execution—Rules made by Local Government.* A decree passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution, A sale in execution took place and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree. The Court held that the Subordinate Judge had jurisdiction to decide the question :—*Held*, that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decision were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji* v. *Joma Kashinath, I. L. R. 7 Bom. 341,* and *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* referred to. SUNDAR DAS *v.* MANSA RAM . . . . **I. L. R. 7 All. 407**

47. ——— *Jurisdiction, interference with exercise of—Limitation.* A Court which admits an application to set aside a decree *ex parte* after the true period of limitation has expired, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section. *Amir Hassan Khan* v. *Sheo Raksh Singh, I. L. R. 11 Calc. 6,* and *Magni Ram* v. *Jiwa Lall, I. L. R. 7 All. 336,* commented on by MAHMOOD, *J. Per* MAHMOOD, *J.*—The term " jurisdiction " as used by their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority. HAR PRASAD *v.* JAFAR ALI **I. L. R. 7 All. 345**

48. ——— *Erroneous decision on point of limitation.* The fact that a Court having power to decide whether or not a certain matter was barred by limitation wrongly decided that it was not barred, and proceeded to deal with it, affords no ground for revision under s. 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6 ; L.R. 11 I. A. 237,* and *Sarman Lal* v. *Khuban, I. L. R. 17 All. 422,* referred to. SUNDAR SINGH *v.* DORU SHANKAR . . . **I. L. R. 20 All. 78**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

49. ——— Where the lower Courts have entertained an application which is on the face of it barred by limitation, without adverting to the question of limitation the High Court can interfere under s. 622 of the Civil Procedure Code. *Semble :* In dealing with a case under s. 622 the High Court can look into the evidence and itself investigate the facts. KAILASH CHANDRA HALDAR *v.* BISSONATH PARAMANIC
1 C. W. N. 67

50. ——— *Jurisdiction, question not relating to—Alleged errors in decision of suit for pre-emption.* In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration-money was less than that stated in the mortgage-deed. The Court of first instance gave the plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed ; and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds : "(i) Because it was for the respondents to prove that any portion of the consideration was not paid. (ii) Because the lower Court has not considered the evidence of the appellants. (iii) Because the finding of the lower Court is based on conjecture." *Held*, on the question whether such grounds not being grounds on which a second appeal is allowed by Ch. XLII of the Civil Procedure Code, the appeal should not proceed rather under Ch. XLVI, s. 622 of that Code, that the appeal could not proceed under s. 622 of the Civil Procedure Code, in consequence of the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*, that only questions relating to the jurisdiction of the Court could be entertained under that section. MAGNI RAM *v.* JIWA LAL . . . **I. L. R. 7 All. 336**

51. ——— *Jurisdiction, interference with exercise of—Second class Subordinate Judge—Subject-matter of suit under ₹5,000 and within jurisdiction—Amount of decree with accumulations of interest exceeding ₹5,000—Application for execution—Second appeal.* The plaintiffs obtained a decree in the Court of a second class Subordinate Judge for a sum less than R5,000, which with accumulations of interest subsequently exceeded R5,000. The plaintiffs applied in execution to recover the total amount The application was rejected by the Subordinate Judge, on the ground that the Court had no jurisdiction under s. 24 of Act XIV of 1869. On appeal the District Judge made an order confirming the decision of the Subordinate Judge. The plaintiffs filed a second appeal in the High Court. *Held*, that no second appeal lay to the High Court from such an order ; but as the Subordinate Judge was wrong in refusing to exercise his jurisdiction, the High Court would give

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

relief under the extraordinary jurisdiction conferred by s. 622 of the Civil Procedure Code (Act XIV of 1882). The subject-matter of the suit was within the jurisdiction of the Subordinate Judge, and his jurisdiction continued, whatever might be the result of the suit, in all such matters in the suit as were within his cognizance, amongst which were matters in execution in the suit. The mere circumstance that the amount actually due by process of accumulation exceeded R5,000 could not oust him from the jurisdiction he hitherto had over the suit. SHAMRAV PANDOJI *v.* NILOJI RAMAJI
I. L. R. 10 Bom. 200

52. ——— *Jurisdiction, interference with exercise of—Error of Mamlatdar —Possessory suit in a Mamlatdar's Court.* The opponents had obtained a decree for the possession of certain land against the brother and father of the applicants in the Court of the Mamlatdar at Karad, in the Satara district. The applicants were not parties to the suit. The decree was executed, and the opponents were put into possession. Thereupon the applicants, on the 19th May 1884, presented a petition in the Mamlatdar's Court, under s. 4 of Bombay Act III of 1876, alleging that they had been in actual possession of the lands and had been ousted from them in execution of the decree, and praying that they might be again put into possession. The Mamlatdar was of opinion that the matter was *res judicata*, and dismissed the petition. He relied on a circular of the Executive Government as his authority. The applicants applied to the High Court under its extraordinary jurisdiction. *Held*, that it was not a case for the exercise of the extraordinary jurisdiction of the High Court. The Mamlatdar was no doubt guilty of a formal error. In the exercise of his judicial functions he was bound to be governed by the law as he understood it, or as it had been expounded by superior judicial authority, not as it was understood or expounded by unjudicial persons. This, however, was merely an irregularity on the part of the Mamlatdar not apparently involving an injustice to the applicants, who might bring a suit on their title if they had a title. NANA BAYAJI *v.* PANDURANG VASUDEV . **I. L. R. 9 Bom. 97**

53. ——— *Jurisdiction, interference with exercise of—Civil Procedure Code, 1882, s. 315.* Where an order was passed under s. 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court :—*Held*, that under s. 622 of the Code of Civil Procedure the High Court could set aside the order, because the judgment-debtor having been found to have a saleable interest, the lower Court had no power to order a refund. KUNHAMED *v.* CHATHU . . **I. L. R. 9 Mad. 437**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

54. ——— *Jurisdiction, interference with exercise of—Excess of jurisdiction—Arbitrators exceeding jurisdiction.* In any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of the purposes of the legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available. DAGDUSA TILAKCHAND *v.* BHUKAN GOVIND SHET
I. L. R. 9 Bom. 82

55. ——— *Judge putting erroneous construction on section of Act—Civil Procedure Code, 1882, s. 329.* Where a Judge took an erroneous view of s. 329 of the Civil Procedure Code, and proceeded on such erroneous construction to make orders which on a proper construction of the section he would have no jurisdiction to make:—*Held*, that it was a proper case for the exercise of the powers given to the High Court under s. 622 of the Code. SALAMBHA *v.* MARTYAVA
I. L. R. 16 Bom. 711 note

See also VISHVAMBHAR PANDIT *v.* VASUDEV PANDIT . **I. L. R. 16 Bom. 708**

a case where his erroneous construction of s. 9 of Bombay Regulation VIII of 1827 resulted in similar action being taken by a Judge.

56. ——— *Jurisdiction, interference with exercise of—Civil Procedure Code, 1882, s. 492—Civil Procedure Code, 1859, s. 92—Injunction to stay sale pending suit to establish title.* A claim by *R* to certain property which had been attached by *B* in the course of execution-proceedings in the Court of the First Subordinate Judge of Dacca having been rejected, *R* instituted a suit in the Court of the Second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under s. 492 of the Civil Procedure Code to stay the sale of the property attached by *B* in the execution-proceedings; but that application was rejected, and *R* thereupon applied for and obtained from the Court of the First Subordinate Judge an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it. *Held*, in an application under s. 622 of the Code to set the latter order aside, that s. 492 of the Code of 1882 has, and was intended to have, a wider application than s. 92 of Act VIII of 1859 had, and provides a remedy where property is "in danger of being wrongfully sold:" if the circumstances justified it, an order could have been obtained under that section from the Court of the Second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided and no express provision in the Code for stay of execution by a Court executing a decree on the application of third party, the order of the first Subordinate Judge was made without jurisdiction, and should be set aside. *In the matter of the petition of* BRAJENDRA KUMAR RAI CHOWDHURI. BROJENDRA KUMAR RAI CHOWDHURI *v.* RUP LALL DOSS
I. L. R. 12 Calc. 515

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

57. ——— *Jurisdiction—Sale set aside on account of irregularity only.* Where a Court, professing to act under s. 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant:—*Held*, that such order was passed without jurisdiction within the meaning of s. 622 of the said Code. LAKSHMANA *v.* NAJIMUDIN
I. L. R. 9 Mad. 145

58. ——— *Sale in execution of decree set aside—Material irregularity—Indequacy of price—Exercise of jurisdiction by District Judge.* A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published and that it referred to only 5 bighas instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved, and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment-debtor, having appealed to the High Court against the order of the District Judge and failed in such appeal by reason of no second appeal lying from such order, applied to the High Court under the provisions of s. 622 of the Code to have the order set aside. *Held*, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section. GOPAL KOERI *v.* GOPI LAL . **I. L. R. 21 Calc. 799**

59. ——— *Jurisdiction, interference with exercise of—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit.* Certain land having been attached in execution of a decree by a District Court, *S*, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger, and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by *S*, set aside the order rejecting his claim. The District Court, in ignorance of the order of the High Court, having subsequently put the purchaser in possession of the land, *S* applied for restitution, but his petition

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

was rejected by the District Judge. In an application under s. 622 of the Civil Procedure Code to revise the Judge's order, on the ground that he refused to exercise his jurisdiction to restore *S* to possession :—*Held*, that the order of the District Judge confirming the sale was passed without jurisdiction, and that the District Judge had no power to restore possession to *S*. The High Court therefore could not interfere under s. 622. The remedy of *S* was by a separate suit. SUBBAYA *v.* YALLAMMA **I. L. R. 9 Mad. 130**

60. ——— *Jurisdiction, interference with exercise of—Trial of case cognizable only by Small Cause Court.* *S* instituted a suit against *T* in the Court of an Assistant Collector of the first class, who dismissed the suit. On appeal by *S* the District Court gave her a decree. On second appeal by *T* the High Court held that, as the suit was one of the nature cognizable in a Court of Small Causes, a second appeal would not lie in the case, and dismissed it. *T* thereupon applied to the High Court to set aside, under the provisions of s. 622 of Act X of 1877, the proceedings of both the lower Courts, on the ground that both those Courts had exercised a jurisdiction not vested in them by law. *Held*, that the High Court was competent to entertain such application and to quash the proceedings of both the lower Courts, under the provisions of s. 622 of Act X of 1877, and the proceedings of both those Courts should be quashed. Observations by STUART, *C.J.*, on the powers of revision of the High Court under s. 622 of Act X of 1877. SARNAM TEWARI *v.* SAKINA BIBI **I. L. R. 3 All. 417**

61. ——— *Jurisdiction, interference with exercise of—Beng. Reg. XVII of 1896—Redemption of mortgage.* After a mortgage had been foreclosed under the provisions of Regulation XVII of 1806, the representative of the mortgagor deposited the mortgage money in Court. The District Judge ordered that the money should be paid to the mortgagee, on the ground that the mortgagor had not been personally served with the notice required by s. 8 of that Regulation, and that it did not appear that she had been aware of the foreclosure proceedings. The District Judge subsequently ordered the mortgagee, who was in possession of the mortgaged property under the terms of the mortgage, to surrender the property. The mortgagee applied to the High Court to revise these orders under s. 622 of Act X of 1877. *Held*, that the application was entertainable under the provisions of that section, and that the orders of the District Judge were made without jurisdiction and should be set aside. HAZARI LAL *v.* KHERU RAI . **I. L. R. 3 All. 576**

62. ——— *Jurisdiction, interference with exercise of—Improper refusal of jurisdiction.* Where a Munsif improperly refused to investigate a claim under ss. 278-280, Civil Procedure Code, 1877, he was *held* to have refused to exercise jurisdiction he was bound to exercise, and the Court set aside his order and ordered the investigation to be made. JAMMELA *v.* LUCHMUN PANDAY . . . . **4 C. L. R. 74**

63. ——— *Appeal against appellate decree by party to suit who did not appeal against original decree.* *S*, having mortgaged land to *K* as security for a debt, sold it to *V*, who undertook to pay the debt. *K*, alleging that *C* had undertaken either to make *V* pay the debt or to execute a mortgage of his own land to secure its repayment, and that *V* had dispossessed him, sued *S*, *V*, and *C* to recover the debt by sale of the land mortgaged, mesne profits from *V*, and costs from *S*, *V*, and *C*. The District Munsif decreed payment against *S* ; mesne profits, and, in default of payment by *S*, a sale of the land against V ; and costs against *S*, *V*, and *C*. *V* and *C* appealed against this decree. The Subordinate Judge found that the debt had been paid, and held that, even if the debt had not been paid, *K* had no cause of action against *V* or *S*, but, if at all, against *C*, and dismissed the suit as against *V*. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against *S*, and saw no reason to interfere with the decree against *C*. *S* appealed against the decree. *Held*, that, even if *S* was not entitled to appeal in order to have the decree against him set aside, the error of the Subordinate Judge could be corrected under s. 622 of the Code of Civil Procedure by a direction to exercise the discretionary power given by s. 544 of the said Code. SESHADRI *v.* KRISHNAN **I. L. R. 8 Mad. 192**

64. ——— *Jurisdiction, interference with exercise of—Bengal Minors Act (XL of 1858), s. 3—Refusal to admit person with certificate of administration to defend suit on behalf of minor.* Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act, to defend a suit on the minor's behalf, as guardian of such minor. Where a Subordinate Judge had so acted :—*Held*, that the High Court has no power to revise his order under s. 622 of the Civil Procedure Code. BALDEO DAS *v.* GOBIND SHANKAR **I. L. R. 7 All. 914**

65. ——— *Jurisdiction, interference with exercise of—Decree, refusal to amend.* Where a Court improperly refused to amend a decree which was at variance with the judgment :—*Held*, that in so acting the Court had acted in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and its order was

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

consequently subject to revision under that section. BALMAKUND *v.* SHEOJATAN LAL
I. L. R. 6 All. 125

66. ——— *Jurisdiction, interference with exercise of—Material irregularity affecting merits of case.* The words "a material irregularity" in s. 622 of the Code of Civil Procedure include an irregularity of procedure materially affecting the merits of the case. An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. *Magni Ram* v. *Jiwa Lal*, *I. L. R. 7 All. 332*, observed on. SEW BUX BOGLA *v.* SHIB CHUNDER SEN
I. L. R. 13 Calc. 225

67. ——— *Jurisdiction, interference with exercise of—"Illegality"—"Material irregularity."* A suit was instituted in the Court of a Munsif to recover from the defendants a sum of R49, being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding R1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code. *Held* by the Full Bench, that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the R49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code. The result of *Amir Hassan* v. *Sheo Bahsh Singh*, *I. L. R. II Calc. 6*, and *Magni Ram* v. *Jiwa Lal*, *I. L. R. 7 All. 336*, is that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final. *Per* STRAIGHT and TYRRELL, *JJ.*—Clauses (*a*) and (*b*) of s. 584, specifying the grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally," that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

the force of law, or failed to determine some material issue of law or usage. Cl. (*c*) of s. 584 indicates the meaning of the words "material irregularity" in s. 622,—*i.e.*, some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *Muhammad* v. *Husain*, *I. L. R. 3 All. 203* referred to. BADAMI KUAR *v.* DINU RAI . . I. L. R. 8 All. 111

68. ——— *Jurisdiction, interference with exercise of—Meaning of "jurisdiction"—Amendment of decree—Civil Procedure Code, s. 206—Act XV of 1877, Sch. II, Art. 178.* In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it. *Held*, that the application for revision must be rejected. *Per* OLDFIELD, *J.*, that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code with reference to the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*, *I. L. R. II Calc. 6*, and of the Full Bench in *Badami Kuar* v. *Dinu Rai*, *I. L. R. 8 All. 111* and further that, upon the facts stated, the Court ought not to interfere. *Per* MAHMOOD, *J.*, that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh*, *I. L. R. II Calc. 6*; *Badami Kuar* v. *Dinu Rai*, *I. L. R. 8 All. 111*; *Raghunath Das* v. *Raj Kumar*, *I. L. R. 7 All. 876*; *Surta* v. *Ganga*, *I. L. R. 7 All. 411*; *Magni Ram* v. *Jiwa Lal*, *I. L. R. 7 All. 336*; *Har Prasad* v. *Jafar Ali*, *I. L. R. 7 All. 345*, referred to. *Bhagwant Singh* v. *Jagesher Singh*, *All. Weekly Notes (1886)*, *57*; and *Abu Saib Khan* v. *Hamid-un-nissa*, *All. Weekly Notes (1886)*, *39*, dissented from. The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy, either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe* v. *Edwards, L. R. 3 P. D. 103,* and *Crepps* v. *Durden, 1 Smith's L. C., 8th Ed., 711,* referred to. *Held,* also, *per* MAHMOOD, *J.*, that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction " illegally or with material irregularity " within the meaning of s. 622. *Lucas* v. *Stephen, 9 W. R. 301 ; Oomanund Roy* v. *Suttish Chunder Roy, 9 W. R. 471 ; Zuhoor Hossein* v. *Syedun, 11 W. R. 142 ;* and *Goluck Chunder Mussant* v. *Ganga Narain Mussant, 20 W. R. 111,* referred to. DHAN SINGH *v.* BASANT SINGH . . . . **I. L. R. 8 All. 519**

69. ——— *Dismissal of suit without considering merits on technical ground—Suit by sole partner for partnership debt.* A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover partnership debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiff. *Held,* that it was the Judge's duty to hear and determine the suit which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain it on the merits he had failed to exercise his jurisdiction, and had acted with material irregularity within the meaning of s. 622 of the Civil Procedure Code. *Muhammad Suleman Khan* v. *Fatima, I. L. R. 9 All. 104,* and *Dhan Singh* v. *Basant Singh I. L. R. 8 All. 519,* referred to. A suit should not be dismissed on merely technical grounds when the merits are proved and no injustice by surprise or otherwise will be done. GOBIND PRASAD *v.* CHANDAR SEKHAR **I. L. R. 9 All. 486**

70. ——— *Failure to exercise jurisdiction.* Where a Subordinate Judge wrongly held that a suit was one of the nature contemplated by s. 539 of the Civil Procedure Code, and returned the plaint for presentation to the District Judge :—*Held,* that the High Court had power, under s. 622 of the Code, to interfere, the Subordinate Judge having failed to exercise a jurisdiction vested in him by law. VISHVANATH GOVIND DESHMANE *v.* RAMBHAT **I. L. R. 15 Bom. 148**

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S 622—*contd.*

71. ——— *Jurisdiction, interference with exercise of—Alleged irregularity by District Judge in decision of suits.* *A* and *B*, both of whom set up a claim to certain land, brought separate rent suits against the tenants. In none of these suits did the amount claimed exceed R100. After the institution of rent suits, *A* sued *B* to establish his title to the land in dispute. The District Judge before whom the rent suits came on appeal allowed them to stand over until the decision in the suit between *A* and *B*. That suit was decided in favour of *B*, and the Judge then decided the rent suits instituted by *B* in his favour, and dismissed the suits instituted by *A*. *Held,* that there was no such irregularity on the part of he District Judge in the course which he pursued, of making his decision in the rent suit depend upon the decision in the suit to establish title as would justify the Court in interfering under s. 622 of the Civil Procedure Code. DOORGA NARAIN SEN *v.* RAM LALL CHUTAR . . . **I. L. R. 7 Calc. 330**

S.C. DURGA NARAIN MISSER *v.* GOBURDHUN GHOSE . . . . . **9 C. L. R. 86**

72. ——— *Jurisdiction, interference with exercise of—Sale in execution of decree against estate of deceased—Suit against representatives of deceased husband's estate—Order releasing property from attachment.* In 1862 a suit for mesne profits was brought against certain persons as being the heirs of one Romanath Lahiry, deceased, among whom were his widow and two infant sons. During the pendency of this suit the two infant sons died, and the widow was made a defendant as representing the estate of her deceased sons. The suit was decreed in favour of the plaintiffs in 1875, and on the plaintiff's applying for execution the widow objected that $\frac{5}{16}$ths of the properties, against which execution was sought, was the property of her adopted son, whom she alleged to have adopted in 1874. The adopted son was not made a party to the suit : this objection was overruled, but the same objection was taken by the adopted son through his natural father as his guardian and next friend and the Court released the $\frac{1}{10}$th share from attachment, and allowed the objection. Against this order some of the plaintiffs appealed, but pending the appeal another of the plaintiffs applied to the High Court, under s. 622 of the Code of Civil Procedure, to have the order set aside. The Court refused to interfere with the order, inasmuch as there appeared to be no material irregularity therein. SOTISH CHUNDER LAHIRY *v.* NIL COMUL LAHIRY . . **I. L. R. 11 Calc. 45**

73. ——— *Jurisdiction, interference with exercise of—Civil Procedure Code, 1882, s. 30—Party added after decree.* A Subordinate Judge having permitted the junior widow of a Hindu to be made a party to the proceedings

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

in execution of a decree obtained by the senior widow against a debtor of their deceased husband, the High Court declined to interfere under s. 622 of the Code of Civil Procedure. LINGAMMAL *v.* CHINNA VENKATAMMAL . **I. L. R. 6 Mad. 227**

74. ——— *Jurisdiction, interference with exercise of—Death of sole defendant —Application to add representative.* In a suit for the recovery of lands against a sole defendant, the latter died before the hearing. Sixty-three days after the death of the defendant the plaintiff applied to the Court to enter on the record the legal representative of the deceased defendant. On the 22nd November 1880 the Court rejected the application under the provisions of Art. 171B of Act XV of 1877, and ordered the suit to abate. On the same day the plaintiff applied to the Court to set aside the order directing the suit to abate, but the application was also rejected on the 20th September 1881. On appeal to the High Court,—*Held*, that no appeal lay against the latter order, and an appeal against the order of November 1880 was out of time, but that the High Court would take cognizance of the case under s. 622 of the Civil Procedure Code. BENODE MOHINI CHOWDHRAIN *v.* SHARAT CHUNDER DEY CHOWDHRY . . . **I. L. R. 8 Calc. 837 10 C. L. R. 449 : 12 C. L. R. 421**

75. ——— *Transfer of interest pending suit—Lis pendens—Application to bring transferee upon the record—Civil Procedure Code, s. 244.* A decree of the High Court, giving possession of certain shares in a bank to the plaintiff *R*, was reversed on appeal by the Privy Council. The defendant then applied to the Court of first instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares, *R* made an application to the Court, professedly under s. 244 of the Civil Procedure Code, in which he alleged that, pending the appeal to the Privy Council, he had transferred the shares to *G*, his counsel in the case, who had failed to restore them, and he prayed "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him." The Court passed an order upon this application, calling on *G* to show cause why he should not be called upon to restore the shares made over to him by *R*, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that *G's* name should be placed on the record, so that the decree might be executed against him. *Held*, that the application by *R* was meant to be and actually was one praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operation of the execution-proceedings; that this was an application under s. 372 of the Civil Procedure Code; and the order passed on it, being appealable under s. 588 (21), was not open to revision by the High Court under s. 622. RAYNOR *v.* MUSSOORIE BANK **I. L. R. 7 All. 681**

76. ——— *Act XX of 1863, s. 18—Order refusing permission to sue.* An order passed under s. 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor, if the Judge has exercised his discretion, liable to revision under s. 622 of the Code of Civil Procedure. *In re* VENKATESWARA . . **I. L. R. 10 Mad. 98**

See ANONYMOUS. **I. L. R. 10 Mad. 98 note**

77. ——— *Revision of interlocutory order when appeal lies from final decree —Power of High Court.* There is nothing in s. 622 of the Code which prevents the High Court from setting aside an interlocutory order if made without jurisdiction. The word "case" in that section is wide enough to include such an order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order. *Omrao Mirza* v. *Jones, 12 C. L. R. 148*; *Harsaran Singh* v. *Muhammad Raza, I. L. R. 4 All. 91* : *Chatter Singh* v. *Lekhraj Singh, I. L. R. 5 All. 293*; *Farid Ahmad* v. *Dulari Bibi, I. L. R. 5 All. 233*, dissented from. DHAPI *v.* RAM PERSHAD **I. L. R. 14 Calc. 768**

78. ——— *Application and purpose of s. 622—Civil Procedure Code, 1882, s. 591—Interlocutory orders.* An application under s. 622 of the Civil Procedure Code cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 591, which provides that they may be made a ground of objection in the appeal against the final decree. The purpose with which s. 622 was framed was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court where there would otherwise be no remedy. MOTILAL KASHIBHAI *v.* NANA . **I. L. R. 18 Bom. 35**

79. ——— *Intelocutory order —Rejection of application to appeal as a pauper.* An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader, and was on that ground rejected. *Held*, on an application to the High Court for revision, that s. 622 of Act X of 1877 did not apply to a proceeding of so purely an interlocutory character as mentioned in s. 592, and such application therefore could not be entertained. HARSARAN SINGH *v.* MUHAMMAD RAZA **I. L. R. 4 All. 91**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

80. ——— *Rejection of application to sue as a pauper—Refusal on ground of suit being barred.* An application to sue as a pauper having been refused, on the ground that the suit was barred by limitation, the High Court on revision permitted the applicant to renew his application to the Court below. The Subordinate Judge verbally rejected this second application, stating that he would deliver a written judgment. Before the written judgment was delivered, the applicant offered to pay the usual Court-fees (although not actually tendering them at the time), and asked that the petition might be taken as a plaint filed on the date of the first application: this offer was mentioned and refused in the written judgment. *Held*, on the case coming up to the High Court under s. 622 of Act X of 1877, that the circumstances of the case were not such as would justify the Court in interfering under that section. RAM SAHAI SING *v.* MANIRAM . . **I. L. R. 5 Calc. 807 : 6 C. L. R. 223**

81. ——— *Rejection of application to sue in formâ pauperis—"Right to sue"—Limitation.* Where an application for leave to sue as a pauper was rejected with reference to s. 407 (c) of the Civil Procedure Code, on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue:—*Held*, by the Full Bench that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh*, *I. L. R. 11 Calc. 6*, referred to. *Per* MAHMOOD, *J.*—The word "case" as used in s. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and it comprehends adjudications under s. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under s. 53 or s. 54. *Phul Singh* v. *Jagan Nath*, *All Weekly Notes* (*1882*) *39*; *Bhulneshri Dat* v. *Bidiadhis*, *All. Weekly Notes* (1882) *69*; and *Sital Sahu* v. *Bachu Ram*, *All. Weekly Notes* (*1882*), *92*, referred to. Also *Per* MAHMOOD, *J.*—The provisions of s. 407 must be interpreted strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of justice, and an exercise of jurisdiction under that section when such exercise of jurisdiction is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. *Har Prasad* v. *Jafar Ali*, *I. L. R. 7 All. 345*, and *Ammal* v. *Nayudu*, *I. L. R. 4 Mad. 323*, referred to. CHATTARPAL SINGH v. RAJA RAM . . . . **I. L. R. 7 All. 661**

82. ——— *Res judicata, erroneous decision on.* A wrong decision on a question of *res judicata* is not a subject for the interference of the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882). HARI BHIKAJI *v.* NARO VISHVANATH **I. L. R. 9 Bom. 432**

83. ——— *High Court's power of revision—Res judicata—Jurisdiction, meaning of the term.* The plaintiff sued the defendant to recover arrears of an annual allowance to which the plaintiff claimed to be entitled under a sanad dated 1846. The defendant in his defence raised certain points most of which he had raised in a previous suit brought against him by the plaintiff for the recovery of arrears of the same allowance, and which in that suit had been decided against him. The lower Court held that the decision in the former suit operated as *res judicata*, and refused to allow the defendant to put forward any new matter which might and ought to have been urged as a defence in the former suit. A decree was made in favour of the plaintiff. The defendant applied to the High Court, under s. 622 of the Civil Procedure Code (Act XIV of 1882). *Held*, following *Hari Bhikaji* v. *Naro Visvanath*, *I. L. R. 9 Bom. 432*, that the decision, even though wrong, of a question of *res judicata* was not a failure or a cause of failure, to exercise jurisdiction and did not warrant the interference of the High Court under s. 622 of the Civil Procedure Code. AMRITRAV KRISHNA DESPANDE *v.* BALKRISHNA GANESH AMRAPURKAR **I. L. R. 11 Bom. 488**

84. ——— *Sale in execution of decree—Fraud—Setting aside order confirming sale.* The purchaser at a sale by public auction succeeded, by the exercise of fraud and collusion with the agent of the execution-creditors (though without the creditors' personal knowledge), in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. *Held*, that the High Court had power, under s. 622 of Act X of 1877, to rescind the order made by the Court of first instance confirming the sale. SUBHAJI RAU *v.* SRINIVASA RAU . **I. L. R. 2 Mad. 298**

85. ——— *Sale in execution of decree—Pre-emption—Civil Procedure Code, 1877, ss. 310, 311—Locus standi of pre-emptor in execution-proceedings.* A person claiming to be a co-sharer in certain undivided immoveable property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction purchaser, and prayed that it might be confirmed in his favour, with reference to the provisions of s. 310 of the Civil Procedure Code.

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

The Court disallowed the objection and confirmed the sale in favour of the auction purchaser. The objector thereupon applied to the High Court for revision of the order of the lower Court under s. 622 of the Civil Procedure Code. *Held*, that, having been allowed to object to the confirmation of the sale and treated as a party to the proceeding held therein, it was competent for him to make such application, notwithstanding that he was not one of the persons mentioned in s. 311 of the Code; that there being no appeal in the case, so far as he was concerned, the High Court was competent to entertain the application under s. 622 of the Code; but that, as he was not one of the persons who was competent to avail himself of the provisions of s. 311, he had no *lucus standi* to justify his application to the lower Court, and the application for revision must therefore be dismissed. BISHESHAR KUAR *v.* HARI SINGH
I. L. R. 5 All. 42

86. ——— *Distribution of assets—Application of decree-holder struck off.* Where a rateable distribution was ordered among decree-holders whose applications had been struck off the file prior to realization of assets:—*Held*, that it was open to the party injured to apply to the High Court under s. 622 to reverse the order. TIRUCHITTAMBALA CHETTI *v.* SESHAYYANGAR
I. L. R. 4 Mad. 383

87. ——— *Execution-proceedings—Rateable distribution—Application for further execution—Notice.* *A* and subsequently *B* obtained decrees against *X*, in execution of which the same land was attached, and *B* obtained an order for rateable distribution. Neither decree was satisfied. *A* then applied for attachment of other property, and the sale was fixed for 28th September. On 25th September *B* filed a petition for further attachment under ss. 250, 274, and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 295, because no application for execution was pending. *Held*, on appeal, that the petition for execution was wrongly rejected, but that the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution. VENKATARAMAN *v.* MAHALINGAYYAN
I. L. R. 9 Mad. 508

88. ——— *Failure to exercise jurisdiction—Refusal of application for rateable distribution of sale-proceeds.* A debtor against whom several decrees had been passed filed his petition in the Insolvency Court at Madras and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and another decree-holder now applied to the same Court in execution of his decrees, for attachment of other property, and

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

for rateable distribution of the proceeds of sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both these applications. *Held*, that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under s. 622 of the Civil Procedure Code, the Judge having failed to exercise a jurisdiction vested in him by law. VIRARAGHAVA *v.* PARASURAMA
I. L. R. 15 Mad. 372

89. ——— *Sanction for prosecution —Act X of 1872 (Criminal Procedure Code), ss. 468, 469.* The discretionary power of a Civil Court, before or against which an offence mentioned in s. 468 or 469 of Act X of 1872 is alleged to have been committed, to grant or withhold sanction to the prosecution for such offence, is not subject to revision by the High Court under s. 622 of Act X of 1877. *In the matter of the petition of* MADHO PRASAD . **I. L. R. 3 All. 508**

90. ——— *Power of revision over Small Cause Court, Calcutta—Alleged excess of jurisdiction by Small Cause Court—Trespass to immoveable property.* The plaintiff brought a suit in the Calcutta Court of Small Causes to recover damages for trespass to certain immoveable property of which he proved he was in possession. The defendant contended that such a suit was one for the determination of a right to or interest in immoveable property, and was therefore not maintainable in the Small Cause Court. The Small Cause Court decided the case, and the High Court, on an application under s. 622, granted a rule to show cause why the judgment should not be set aside as being without jurisdiction. *Held*, on such application, that the Court had jurisdiction to entertain such a suit. PEARY MOHUN GHOSAUL *v.* HARRAN CHUNDER GANGOOLY
I. L. R. 11 Calc. 261

91. ——— *Civil Procedure Code, 1882, s. 43—Cause of action—Splitting a claim—Separate suits for rent due for successive years.* Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limit of the Court's jurisdiction. The suit for the rent of the first year was dismissed under s. 43 of the Code of Civil Procedure, on the ground that the claim ought to have been included in the suit for the second year's rent. *Held*, in an application under s. 622 to the High Court to set aside the order, that although s. 43 did prevent the maintenance of the two suits, yet as the petitioners had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court. ALAGU *v.* ABDOOLA
I. L. R. 8 Mad. 147

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

92. ———— *Civil Procedure Code, s. 25, order under, for transfer of suit. Held,* that an order under s. 25 of the Civil Procedure Code, transferring a suit in which an appeal would lie from the decree made therein, was not subject to revision by the High Court under s. 622. FARID AHMAD *v.* DULARI BIBI . **I. L. R. 6 All. 233**

MUHAMMAD SAFDAR HUSEN *v.* PURAN CHAND **I. L. R. 20 All. 395**

93. ———— *Court Fees Act, 1870, s. 6, and Sch. II, Art. 17 (1)—Stamp—Valuation by subordinate Court—Practice—Civil Procedure Code (Act XIV of 1882), s. 622, and Bom. Reg. II of 1827, s. 5.* A decision by a subordinate Court on a question of valuation, determining the amount of a Court-fee, is, notwithstanding its declared finality, subject to revision by the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882) and s. 5 of Regulation II of 1827. VITHAL KRISHNA *v.* BALKRISHNA JANARDAN . . . **I. L. R. 10 Bom. 610**

94. ———— *Order dismissing suit for insufficient stamp.* In a suit instituted upon a ten-rupee stamp for an account, the removal of the original trustee and the appointment of a new trustee, where the value of the trust property was 5 lakhs of rupees, the Court below directed that the stamp should be calculated upon the value of the trust property, and ordered that the deficiency should be made up within a particular time. Before the time expired, a rule was obtained from the High Court under s. 622 of the Civil Procedure Code to show cause why the order should not be set aside. *Held,* that the rule must be discharged, inasmuch as if the suit had been dismissed on the expiration of the time limited on the ground that the relief was not properly valued, there would have been an appeal. OMRAO MIRZA *v.* JONES . . . **12 C. L. R. 148**

95. ———— *Order made without jurisdiction under Act XIX of 1841, ss. 3 and 4.* Where a District Court, purporting to act under s. 4 of Act XIX of 1841, directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of s. 3 of that Act, the High Court set aside the order under s. 622 of the Code of Civil Procedure as made without jurisdiction. ABDUL RAHIMAN *v.* KUTTI AHMED . . **I. L. R. 10 Mad. 68**

96. ———— *Act XIX of 1841, ss. 2, 3, 5, 15—Order of District Court on petition by Court of Wards.* On a petition presented by the Agent of the Court of Wards, a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist. *Held,* that the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure. PAPAMMA *v.* COLLECTOR OF GODAVARI **I. L. R. 12 Mad. 341**

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

97. ———— *Bengal Tenancy Act (VIII of 1885), ss. 104, cl. 2, 105, 106, 108—Rule 33 of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622—Order of Special Judge as to settlement of rents.* The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a special Judge in regard to settlement of rents. SHEWBARAT KOER *v.* NIRPAT ROY **I. L. R. 16 Calc. 596**

98. ———— *Bengal Tenancy Act (VIII of 1885), s. 174—Deposit, nature of—Jurisdiction—Application under s. 622 of the Civil Procedure Code.* The deposit under s. 174 of the Tenancy Act must be of such a nature as to be at once payable to the parties, and a court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions. Where, therefore, the Court accepted a deposit partly of cash and partly of a Government Promissory Note, and notwithstanding the objection of the auction purchaser gave the judgment-debtor the benefit of s. 174 and set aside the sale, the High Court set aside such order under s. 622 of the Civil Procedure Code. RAHIM BUX *v.* NUNDO LAL GOSSAMI **I. L. R. 14 Calc. 321**

99. ———— *Bengal Tenancy Act (VIII of 1885), s. 188—Suit for rent—Co-sharers, suit by — Joint undivided estate — Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 622.* A District Judge, in deciding a rent suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form in which it had been framed, and therefore dismissed the suit. *Held,* on an application under s. 622 of the Civil Procedure Code to have the judgment of the District Judge set aside, that the District Judge had acted in the exercise of his jurisdiction illegally, inasmuch as s. 188 had no application to the case, and that his decision must be set aside. *Prem Chand Nuskur v. Mokshoda Debi, I. L. R, 14 Calc., 201,* and *Umesh Chunder Roy v. Nashir Mullick, I. L. R. 14 Calc., 203, note,* followed. *Amir Hassan Khan* v. *Shoe Baksh Singh, I. L. R. 11 Calc. 6 L. R. 11 I. A., 237* distinguished. JUGOBANDHOO PATTUCK *v.* JADU GHOSE ALKUSHI . . **I. L. R. 15 Calc. 47**

100. ———— *High Court's power of interference with order of Special Judge—Rules under Bengal Tenancy Act, Ch. VI, No. 25, —Power of Local Government to make the rule—Bengal Tenancy Act, ss. 104, 108, and 189.* A number of tenants were joined as defendants in a proceeding for settlement of rents under s. 104, cl. 2, of the Bengal Tenancy Act, and an appeal preferred by the landlords under s. 108, cl. 2, from the Revenue officers' decision making all or nearly

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

all the tenants respondents. The appeal was dismissed by the Special Judge, on the ground that as many Court-fees of R10 each as there were tenants defendants had not been paid, and the appellants petitioned the High Court to set aside the order under s. 622 of the Civil Procedure Code. *Held*, by a Full Bench (i) that the Special Judge refused to exercise a jurisdiction vested in him by law ; that the Court of Special Judge is a Court subordinate to the High Court ; and the High Court had power to interfere under s. 622 of the Civil Procedure Code. *Shewbarat Koer* v. *Nirpat Roy*, *I. L. R. 16 Calc. 596*, dissented from. (ii) That the Local Government acted within the powers conferred by s. 189, cl. 1, of the Bengal Tenancy Act, in making rule 25 of Ch. VI of the Government rules under the Act, by which a landlord is authorized to join as defendant several tenants in one application for settlement of rents. UPADHYA THAKUR *v.* PERSIDH SINGH

I. L. R. 23 Calc. 723

101. ——— *Refraining from exercise of jurisdiction—Special Judge acting under Bengal Tenancy Act (VIII of 1885), ss. 106, 8—Boundary dispute—Decision of settlement officer acting as survey officer under Bengal Survey Act (Beng. Act V of 1875).* Where the Special Judge under the Bengal Tenancy Act (VIII of 1885), in a case of a boundary dispute which had been tried and decided by a settlement officer acting as a survey officer under part V of the Bengal Survey Act (V of 1875), dismissed an appeal on the ground that no appeal lay to him in such a case, the High Court declined to interfere under s. 622 of the Civil Procedure Code, being of opinion that the settlement officer had power under s. 189(*b*) of the Bengal Tenancy Act, and rule 1, Ch. VI of the Government rules under the Tenancy Act, to act as he had done, and that therefore, in holding that no appeal lay to him, the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised. IRSHAD ALI CHOWDHRY *v.* KANTA PERSHAD HAZAREE

I. L. R. 21 Calc. 935

102. ——— *Special Judge, discretion of—Dekkan Agriculturists' Relief Act (XVII of 1879)—Finding of fact.* When the Special Judge under the Dekhan Agriculturists' Relief Act (XVII of 1879) entertains a clear opinion that the findings of the Subordinate Judge on the questions of fact are erroneous, and exercises his discretion in setting aside the decree, the High Court will not, in its extraordinary jurisdiction, interfere with that discretion except under most exceptional circumstances. RAYACHAND MAYACHAND *v.* RAHIMBHAI . **I. L. R. 18 Bom. 347**

103. ——— *Revisionary power of the Special Judge—Cases in which failure of justice appears to have taken place—Jurisdiction—Discretion of Court—Dekkan Agriculturists' Relief Act, s. 53.* S. 622 of the Civil Procedure Code (Act XIV of 1882) gives to the High Court jurisdiction to interfere only where the lower Court acts without jurisdiction or has exercised its jurisdiction "illegally or with material irregularity." Under s. 53 of the Dekkan Agriculturists' Relief Act (XVII of 1879), the Special Judge has a revisionary power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction. *Shidhu* v. *Bali*, *I. L. R. 15 Bom. 180*, dissented from. GURU BASAYA *v.* CHANMALAPPA

I. L. R. 19 Bom. 286

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

104. ——— *Mamlatdars' Courts Act (Bom. Act III of 1876), s. 15, cl. (a), sub-cls. (1) and (2), s. 18—Execution of decree for possession against a third party—Jurisdiction of Mamlatdar.* *A* obtained an order in a Mamlatdar's Court against *G* for possession of a house, and in execution *N*, who was found in possession of the house and who was reported by the village officers as holding possession for *G*, was evicted by order of the Mamlatdar. *N* then applied to the High Court. *Held*, that the Mamlatdar's order was, strictly speaking, beyond his authority, but that, as *N's* petition to the High Court contained no distinct denial that he was occupying merely on behalf of the defendant, the High Court would not interfere in its extraordinary jurisdiction. NATHEKHA *v.* ABDUL ALLI

I. L. R. 18 Bom. 449

105. ——— *Irregular decree of Mamlatdar made by consent of parties—Subsequent refusal of Mamlatdar to order execution of decree—Questions of fact.* The applicant brought two possessory suits against the opponent in the Mamlatdar's Court for the recovery of certain pieces of land. By consent, decrees were passed in these suits, that unless the opponent paid a certain sum of money to the applicant within two months, the latter should get possession. After the expiration of two months, the applicant, alleging that the money had not been paid as agreed, applied for execution of the decrees. The Mamlatdar found that the money had been tendered to the applicant, but had been wrongfully refused by him. He ordered execution to issue as to costs, but declined to make any order as to possession. The applicant thereupon applied to the High Court in its extraordinary jurisdiction, and alleged that the money had not been duly tendered *Held*, that the decrees were such as the Mamlatdar could not legally make under the provisions of the Mamlatdars' Act (Bombay Act III of 1876), and the consent of parties could not give him power to do so. *Held*, also, that the High Court would not go into the question as to the due tender of the money. It was not open to the High Court, in the exercise of its extra-

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

ordinary jurisdiction, to go into this question of fact, nor would it be proper to further the execution of an irregular decree, especially as the applicant had a clear remedy by suit. RAMRAO TATYAJI PATIL *v.* BABAJI DHONDJI BIBVE
I. L. R. 20 Bom. 630

106. ——— *Mamlatdar, jurisdiction of.* The plaintiff sued in a Mamlatdar's Court for possession of certain lands, alleging that the defendants held them under a lease, the time of which had expired. The Mamlatdar found the execution of the lease proved, but held it to be colourable, and that the defendants did not hold under it. He therefore rejected the plaintiff's claim. The plaintiff applied to the High Court in its extraordinary jurisdiction and obtained a rule to set aside the order, contending that the Mamlatdar had no jurisdiction to decide that the lease was colourable, and that he ought not to have admitted evidence upon that point. *Held* (discharging the rule), that the matter was not one for the extraordinary jurisdiction of the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882). The Mamlatdar had not declined jurisdiction. He had considered the materials laid before him, and had come to a conclusion. That conclusion, if erroneous, ought to be corrected in a regular suit and not by an application to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882). KASHINATH SAKHARAM KULKARNI *v.* NANA . . **I. L. R. 21 Bom. 731**

107. ——— *Dispossession of a third person not a party to suit—Remedy of person so dispossessed—Mamlatdar acting without jurisdiction.* *G* got a decree for possession against *P* in a Mamlatdar's Court. In execution the Mamlatdar directed the ouster of *P*, who was in possession, and who was not a party to the decree. *Held*, that the Mamlatdar's order for the execution of the decree by the ouster of *P* was without jurisdiction, and that it should be set aside under s. 622 of the Civil Procedure Code (Act XIV of 1882). CHINAYA *v.* GANGAVA
I. L. R. 21 Bom. 775

108. ——— *Order of District Judge acting under Bombay District Municipal Act (Bom. Act II of 1884), s. 23—Application to set aside a Municipal election—Order made as to costs—"Court," meaning of.* A District Judge acting under s. 23 of the Bombay District Municipal Act (Bombay Act II of 1884) is not a "Court" within the meaning of the word in s. 622 of the Civil Procedure Code (Act XIV of 1882), and the High Court has no jurisdiction to revise his order refusing to set aside an election nor can it interfere with an order made by him that the applicant shall pay the costs incurred by the opponent. BALAJI SAKHARAM *v.* MERWANJI NOWROJI . . **I. L. R. 21 Bom. 279**

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

109. ——— *Revision—Illegality in exercise of jurisdiction—Judge's duty to decide secundum allegata et probata.* The plaintiffs sued upon two bonds executed by the defendant in their father's favour, one for R200 and the for R99-15 annas. The defendant in his written statement, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of the consideration. The Subordinate Judge held that the bond for R200 was not proved, but awarded the claim upon the other bond. On appeal, one of the issues raised by the Assistant Judge was—are the bonds in suit proved ? He held that the plaintiffs had failed to prove execution of the bonds, and dismissed the claim *in toto*. On an application to the High Court under s. 622 of the Civil Procedure Code (Act XIV of 1882),—*Held*, reversing the decision of the lower Court, that the defendant having admitted execution of the bonds in question, the Assistant Judge acted illegally in the exercise of his jurisdiction in raising the question of the execution. The first rule of adjudication is that a Judge shall decide *secundum allegata et probata*. The only question that could be tried in the present case was non-receipt of consideration. GORAKH BABAJI *v.* VITHAL NARAYAN JOSHI
I. L. R. 11 Bom. 435

110. ——— *Passing decree unsupported by proof—High Court's powers of revision—Bailment—Negligence.* A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree it is liable to be set aside in revision under s. 622 of the Civil Procedure Code. *Moulvi Muhammad* v. *Syad Husain*, *I. L. R. 3 All. 203*, and *Harnam Tewari* v. *Sakina Bibi*, *I. L. R. 3 All. 417*, referred to. *S* hired a horse from *W*, and while it was in his custody, it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit by *W* against *S* to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that for some time previously it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely or done something else which caused the horse to bolt, and that in so doing he had acted without reasonable care and had thus caused the animal's death. The Court accordingly decreed the claim. *Held*, by EDGE, *C.J.*, that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicated nor *primâ facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under s. 622 of the Civil Procedure Code. *Per* BRODHURST, *J.*, that as the decree was not only unsupported by proof but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally" within the meaning of s. 622. *Collins* v. *Bennett, 46 New York Rep.; Byrne* v. *Boadle, 2 H. & C. 722; Gee* v. *Metropolitan Railway Company, L. R. 8 Q. B. 161; Scott* v. *London Dock Company, 3 H. & C. 596; Manzoni* v. *Douglas, 6 Q. B. D. 145; Cotton* v. *Wood, 8 C. B. N. S. 569; Davey* v. *London and South Western Railway Company, 12 Q. B. D. 70;* and *Hammack* v. *White, 11 C. B. N. S. 588*, referred to. SHIELDS *v.* WILKINSON . . **I. L. R. 9 All. 398**

111. ——— *Civil Procedure Code, 1882, s. 516—Material irregularity—Omission to give notice of proceedings.* A District Munsif passed a decree in the terms of an award without giving notice of the filing of the award under s. 516 of the Code of Civil Procedure. *Held*, that the District Munsif acted with material irregularity within the meaning of s. 622 of the Code Civil Procedure. RANGASAMI *v.* MUTTUSAMI **I. L. R. 11 Mad. 144**

112. ——— *Civil Procedure Code, 1882, s. 156—Decree passed upon an award filed in Court without notice of its filing having been sent to the parties. Held*, that it was a good ground for revision of a decree based upon an award filed in Court that no notice of filing of the award was given by the Court to the parties as required by s. 516 of the Code of Civil Procedure, even though the applicant in revision might have received information *aliunde* that the award had been filed. *Rangasami* v. *Muttusami, I. L. R. 11 Mad. 144*, followed. CHATARBUJ DAS *v.* GANESH RAM **I. L. R. 20 All. 474**

113. ——— *Error of law—Material irregularity—Personal decree against minors for debt of deceased Hindu father.* In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor of whom two were minors. *Held*, that, under s. 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants. BHASHYAM *v.* JAYARAM **I. L. R. 11 Mad. 303**

114. ——— *Civil Procedure Code, s. 373—Leave given by District Court on appeal to withdraw suit—Material irregularity.* A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and at the same time applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action. The District Court granted the application without assigning any reasons for its order. *Held*, under s. 622 of the Code of Civil Procedure, that the District Court had acted with material irregularity. TIRUPATI *v.* MUTTA . . . **I. L. R. 11 Mad. 322**

115. ——— *Immoveable property—Right of fishery—Possession—Dispossession—Specific Relief Act (I of 1877), s. 9—Civil Procedure Code (Act XIV of 1882), ss. 30 and 622—Objection under s. 30 where suit is under s. 9 of Specific Relief Act.* The plaintiffs were fishermen belonging to the village of *N*. They claim in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nagothna Creek between high and low-water marks, within certain limits set forth in the plaint, and, under s. 9 of the Specific Relief Act, I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendants then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section. *Held*, that the first Court did not act without jurisdiction, the right claim coming within the denomination of immoveable property. It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under s. 30 of the Civil Procedure Code (Act XIV of 1882). *Held*, that the objection was a good one; but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under s. 622 of the Civil Procedure Code. BHUNDAL PANDA *v.* PANDOL POS PATIL **I. L. R. 12 Bom. 221**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

116. ——— *Jurisdiction, Presumption of—Maxim, omnia præsumuntur rite et solemniter esse acta—Civil Procedure Code, ss. 103, 283, 647.* The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it. *Held*, that the High Court, in the exercise of its revisional powers under s. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction : that the proper remedy of the petitioner was an application under s. 103, read with s. 647, or a suit under s. 283, and that the High Court should not interfere in revision. SHEO PRASAD SINGH *v.* KASTURA KUAR
I. L. R. 10 All. 119

117. ——— *Limitation—High Court's revisional powers—Material irregularity.* On the 29th November 1886 this suit was filed on a bond dated the 29th November 1881, payable in two years. The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November 1883. Against this decision the plaintiff applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882). *Held*, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November 1883, that is, the day of the month corresponding with the day on which the bond was dated. *Held*, further, that, the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under s. 622 of the Code of Civil Procedure (Act XIV of 1882). Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such question with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal ; and where no appeal is permissible, there is no remedy under s. 622 of the Code or under the provisions of s. 15 of Stat. 24 and 25 Vict., c. 104, whatever remedy there may be, in the Bombay Presidency, under cl. 2 of s. 5 of Regulation II of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue proceeds to determine an issue, which does not really arise in the case, and bases its decision of the case on its determination of that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction. VENKUBAI *v.* LAKSHMAN VENKOBA KHOT
I. L. R. 12 Bom. 617

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

118. ——— *Orders in pauper suit—Civil Procedure Code, s. 407.* All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of the revisional powers of the High Court under s. 622 of the Code. *Chatterpal Singh* v. *Rajaram, I. L. R. 7 All. 661*, notwithstanding. In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence ; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. MUHAMMAD HUSAIN *v.* AJUHDIA PRASAD
I. L. R. 10 All. 467

119. ——— *Pauper suit—Costs of plaintiff—Right of appeal—Decree omitting to order plaintiff to pay Court-fees—Power of Collector to apply under the extraordinary jurisdiction of High Court—Amendment of decree.* The plaintiff's suit *in formâ pauperis* was rejected by the Subordinate Judge. The decree, however, omitted to order the recovery from the plaintiff of the Court-fees payable in the plaint. The Collector applied to the High Court under its extraordinary jurisdiction for the rectification of the decree. It was contended that, as the omission might have been remedied by an appeal or on review, the Collector could not apply under the extraordinary jurisdiction of the Court. *Held*, on the authority of *Collector of Ratnagiri* v. *Janardan, I. L. R. 6 Bom. 590*, that no appeal by Government would lie in the case, and that in the exercise of the extraordinary jurisdiction, the High Court would rectify the decree by directing the plaintiff to pay the costs of Government. COLLECTOR OF KANARA *v.* RAMBHAT . . **I. L. R. 18 Bom. 454**

120. ——— *Civil Procedure Code, ss. 494, 588—Appeal against order for issue of notice under s. 494—Revision by High Court of an order purporting to be made on appeal from such an order.* A petition praying for a temporary injunction in a suit was presented by the plaintiff in a subordinate Court. The Judge refused to pass orders on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge, who granted the injunction prayed for. *Held*, that no appeal lay from the subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law. LUIS *v.* LUIS
I. L. R. 12 Mad. 186

121. ——— *Civil Procedure Code, s. 269—Order on appeal affirming order granting application for review of judgment.* The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

way of appeal from the final decree at the rehearing. GOPAL DAS *v.* ALAF KHAN
I. L. R. 11 All. 383

122. ——— *Pauper suit—Judge applying to suit a course of inquiry not applicable—Civil Procedure Code, 1882, ss. 407, 622.* Where the Judge in the Court below in making an inquiry under cl. (*c*) of s. 407 of the Civil Procedure Code found that the applicant was a pauper, but having addressed himself to the merits of the case, to the rights of parties and to matters which were entirely foreign to the enquiry that he had to make, rejected the application upon the ground that the allegations of the petitioner did not show a right to sue :—*Held*, that the High Court could interfere under s. 622, Civil Procedure Code, inasmuch as the Judge of the lower Court applied a course of enquiry to the matter he had to investigate under s. 407, Civil Procedure Code, which was not applicable to it, and he thereby failed to apply to the matter a course of enquiry which was applicable ; and that upon the allegations contained in the plaint there was nothing to show that the petitioner had no right to sue within the meaning of s. 407, Civil Procedure Code. *Mathuranath Sarkar* v. *Umesh Chunder-Sarkar, 1 C. W. N. 626 ; Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6 ; Sew Bux Bogla* v. *Shib Chander Sen, I. L. R. 13 Calc. 225 ; Rahim Bux* v. *Nundo Lal Gossami, I. L. R. 14 Calc. 321 ; Jagbandhu Pattuck v. Jadhu Ghose, I. L. R. 15 Calc. 47 ;* and *Birj Mohun Thakur* v. *Rai Umanath Chowdhury, I. L. R. 20 Calc. 8,* referred to and explained. DEBO DAS *v* RAM CHARAN DAS CHELLA . . **2 C. W. N. 474**

123. ——— *Civil Procedure Code (Act XIV of 1882), s. 412—Dismissal of suit in formâ pauperis without trial—Liability of plaintiff for Court-fee.* A plaintiff who sues *in formâ pauperis* is liable to pay the stamp duty if his suit is dismissed without trial ; and where in such a case the Judge decided that the plaintiff was not liable for the Court-fees, it was *held* that he had by misconstruing s. 412 of the Code failed to exercise a jurisdiction vested in him by law ; his order was rectified under s. 622. COLLECTOR OF VIZAGAPATAM *v.* ABDUL KHARIM
I. L. R. 21 Mad. 113

124. ——— *Landlord and tenant—Suit for rent.* In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under the Civil Procedure Code, s. 622, which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under the Letters Patent, cl. 15. *Held*, that, even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under the Civil Procedure Code, s. 622. VANANGAMUDI *v.* RAMASAMI
I. L. R. 14 Mad. 406

125. ——— *Revision, powers of High Court in—Jurisdiction, want of, by lower Court.* Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision. MIHR ALI SHAH *v.* MUHAMMAD HUSEN
I. L. R. 14 All. 413

126. ——— *Transfer of Property Act (IV of 1882), s. 87, Order under—Right of appeal.* An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgage-money by a mortgagor is a "decree" within the meaning of ss. 2 and 244 of the Code of Civil Procedure, 1882, and since an appeal lies from it, no application will lie under s. 622 of the Code for revision of such order. RAHIMA *v.* NEPAL RAI
I. L. R. 14 All. 520

See KEDARNATH *v.* LALJI SAHAI
I. L. R. 12 All. 61

127. ——— *Order made without jurisdicion—Order cancelling sale in execution of decree under s. 308, Code of Civil Procedure—Appeal.* A person who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution, and to have the purchase-money and the amount due under the decree set off against each other, became the purchaser for a sum less than the amount due under the decree. The Court made an order under the Civil Procedure Code, s. 308, cancelling the sale and ordering a re-sale on the ground that the purchaser had not paid the full amount due on his purchase within the time limited. The purchaser preferred a revision petition under the Civil Procedure Code, s. 622. *Held*, that the petitioner was the representative of the decree-holder within the meaning of the Civil Procedure Code, s. 244, and might have preferred an appeal against the order sought to be revised ; and that therefore the petition for division was not maintainable, although, under the circumstances above stated, the Court had no jurisdiction to make an order under the Civil Procedure Code, s. 308. SAH MAN MULL *v.* KANAGASABAPATHI
I. L. R. 16 Mad. 20

128. ——— *Erroneous decision with jurisdiction—Succession Certificate Act (VII of 1889), s. 4.* A person applied for leave to sue *in formâ pauperis* to recover assets forming part of the estate of a deceased person. His

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

application was dismissed on the ground that he produced no certificate under Act VII of 1889. *Held*, that the application was wrongly dismissed; and that the High Court had jurisdiction to interfere on revision under the Civil Procedure Code, s. 622. KAMMATHI *v.* MANGAPPA.
I. L. R. 16 Mad. 454

129. ——— *Order allowing withdrawal of suit—Civil Procedure Code. s. 373—Revision.* A Subordinate Judge, in granting the application of a plaintiff before him for permission to withdraw with leave to file a fresh suit in the same matter, made an order as to costs in favour of the defendants in the following terms: "As the case has not been contested to the bitter end, half the pleader's fees are allowed and the process expenses, etc., incurred in the case, except those already refused to the defendants. For travelling and incidental expenses defendants to put in a bill in one week, this to be subject to the decision of the Court after hearing both parties. The application under s. 373 of the Code of Civil Procedure is granted with leave to the plaintiff to bring a fresh suit for the same matter. Cost allowed to defendants as above." *Held*, that the order under s. 373 of the Code of Civil Procedure was an order liable to revision, as it was not open to appeal. *Kalian Singh* v. *Lekhraj Singh*, *I. L. R. 6 All. 211*, referred to. DICK *v.* DICK
I. L. R. 15 All. 169

130. ——— *Order refusing to discharge surety for insolvent judgment-debtor—Civil Procedure Code, ss. 336, 344—Appeal.* One *B M* became surety under s. 336 of the Code of Civil Procedure on behalf of one *G R*, a judgment-debtor, to the effect that *G R* would appear before the Court when called on and would within one month file an application to be declared an insolvent. *G R* did so apply, but, on the surety's asking the Court to declare him discharged of his liability, the Court refused to do so. *Held*, that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent, and that the order refusing to discharge him was not appealable, and was therefore open to revision under s. 622 of the Code. BANNA MAL *v.* JAMNA DAS
I. L. R. 15 All. 183

131. ——— *Transfer of execution-proceedings from one subordinate Court to another—Discretion of Court.* The High Court will not in its extraordinary jurisdiction interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution-proceedings under a decree from one subordinate Court to another. KRISHNA VELJI MARWADI *v.* BHAU MANSARAM
I. L. R. 18 Bom. 61

132. ——— *Judge of Small Cause Court erroneously treating defective service of summons as good—Material irregularity.* Where a Judge of the Small Cause Court, Bombay, treated the delivery of a summons by post to a person who was not shown to be the defendant as good service and had passed a decree against the defendant, he was *held* to have acted with material irregularity, and the High Court reversed his decree in the exercise of their powers under s. 622 of the Civil Procedure Code. JAGANNATH BRAKHBHAU *v.* SASSOON . . **I. L. R. 18 Bom. 606**

133. ——— *Decision on unstamped hundis.* Where a Judge acted on hundis which were unstamped and therefore inadmissible in evidence, the High Court set aside his decision under s. 622 of the Civil Procedure Code. CHENBASAPA *v.* LAKSHMAN RAMCHANDRA
I. L. R. 18 Bom. 369

134. ——— *Decision on inadmissible evidence.* A decision taking into consideration as evidence an unregistered lease was set aside under s. 622. GURUNATH SHRINIVAS DESAI *v.* CHENBASAPPA . . **I. L. R. 18 Bom. 745**

135. ——— *Construction of document.* The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision under s. 622 of the Code of Civil Procedure. DASRATH RAI *v.* SHEODIN RAI
I. L. R. 16 All. 39

136. ——— *Allowing objection to application in execution of decree by person not party to decree—Failure of exercise of jurisdiction vested by law—Decree against wrong person as representative.* A person not a party to a suit is not entitled to object to the issue of an order for execution of the decree. A Judge having at the instance of a person not a party to a suit refused to pass an order for the execution of decree on the judgment-creditor's application. *Held*, that in omitting to make such an order the Judge failed to exercise a jurisdiction vested in him by law, and that s. 622 of the Civil Procedure Code (Act XIV of 1882) was therefore applicable. NATHUBHAI MULCHAND *v.* NANA BABU **I. L. R. 19 Bom. 454**

137. ——— *Dismissal of appeal "for default of prosecution," appellant and his pleaders being present—Refusal to reinstate appeal—Civil Procedure Code, 1882, ss. 556 and 558—Appeal from order rejecting appeal.* A civil appeal was being heard before a Subordinate Judge, the appellant and two pleaders on his behalf being present. During the argument one of the pleaders was called away to another Court and remained absent, and, as neither the other pleader nor the appellant was in a position to continue the argument, the Subordinate Judge passed an order, purporting to be under s. 556 of the Code of Civil Procedure, dismissing the appeal "for default of prosecution." An application under s. 558 to

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4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

reinstate the appeal was rejected. The appellant appealed under s. 588 to the High Court against the order under s. 558. *Held*, that no such appeal lay, as the order in question could not have been made under s. 556. But the appellant was allowed to apply in revision under s. 622 against the order under s. 556, and upon that application it was held that the Court below had acted illegally and with material irregularity in dismissing the appeal for default under s. 556. JAWAHIR SINGH *v.* DEBI SINGH . . . **I. L. R. 18 All. 119**

138. ——— *Discretion of Court in exercisiny revisional powers—Civil Procedure Code, ss. 623 et seq.—Review of judgment granted on ground not allowed by s. 629.* A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to s. 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's appellate order, it was *held* that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results. ABDUL SADIQ *v.* ABDUL AZIZ . . . . **I. L. R. 21 All. 152**

139. ——— *Land Acquisition Act (X of 1870), ss. 3, 24, and 25—Exercise of jurisdiction by Judge under the Act—"Material irregularity"—Mistake in regard to the principle of calculation of the value of the land acquired.* If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by s. 24 of that Act, or have improperly taken into consideration any of the matters prohibited by s. 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under s. 622 of the Code of Civil Procedure. Having regard to the definition of "land" contained in s. 3 of Act X of 1876, there is nothing illegal in a Judge taking into account the value of works of the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation, and not an irregularity in the exercise of jurisdiction. JOSEPH *v.* SALT CO. **I. L. R. 17 Mad. 371**

140. ——— *Power to call for record of cases not appealable to High Court—*

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622.—*contd.*

When a Court can be said "to have acted in the exercise of its jurisdiction illegally or with material irregularity." A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, and admitted other appeals after they had become time-barred. *Held*, by the majority of the Full Bench, that where a Subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by s. 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*, followed. *Held*, further, (BEST and DAVIS, *JJ.*, dissenting), that the case contemplated by the words "act . . . . illegally or with material irregularity" in s. 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or procedure. *Per* BEST, *J.*—The words in question of s. 622 of the Code are applicable to illegalities or irregularities which are the result merely of ignorance of law or carelessness, and the disposal of a suit on a point taken by the Court itself on appeal without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure within the meaning of s. 622; and that the inadvertent admission of an appeal that is time-barred is an illegality in procedure within the meaning of that section. *Per* DAVIES, *J.*—The clause of s. 622 in question is applicable only to errors of procedure, and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section, interfere in revision. The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case. KRISTAMMA NAIDU *v.* CHAPA NAIDU **I. L. R. 17 Mad. 410**

141. ——— *Error of procedure—Mode of applying powers of superintendence of Court under s. 622.* The words "acting with material irregularity" in the third clause of s. 622, Civil Procedure Code, imply only the committing of an error of procedure, but "acting illegally" does not mean the same thing. The third clause of s. 622, Civil Procedure Code, is intended to authorize the High Court to interfere and correct gross and palpable errors of subordinate Courts so as to prevent grave injustice in non-appealable cases, and the question whether any case comes under the clause has to be determined with reference to the grossness and palpableness of the error complained of, and to the gravity of the injustice resulting from it. *Kristamma Naidu* v. *Chapa Naidu, I. L. R. 17 Mad. 410*, dissented

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

from. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*, explained. BHAGWAN RAMANUJ DAS *v.* KHETTER MONI DASSI
1 C. W. N. 617

142. ——— *Succession Certificate Act (VII of 1889), s. 9—Order granting certificate on the applicant's furnishing security—Discretion of Court.* The widow of a deceased person having applied for a certificate under the Succession Certificate Act (VII of 1889), the Judge ordered the certificate to issue on the applicant's furnishing security under s. 9 of the Act. *Held*, that such an order was within the discretion of the Judge, and there being shown to be nothing improper in the exercise by the Judge of his jurisdiction, the Court refused to interfere to set the order for security aside. *Mhalsabhai* v. *Vithoba Khandappa Gulbe, 7 Bom. Ap. 26*, referred to. BAI DEVKORE *v.* LALCHAND JIVANDAS
I. L. R. 19 Bom. 790

143. ——— *Decision of Appellate Court as to jurisdiction of lower Court—Reversal of order rejecting plaint.* Where a Court of first instance having ordered a plaint presented to it to be returned to the proper Court under s.5 7, cl. (*a*), Civil Procedure Code, the Court of Appeal, acting under s. 588, cl. (*6*), Civil Procedure Code, set aside such order and directed the original Court to hear the cause:—*Held*, that the High Court had no jurisdiction to interfere with such appellate order under s. 622, Civil Procedure Code, for it could not be said that the lower Appellate Court acted in the exercise of its jurisdiction illegally or with material irregularity simply because its decision as to the jurisdiction of the first Court to entertain the suit was erroneous in law. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*: *11 I. A. 237*; *Birj Mohan Thakur* v. *Ray Uma Nath Chowdhry, I. L. R. 20 Calc. 8*: *19 I. A. 154*; *Jugobundhu Pattuck* v. *Jadu Ghose, I. L. R. 15 Calc. 47*; and *Kristamma* v. *Chapa Naidu, I. L. R. 17 Mad. 410*, referred to. *Held, per* BANERJEE, *J.*—The scope of the third clause of s. 622, Civil Procedure Code, is not limited merely to cases of material irregularity of procedure, for the third clause not only refers to cases, where a Court has acted with material irregularity but also to those in which it has acted illegally. The clause is evidently intended to authorize the High Courts to interfere and correct gross and palpable error of subordinate Courts, so as to prevent grave injustice in non-appealable cases. *Bhagwan Ramanuj* v. *Khetter Moni Dassi, I. C. W. N. 617*, referred to. *Amir Hassan Khan* v. *Sheo Baksh, I. L. R. 11 Calc. 6*, explained. *Kristamma Naidu* v. *Chapa Naidu, I. L. R. 17 Mad. 410*, disapproved. MATHURA NATH SARKAR v. UMESH CHANDRA SARKAR . **1 C. W. N. 626**

SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882. S. 622 —*contd.*

144. ——— *Error in distribution of proceeds of sale in execution of decree—Civil Procedure Code (Act XIV of 1882), s. 295—Jurisdiction—Powers of revision by High Court.* An application by a decree-holder under s. 295 for rateable distribution was refused by the Judge in the lower Court on the grounds (i) that the decree was not a *bonâ fide* one; (ii) that the decree in favour of the petitioner, which was sent down by the High Court for execution to his Court, was sent down by the High Court with direction merely to hold under attachment the property of the judgment-debtor, but not to proceed to sell the property until further instructions were received, and the petitioner could not be regarded as one who had applied for execution of decree within the meaning of s. 295; and (iii) that the petitioner had not obtained satisfaction of her decree in whole or in part of any of the other districts to which her decree had been simultaneously sent for execution. *Held, per* MACLEAN, *C.J.*, that, as the Court below had jurisdiction under s. 295, Civil Procedure Code, to divide the assets, and if, with a view to the division of assets, he had made a mistake in the principle upon which they ought to have been divided, such an error was one of law merely, and not subject to review under s. 622, Civil Procedure Code. *Held*, further, that a mere mistake in law by a lower Court does not bring a case under s. 622, Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*, followed. *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry, I. L. R. 20 Calc. 8*, referred to. *Held, per* BANERJEE, *J.*, that the third clause of s. 622, *viz.*, "acted illegally or with material irregularity," is not limited to cases of procedure only. This clause is intended to empower the High Court to interfere in non-appealable cases with orders or decisions of lower Courts where the orders or decisions are vitiated by an error which is so gross and palpable, and which has led to injustice so grave and manifest that it is desirable that the High Court should interfere with them. *Held*, that, assuming that the lower Court had no jurisdiction to enter into the question of the *bonâ fides* of the decree, the order of the lower Court might stand upon the other two grounds, for the error, if any, does not come within the scope of this clause and having regard to the fact that s. 295, Civil Procedure Code, provides a remedy by a regular suit, the case is not one which, so far as the decision rests upon the second and third reasons, can be said to come within the scope of the third clause of s. 622, Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Sing, I. L. R. 11 Calc. 6*, explained. *Badami Koer* v. *Dinu Rai, I. L. R. 8 All. 111*, dissented from. *Kristamma Naidu*, v. *Chapa Naidu, I. L. R., 17 Mad. 410*, disapproved. RAGHU NATH GUJRATI *v.* RAI CHATRAPUT SINGH
1 C. W. N. 633

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622 —*contd.*

145. ——— *Civil Procedure Code, s. 283—High Court's powers of revision—Remedy by suit.* The High Court will not exercise its revisional jurisdiction so long as there is any other remedy open to the applicant. Where a Subordinate Judge disallowed an application for the release of certain property which had been attached before judgment:—*Held*, that, there being a remedy by suit under s. 283 of the Code of Civil Procedure, the High Court should not interfere with such order in revision. *Ittiachan* v. *Velappan, I. L. R. 8 Mad. 484; Sheo Prasad Singh* v. *Kastura Kuar, I. L. R. 10 All. 119;* and *Gopal Das* v. *Alaf Khan, I. L. R. 11 All. 383*, referred to. GUISE *v.* JAISRAJ
I. L. R. 15 All. 405

146. ——— *Exercise of power of High Court under s. 622 of the Civil Procedure Code, 1882, where there is no appeal—Order refusing to make person party to oppose probate.* Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was *held* to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court finding that no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civil Procedure Code, and remanded the case for trial as a contested application. KHETTRAMONI DASI *v.* SHYAMA CHURN KUNDU . . **I. L. R. 21 Calc. 539**

147. ——— *Order refusing to amend a clerical error in the form of probate—Probate and Administration Act (V of 1881), s. 86—Succession Act (X of 1885), s. 263.* Where there was a clerical error in the form of probate granted and the Judicial Commissioner refused to amend it on the ground that the probate was granted by his predecessor, it was *held* that, though there was no appeal from such an order either under s. 26 of the Probate and Administration Act (V of 1881) or s. 263 of the Succession Act (X of 1865), yet the High Court might deal with the case under s. 622 of the Civil Procedure Code, and set aside the order. *Khettramoni Dasi* v. *Shyama Churn Kundu, I. L. R. 21 Calc. 539*, followed. GERINDRA KUMAR DAS GUPTA *v.* RAJESWARI ROY.
I. L. R. 27 Calc. 5

148. ——— *Exercise of revisional powers when there was remedy by separate suit—Right of suit—Executing Court delivering possession of property not specified in sale-certificate.* In execution of a decree against several joint judgment-debtors, certain immoveable property was proclaimed for sale. The sale proclamation described the property as so many biswas and biswansis in certain villages amounting to a certain area. The judgment-debtors possessed property in those villages over and above that sought to be sold. The property as above described was sold, and certificates of sale were granted which in terms followed the description contained in the proclamation of sale. The decree-holder purchased the property so sold and applied for possession thereof, but in their application they inserted a detail of the specific shares of property held by the several judgment-debtors over which they prayed for possession. The Court executing the decree went into the question of the specification of shares and ordered possession to be delivered over certain specific shares of the several judgment-debtors. *Held*, that, under the circumstances described above, the High Court would interfere in revision under s. 622 of the Code of Civil Procedure, although it was possible that the matters complained of might be grounds for a separate suit. *Guise* v. *Jaisraj, I. L. R. 15 All. 405; Gopal Das* v. *Alaf Khan, I. L. R. 11 All. 383;* and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal, I. L. R. 19 Calc. 663*, referred to. GHULAM SHABBIR *v.* DWARKA PRASAD
I. L. R. 18 All. 163

149. ——— *Decision as to admissibility of document—Error in law. Per* FARRAN, *C.J.*—When Courts in the exercise of their judicial functions decide that a document is inadmissible in evidence, having exercised their judgment upon the questions of its admissibility or inadmissibility, we have no jurisdiction to interfere in the matter under s. 622. What the Courts do in such a case, assuming the document tendered to be erroneously rejected, is to make a mistake upon a question of law, and it does not appear to me to be material whether the mistake in law is made during the hearing of the case or in the final decision. A mere error in law is not, I think, an illegality or a material irregularity within the meaning of s. 622 of the Code. MADHABRAV GANESHPANT DYE *v.* GULABBHAI LAKABHAI . . **I. L. R. 23 Bom. 177**

150. ——— *Revision. Powers of—Stamp Act (I of 1879), s. 34, sub-s. (3).* A certain document, although unstamped, was admitted in evidence by the first Court. Upon appeal the Subordinate Judge refused to admit the document in evidence, on the ground that it was unstamped, and on the merits reversed the judgment of the first Court and dismissed the suit. The plaintiff moved the High Court under s. 622, Civil Procedure Code, on the ground that, under s. 34, sub-s. (3), of the Stamp Act, the document, although unstamped, was admissible in the lower Appellate Court, inasmuch as the first Court admitted the same. *Held*, by MACLEAN, *C.J.*, that s. 622, Civil Procedure Code, did not apply. That an error of law does not amount to acting, in the exercise of jurisdiction,

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SUPERINTENDENCE OF HIGH COURT—*contd.*

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illegally or with material irregularity within the meaning of s. 622, Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* relied upon. *Mathura Nath Sarkar* v. *Umes Chandra Sarkar, 1 C. W. N. 626; Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi, 1 C. W. N. 617,* referred to. *Held* by BANERJEE, *J.*, that the error of the lower Appellate Court in rejecting the document, admitted by the first Court, as not stamped, in contravention of s. 34 of Act I of 1879, comes within that part of s. 622, Civil Procedure Code, which speaks of a Court's acting with material irregularity in the exercise of its jurisdiction. That the rejection of the document is more in the nature of a materially irregular act than an erroneous decision on a point of law. The case of *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* must be taken to have settled that it is not every error of law that will come within the scope of s. 622, Civil Procedure Code, but it does not follow that no error of law, unless it is also an error of jurisdiction, can come within the operation of that section. That the error in this case was gross and palpable, and it was likely to have led to injustice. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* explained. *Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi, 1 C. W. N. 617; Mathura Nath Sarkar* v. *Umes Chandra Sarkar, 1 C. W. N. 626;* and *Raghu Nath Gujrati* v. *Rai Chatraput Singh, 1 C. W. N. 633,* referred to. ENAT MONDUL *v.* BALORAM DEY **3 C. W. N. 581**

151. ——— *Civil Procedure Code (Act XIV of 1882), s. 108—Ex parte decree, setting aside, effect of, as against contesting defendants who preferred appeal—Jurisdiction of a Court to set aside, under s. 108, Civil Procedure Code, decree of a superior Court.* Plaintiff brought a suit against defendants 1 and 2 for declaration of title to, and for khas possession of, certainl and against the other defendants. The suit was contested by defendants 1 and 2 only, and plaintiff obtained a decree. Defendants 1 and 2 preferred an appeal to the Subordinate Judge's Court and a second appeal to the High Court, with the result that the judgment of the first Court was upheld; the other defendants, who were no parties to the appeal, applied to set aside the *ex parte* decree; the Munsif ordered that "the *ex parte* decree be set aside and the original regular suit be restored." By a later order defendants 1 and 2 were allowed to defend the suit *de novo* and to file fresh defences. *Held,* that the Munsif had no jurisdiction to set aside the decree as against defendants 1 and 2, which was not an *ex parte* decree and was not a decree of his Court, but that of a superior Court; and that the High Court had jurisdiction, under s. 622, Civil Procedure Code, to set aside the order of the Munsif. That s. 108, Civil Procedure Code, contemplates the case of a Court setting aside its own decree and not that of another and a higher tribunal. *Mahamed Hamidulla* v. *Johurennessa Bibi, I. L. R. 25 Calc. 155,* distinguished. MONOMOHINI CHOWDHURANI *v.* NARA NARAYAN ROY CHOWDHRY . . . . **4 C. W. N. 456**

152. ——— **Arbitration**—*Award—Setting aside an award on ground of misconduct—Civil Procedure Code (Act XIV of 1882), ss. 521 and 622—Practice—Procedure.* Where an award, made under Chapter XXXVII of the Civil Procedure Code (Act XIV of 1882), on a reference to arbitration in the course of a suit, is set aside on the ground of the arbitrator's misconduct, the order setting aside the award is not subject to revision under s. 622 of the Civil Procedure Code. It is an interlocutory order, and may be a ground of appeal against the decree passed in that suit. DAMODAR TRIMBAK DHARAP *v.* RAGHUNATH HARI (1902) **I. L. R. 26 Bom. 551**

153. ——— **Counsel and client**—*Suit by client to recover fees paid to counsel—Cause of action—Status of a barrister practising as an advocate in the High Court for the North-Western Provinces—Revision.* A client who had paid a fee to a barrister for professional services, which in fact were not rendered, sued the barrister in Court of a Munsif, claiming a refund of the fee paid. The Munsif dismissed the suit, holding that such a suit could not lie. On appeal, the District Judge held that the suit would lie, and gave the plaintiff a decree. Against this decision the defendant applied in revision to the High Court. *Held* by STANLEY, *C.J.*, and BLAIR, *J.* (*dissentiente* BANERJI, *J.*), that the High Court was competent to interfere, in the exercise of its revisional jurisdiction. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* distinguished. *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi, I. L. R. 15 Calc. 47; Manisha Eradi* v. *Siyali Koya, I. L. R. 11 Mad. 220;* and *Chenbasada* v. *Lakshman Ramchandra, I. L. R. 18 Bom. 369,* referred to by STANLEY, *C.J. Held,* by BANERJI, *J.*, that the application for revision preferred by the defendant could not be entertained under s. 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6; Magni Ram* v. *Jiwa Lal, I. L. R. 7 All. 336; Badami Kuar* v. *Dinu Rai I. L. R. 8 All. 111; Enat Mondul* v. *Baloram Dey, 3 C. W. N. 581; Sarman Lal* v. *Khuban, I. L. R. 17 All. 499;* and *Sundar Singh* v. *Doru Shankar, I. L. R. 20 All. 78,* referred to. ROSS ALSTON *v.* PITAMBAR DAS (1903) **I. L. R. 25 All. 509**

154. ——— **Duty of High Court.** Where it appears that the Court of first instance, or of appeal, has exercised a jurisdiction not vested in it by law, the High Court is bound to interfere under its revisional powers. RAMASAMY CHETTIAR *v.* ORR (1902). **I. L. R. 26 Mad. 176**

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

155. ——— **Order amending a decree** —*Civil Procedure Code (Act XIV of 1882), ss. 206, 622, 623—Appeal—Second appeal—Review.* An order under s. 206, Civil Procedure Code, amending a decree, is not a decree; and no appeal lies against such an order. The proper remedy is by an application under s. 622, Civil Procedure Code. *Surta* v. *Ganga, I. L. R. 7 All. 875*, referred to and followed. *Joy Kishen Mookherjee* v. *Ataoor Rohoman, I. L. R. 6 Calc. 22*, referred to. *Kali Prosunno Basu* v. *Lal Mohun Guha, I. L. R. 25 Calc. 258*, distinguished. *Abdul Hayai Khan* v. *Chuia Kuar, I. L. R. 8 All. 37; 7 Mohammad Sulaiman Khan* v. *Fatima, I. L. R. 11 All. 314*, explained. RAGHU NATH GHOSHAL *v.* MAFAKSHAR HOSSAIN CHOWDHURY (1900) **5 C. W. N. 192**

156. ——— **Power of High Court**— —*Code of Civil Procedure (Act XIV of 1882), ss. 310A, 622—"Exercised a jurisdiction not vested in it by law," meaning of—Appeal.* Whether an order under s. 310A is subject to appeal or to revision under s. 622, Civil Procedure Code, depends upon the circumstances of each particular case. Where the purchaser is the decree-holder himself, and the question arises between him and the judgment-debtor, an appeal lies. *Chundi Charan Mandal* v. *Banke Behary Lal Mandal, I. L. R. 26 Calc. 449*, followed. Where the auction-purchaser is a stranger, s. 622, Civil Procedure Code, is applicable. *Jogodanund Singh* v. *Amrita Lal Sircar, I. L. R. 22 Calc. 767*, and *Bungshidhar Haldar* v. *Kedar Nath Mondal, 1 C. W. N. 114*, followed. Where the lower Court sets aside a sale under s. 310A, Civil Procedure Code, in a case to which the section is not applicable, the High Court can interfere under s. 622, Civil Procedure Code, as the order is not merely an erroneous order but is made without jurisdiction. KEDAR NATH SEN *v.* UMA CHARAN (1900) **6 C. W. N. 57**

157. ——— *Revision, High Court's power of, without application—Property, management of, by Court.* Under the terms of s. 622, Civil Procedure Code, the High Court can deal with a case under that section without there being any application by any of the parties. *Golam Mahammad* v. *Saroda Mohan Maitra, 4 C. W. N. 695*, approved of. There is no law or procedure under which a Court can, on the mere application of the parties interested, take over the management of properties belonging to an estate, and pass such orders as would place them entirely beyond the reach of the judgment-creditors of the estate. PURAN MAL *v.* JANKI PERSHAD SINGH (1901) **I. L. R. 28 Calc. 680: s.c. 6 C. W. N. 114**

158. ——— *Criminal Procedure Code (Act V of 1898), ss. 435, 439—Jurisdiction of High Court, under Criminal Procedure Code, to revise order according sanction which has been granted by a Civil Court.* The High Court has no jurisdiction, under ss. 435 and 439 of the Code of Criminal Procedure, to revise an order passed by any Court other than a Criminal Court under cl. (*b*) or (*c*) or sub-s. (*1*) of s. 195 of the Code of Criminal Procedure, according sanction to institute a prosecution; or an order passed under sub-s. (*6*) of s. 195 revoking or refusing to revoke a sanction which has been given, or granting a sanction which has been refused. It may be open to the the High Court, under s. 622 of the Code of Civil Procedure, to revise such proceedings of a Civil Court, in cases which come within the terms of that section. *In re* CHENNANAGOUD (1902) **I. L. R. 26 Mad. 139**

159. ——— **Religious Endowments Act (XX of 1863), s. 5**—*Vacancy in office of manager—Appointment by Civil Court—Jurisdiction of High Court to entertain petition to revise order appointing manager.* An order made by a Civil Court under the powers conferred by s. 5 of the Religious Endowments Act is a judicial adjudication in the matter before it, and it is competent to the High Court to entertain a civil revision petition against such an order. GOPALA AYYAR *v.* ARUNACHALLAM CHETTY (1902) . **I. L. R. 26 Mad. 85**

160. ——— **s. 18**—*Leave to sue granted on application made by unverified letter and not presented to Court by applicant or pleader—Validity—Civil Procedure Code (Act XIV of 1882), ss. 622, 647—Maintainability of civil revision petition against order granting leave passed with material irregularity.* Applications to District Courts, under s. 18 of the Religious Endowments Act, for leave to sue should be duly verified, and presented either by the applicant in person or by his pleader. A grant of such leave on an unverified application not presented in Court is a material irregularity, within the meaning of s. 622 of the Code of Civil Procedure, and a civil revision petition lies from the order granting it. Omission to give notice of such an application to the person whom it is intended to sue does not of itself render the leave, if granted, irregular. *Venkatappayya* v. *Venkatapathi, I. L. R. 24 Mad. 687*, approved. AMDOO MIYAN *v.* MUHAMMAD DAOUD KHAN (1901) **I. L. R. 24 Mad. 685**

161. ——— **Restriction on High Court's jurisdiction.** The High Court cannot interfere under s. 622 of the Code unless it is satisfied that the lower Court has acted in the exercise of its jurisdiction illegally. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*, referred to. KALI CHARAN SIRDAR *v.* SARAT CHUNDER CHOWDHRY (1903) **I. L. R. 30 Calc. 397**
s.c. 7 C. W. N. 545

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SUPERINTENDENCE OF HIGH COURT—*contd.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*contd.*

162. ——— Right of vakil to appear on Original side—*Rule IV A, Part I, Chap. II, of the rules of the High Court—Rule 71, Belchambers' Rules and Orders (2nd Ed.)—Revisional powers of the High Court in its Original jurisdiction—Appellate jurisdiction—Right of vakil to appear on the original side.* A vakil has no right to appear on the Original side, in an application under s. 622 of the Civil Procedure Code, to move against any order of the Presidency Small Cause Court. Such revisional powers, when exercised by the Original side of this Court, fall within and form a part of its ordinary Original civil jurisdiction. *Re* APPLICATION OF A VAKIL OF THE APPELLATE SIDE (1903)
7 C. W. N. 843

163. ——— Small Cause Court—*Jurisdiction—High Court, Power of, to review orders passed without jurisdiction in the Presidency Small Cause Court—Bench consisting of the Chief Justice and another Judge—Charter Act (24 & 25 Vict., c. 104), ss. 14, 15—Registrar—Presidency Small Cause Court, jurisdiction of—Ex parte decree for default—Rules 63, 70, 92, 94 (framed by the High Court) under s. 9 of the Presidency Small Cause Courts Act (I of 1895).* By virtue of the power conferred under s. 14 under s. 14 of the Charter Act (24 & 25 Vict., c. 104), the Chief Justice, by constituting a Division Court consisting of himself and any other Judge of the High Court, can deal with applications against an order made by the Presidency Small Cause Court. *Shamsher Mundul* v. *Ganendra Narain Mitter, I. L. R. 29 Calc. 498*, explained. The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for new trial to set aside an *ex parte* decree made by him for default. HALADHAR MAITI *v.* CHOYTONNA MAITI (1903)
I. L. R. 30 Calc. 588 ; s.c. 7 C. W. N. 547

164. ——— Succession—*Succession (Property Protection) Act (XIX of 1841), ss. 3, 5, 8—Appointment of curator—Omission to take evidence before making order—Want of jurisdiction—Material irregularity.* On an application, under Act XIX of 1841, to recover possession of the properties of a deceased zaminder by summary suit, and for the appointment of a curator pending the determination of the suit, the District Judge omitted to examine the complainant or inquire further under s. 3 of the Act but called for a report from the Collector under s. 8, and on receipt thereof, made an order under s. 5 appointing a curator. *Held* (SUBRAMANIA AYYAR, *J.*, dissenting), that order must be set aside, under s. 622 of the Code of Civil Procedure. The Judge was bound to hold an enquiry under s. 3 before appointing a curator under s. 5. The provisions of s. 3 are mandatory, and not merely directory.

SUPERINTENDENCE OF HIGH COURT—*concld.*

4. CIVIL PROCEDURE CODE, 1882, S. 622—*concld.*

Per SIR ARNOLD WHITE, *C.J.*—The Judge acted without jurisdiction, or with material irregularity. *Per* SHEPHARD, *J.*—The Judge acted within his jurisdiction, but with material irregularity. KRISHNASAMI PANNIKONDAR *v.* MUTHUKRISHNA PANNIKONDAR (1901) **I. L. R. 24 Mad. 364**

165. ——— Order directing prosecution, made by a Munsif—*Revision—Jurisdiction of the Criminal Bench to interfere—Civil Procedure Code (Act XIV of 1882), s. 622.* The Criminal Bench of the High Court has no authority to interfere under s. 439, with the proceedings of a Munsif taken under s. 476. The Civil Bench should be moved under s. 622 of the Civil Procedure Code. *Eranholi Athan* v. *King-Emperor, I. L. R. 26 Mad. 98* ; *In re Chennangoud, I. L. R. 26 Mad. 198*, followed. KALI PROSAD CHATTERJEE *v.* BHUBAN MOHINI DASI (1904)
8 C. W. N. 73

166. ——— Order passed without jurisdiction—*Execution of decree—Order—Appeal—Grounds for non-interference in extraordinary jurisdiction.* Where the order of the lower Appellate Court was passed without jurisdiction, the High Court declined to interfere under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) on the ground that the plaintiff, to whom relief was granted by the lower Appellate Court, would, if the application were allowed, be obliged to bring a suit to establish the right which he claimed to his property in dispute, after the expiry of the period of limitation within which he was entitled to bring that suit. DAYARAM *v.* GOVARDHANDAS (1904)
I. L. R. 29 Bom. 458

SUPERIOR LANDLORD.

——— Sub-tenant—*Bengal Tenancy Act (VIII of 1885), s. 85.* As long as the interest of the tenant from year to year is not put an end to, the superior landlord has no right to eject the sub-lessee, who is not his raiyat ; and the sub-lessee can maintain a suit for possession of the land, from which he is dispossessed by the superior landlord and a tenant of his, who is not the lessor of the plaintiff. S. 85 of the Bengal Tenancy Act interpreted. *Gopal Mandal* v. *Eshan Chunder Banerjee, I. L. R. 29 Calc. 148*, and *Madan Chandra Kapali* v. *Jaki Karikar, 6 C. W. N. 377*, explained and followed. *Srikant Mundul* v. *Saroda Kant Mundul, I. L. R. 26 Calc. 46 : Fazel Sheikh* v. *Keramuddi, 6 C. W. N. 916 ; Ramgatti Mundul* v. *Shyama Charan Dutt, C. W. N. 919*, and *Basarutulla Mundul* v. *Kasirunnessa Bibi, 11 C. W. N. 190*, held inapplicable. TAMIJUDDI *v.* ASGAR HOWLADAR (1908)
I. L. R. 36 Calc. 256

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——— bequest for—

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12 Bom. 214

SUPPLEMENTAL DECREE.

See LIMITATION. I. L. R. 34 Calc. 672

SUPPLEMENTAL SUIT.

See COSTS—SPECIAL CASES—PARTITION.
I. L. R. 21 Calc. 904

——— **Suit in Zillah Court simultaneous with suit in Supreme Court.** The mere pendency of a suit in the Supreme Court does not operate as a bar to the prosecution of a suit in a Zillah Court intended to be simply in furtherance of, and supplemental to, the suit in the Supreme Court. NAZIR ALI KHAN *v.* OJOODHYARAM KHAN
5 W. R. P. C. 83 : 10 Moo. I. A. 540

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5 Moo. I. A. 137

See JURISDICTION—MATRIMONIAL JURISDICTION . . 4 W. R. P. C. 91
5 Moo. I. A. 348

1. ——— **Charter of Supreme Court** *—Construction of statute—Statute limiting prerogative of the Crown—Power to grant leave to appeal in criminal case.* Under the Bombay Charter of the Supreme Court, 8th December 1823, that Court was invested with full and absolute powers to allow or deny an appeal in criminal cases, and no power was reserved to the Crown by such Charter to grant leave to appeal in such cases, such power being only reserved as to civil cases. The case of *Christian* v. *Cowan, 1 P. W. 329*, observed on. QUEEN *v.* STEPHENSON 3 Moo. I. A. 488

QUEEN *v.* EDULJEE BYRAMJEE
3 Moo. I. A. 468

The Charter, having been granted by the Crown by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction. QUEEN *v.* EDULJEE BYRAMJEE 3 Moo. I. A. 468

2. ——— *Construction of Charter—Law of limitation—English law.* The Charter of 8th December 1823, which created the Supreme Court at Bombay, provided by s. 29 that "in cases of Mahomedans or Gentoos their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, should be determined, in cases of Mahomedans, by the laws and usages of the Mahomedans; and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by if the suit had been brought in a native Court," and the 37th section directs that "the Court shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted, within their jurisdiction, as shall be necessary for the due execution of all or any of the persons thereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants living within its jurisdiction, and accommodating the same to their religion, manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law and the attainment of substantial justice." *Held*, upon a construction of these sections, that as the law of the limitation is a matter of procedure and the Supreme Court at Bombay had power to frame its procedure different from the native Courts, the Court was right in allowing the plea of the English statute of limitations in an action between Hindus upon a Hindu contract, as the judgment of the Court on such plea was no determination relating to any right arising out of any contract or dealing involved in the cause of action. *Semble*:—The mere allegation in the plaint that the parties are Hindus is a sufficient averment of the fact to raise an objection to the cause being decided by the English law of limitations. RUCKMABOYE *v.* LULLOOBHOY MOTTICHAND
5 Moo. I. A. 234

3. ——— **Jurisdiction**—*Admission of attorneys.* The Supreme Court, Bombay, had no jurisdiction to admit persons as attorneys and solicitors to practise in the Courts there, except such as were qualified in the manner pointed out in the Bombay Charter and Letters Patent of 1823 establishing the Court, *viz.*, those who had been admitted in the Courts at Westminster or were practising in the Recorder's Court, Bombay, at the time of the publication of the Charter. MORGAN *v.* LEECH . . 2 Moo. I. A. 428

4. ——— *Suit for partition of property out of jurisdiction.* The late Supreme Court (Bombay) had no power to decree a partition of ancestral property situate beyond the limits of its jurisdiction. RAMCHANDRA DADA NAIK *v.* DADA MAHADEV NAIK
1 Bom. Ap. 76

5. ——— *Suit concerning revenue—Government quit-rent—Suit against Collector of Revenue for distraint.* By the Charter of the Supreme Court, Bombay, of December 1825, that Court was prohibited from entertaining any suit in any matter concerning the revenue under the management of the Governor and Council

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SUPREME COURT, BOMBAY—*concld.*

or any act done in the collection thereof. In an action of trespass brought against the Collector of Revenue at Bombay for distraining for arrears of Government "quit-rent":—*Held*, reversing the judgment of the Bombay Court, that the "quit-rent" was part of the revenue of the Company at Bombay, and the Court therefore had no jurisdiction. SPOONER *v.* JUDDOW
4 Moo. I. A. 353

SUPREME COURT, CALCUTTA.

——— **Charter of 1726—**

See SLANDER. **I. L. R. 28 Calc. 452**

——— **rules, 1883, order 26—**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 373.
I. L. R. 31 Calc. 965

1. ——— **Carrying on business.** An inhabitant of Benares, trading at Calcutta and having a house of business there, held to be subject to the jurisdiction of the Supreme Court. JANOKEY DOSS *v.* BINDABUN DOSS
3 Moo. I. A. 175

2. ——— **Jurisdiction of Criminal Court**—*Party privy to misdemeanour committed within jurisdiction.* Under the general jurisdiction of the Supreme Court at Calcutta, a person, though resident at Benares, was liable to its jurisdiction, if privy to, and co-operating in, a misdemeanour committed within it. Where, therefore, a party resident at Benares was indicted with others before the Supreme Court for a conspiracy in procuring the prosecutor to be arrested in a fictitious action at law, and the instructions for the arrest were proved to the satisfaction of the jury to have originated with the appellant, it was *held* by the Judicial Committee that the offence having been completed within the jurisdiction of the Supreme Court at Calcutta, that Court had rightly assumed jurisdiction over the parties privy to it, though from the slight nature of the evidence they directed a new trial. JANNOKEE DOSS *v.* KING
I Moo. I. A. 67

SUPREME COURT, MADRAS.

See HIGH COURT, JURISDICTION OF—MADRAS—CIVIL. **I. L. R. 8 Mad. 24**

1. ——— **Jurisdiction**—*Order allowing Registrar to institute suit on behalf of infants—Officer of Court entitled to commission—Personal interest in conduct of suit—Stat. 2 & 3 Will. IV, c. 34.* An order was made on the equity side of the Supreme Court at Madras by which the Registrar, an officer who under the practice of the Court was entitled to a commission of 5 per cent. on all sums of money paid into Court, was allowed by consent of the Court or a Judge to institute proceedings for the benefit of infants where it appeared their property was unprotected. *Held*, in a case in which he was allowed to file a bill on behalf of certain such infants, that the order being made under the general jurisdiction of the Supreme Court, and not under the Stat. 2 & 3 Vict., c. 34, was void, it being against public policy to allow an officer of the Court to institute suits in the conduct of which he might have a direct personal interest. KERAKOOSE *v.* SERLE . . . . . **3 Moo. I. A. 329**

SUPREME COURT, MADRAS—*concld.*

2. ——— *Equitable jurisdiction in suits relating to charitable funds.* The Supreme Court, Madras (established by the Madras Charter, 1800), had an equitable jurisdiction similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in England over charities. ATTORNEY GENERAL *v.* BRODIE . . . . **4 Moo. I. A. 190**

SUPREME COURTS' OFFICERS ACT (XV OF 1843) SS. 1, 2.

See OFFICIAL ASSIGNEE.
I. L. R. 36 Calc. 990

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See LAND TENURE IN ORISSA.
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See EXECUTION OF DECREE—MODE OF EXECUTION—PRINCIPAL AND SURETY.
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See PRINCIPAL AND SURETY, PRINCIPAL AND AGENT I. L. R. 31 Calc. 242

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SURETY—*contd.*

———— suit by, against principal for money paid on his account—

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—CONTRIBUTION. B. L. R. Sup. Vol. 691

1. LIABILITY OF SURETY.

1. ———— **Duration and extent of liability.** A surety must be taken to have entered into his contract only for the time during which the relation created by the instrument of suretyship exists, and with reference only to the person to whom he made himself responsible. MOHIP NARAIN *v.* SHAW . . . 25 W. R. 250

2. ———— *Security, bond for restitution of property taken under decree—Liability of surety where decree is reversed on appeal—Act XXIII of 1861, s. 36.* A surety, who executed a security bond in Form No. 82 of the High Court Circulars, under s. 36 of Act XXIII of 1861, was liable for the fulfilment of the decree, not only of the Court of Regular, but also of that of the Court of Special Appeal. NARAYAN DEV *v.* GAJANAN DIKSHIT . . . . 10 Bom. 1

3. ———— *Liability of guarantor for gomashta—Death of surety.* Where a party engaged to be surety for a gomashta and to make good all defalcations proved to have been made by him, the engagement was *held* to refer to defalcations shown to have been made by the gomashta during the period of the guarantor's life, and not to apply to a time after guarantor's death, when all power of advising or controlling the gomashta had ceased. LYALL & Co. *v.* AMORABUTTY DOSSEE . 20 W. R. 12

4. ———— *Civil Procedure Code, 1859, s. 338—Remand of case and final decree on remand.* A decree-holder having taken out execution of a decree held by him, and the judgment-debtor having appealed to the District Court, the two opponents became sureties, under s. 338 of Act VIII of 1859, that the judgment-debtor would "obey and fulfil all such orders and decrees as should be given against him in appeal;" and, in default of his so doing, they bound themselves "to pay jointly and severally, at the order of the Court, all such sums as the Court should, to the extent of RS12-8, adjudge." *Held* (PINHEY, *J. dissentiente*), that the obligation of the sureties to fulfil the decree of the Appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal. SHIVLAL KHUBCHAND *v.* APAJI BHIVRAV . . . I. L. R. 2 Bom. 654

Held, in the same case on appeal under the Letters Patent, that the obligation of the surties was not confined to the first decree of the Appellate Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal. APPAJI BHIVRAV *v.* SHIVLAL KHUBCHAND . . I. L. R. 3 Bom. 204

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SURETY—*contd.*

1. LIABILITY OF SURETY—*contd.*

5. ——— **Extent of liability**—*Security bond given for faithful discharge of duties by moharrir —Misconduct other than misappropriation.* The defendant executed a bond which, after reciting that the President of the Allahabad Municipal Committee required security to the extent of R100 from Sheikh Akbur Ali, mohurrir in the Ocrtoi Department, for the honest and faithful discharge of his duties to Government, went on to say that the defendant of his own free will and pleasure pledged a certain dwelling house in lieu of security for the mohurrir, and to promise that, if any sort of embezzlement or misappropriation was proved against the mohurrir in Court, the property might be seized. There was a proviso that, if he deposited R100, the money, and not the property, would be liable; if he failed to deposit the money, the property was to be liable for the payment of the amount of the security. The mohurrir fraudulently allowed certain goods to pass the choonghee without payment of duty, whereby, he caused the Municipality a loss of R8. He was convicted under s. 161 of the Penal Code. The plaintiff sued to recover the amount of the security. *Held*, that the defendant could only be liable under the bond for sums shown to have been misappropriated, and that he could not be held liable for losses which accrued to the Municipality from misconduct on the part of the mohurrir other than misappropriation; and that in any case he could only be liable for the actual damage sustained by the Municipality. TORAB ALI *v.* PRESIDENT OF THE MUNICIPAL COMMITTEE OF ALLAHABAD . **6 N. W. 170**

6. ——— *Withdrawal of security placed with sureties to indemnify co-sureties.* Where a surety, without taking precautions to see to its proper application, permits the party for whom he is surety to get possession of money, which by an arrangement with that party and the co-sureties had been placed in his (the surety's) hands for the purpose of indemnifying the co-sureties, he loses his remedy against the co-sureties to the extent of the security thus allowed to be withdrawn. Where money is permitted to remain in the hands of sureties in order to its being applied to the purpose to secure which they become sureties, it is the duty of each as between himself and co-sureties to see that the money is not misapplied. WOON CHIT POE *v.* WEE CHANG **15 W. R. 185**

7. ———*Suit against surety of Nazir by party whose property has been misappropriated by Nazir.* The surety of a Nazir who had entered into the usual bond of indemnity with the Collector of the district against all losses caused by the Nazir during the tenure of his office was *held* not liable, at the suit of a person whose property had been misappropriated by the Nazir, to make good any loss sustained by such person. BOCHA GOPE CHOWDHRY *v.* BRAJAGABIND DAS **9 B. L. R. Ap. 26 : 18 W. R. 259**

SURETY—*contd.*

1. LIABILITY OF SURETY—*contd.*

8. ——— *Civil Procedure Code, 1882, s. 336—Execution-proceedings.* The liability of a surety under s. 336 of the Civil Procedure Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end. LALJI SAHOY *v.* ODOYA SUNDERI MITRA **I. L. R. 14 Calc. 757**

9. ——— *Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss. 336, 344.* *S* on the 16th January 1886 obtained a decree for a certain sum of money against *C*. In execution of that decree *C* was arrested on the 28th January, and upon his being brought before the Court he expressed his intention of applying to be declared an insolvent under the provisions of Ch. XX of the Code of Civil Procedure, and he was thereupon released upon furnishing security, under the provisions of s. 336 of the Code. *K* became surety for *C* and executed a bond undertaking to produce *C* at any time when the Court should direct him so to do, and in default of so producing him to pay the amount of the decree, and standing security for *C's* applying to be declared insolvent. On the 19th February *C* filed his petition to be declared an insolvent before the District Judge under s. 344 of the Code, and on the 14th May 1886 his petition was dismissed owing to his non-appearance. *S* thereupon applied for execution of the decree against *K*. *Held*, that *K* was released from his obligation under the bond executed. KOYLASH CHANDRA SHAHA *v.* CHRISTOPHORIDI **I. L. R. 15 Calc. 171**

10. ——— *Civil Procedure Code, ss. 336, 344—Judgment-debtor applying to be declared an insolvent.* A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor files his petition under s. 344 to be declared insolvent. *Koylash Chandra Shaha* v. *Christophoridi, I. L. R. 15 Calc. 171*, approved. RAMZAN *v.* GERARD . . . **I. L. R. 13 All. 100**

11. ——— *Civil Procedure Code, 1882, s. 336—Bond for production of insolvent judgment-debtor—Conditions in bond unprovided for by s. 336.* Where in a bond under s. 336 of the Code of Civil Procedure, besides the usual covenants to produce the judgment-debtor before the Court, and that the judgment-debtor would apply to be declared an insolvent, further stipulations were contained as to what should happen if the judgment-debtor's application to be declared insolvent were refused, it was *held* that the latter stipulations were not such as were contemplated by s. 336, and could not be enforced under that section. JANKI DAS *v.* RAM PARTAB **I. L. R. 16 All. 37**

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SURETY—*contd.*

1. LIABILITY OF SURETY—*contd.*

12. ———— *Civil Procedure Code, 1882, s. 336—Judgment debtor's application to be declared an insolvent—Release of the surety.* A person standing surety for a judgment-debtor under s. 336 of the Civil Procedure Code (Act XIV of 1882) is released from his obligation when the judgment-debtor has applied to be declared an insolvent. *Koylash Chandra Shaha* v. *Christophoridi, I. L. R. 15 Calc., 171,* and *Ramzan* v. *Gerard, I. L. R. 13 All., 100,* followed. DWARKADAS PARSHOTAMDAS *v.* ISABHAI DAUDKHAN . . . **I. L. R. 19 Bom. 210**

13. ———— *Surety for minor—Contract Act (IX of 1872), s. 128.* A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary is liable to be sued on it, whether the contract of the minor is considered to be void or voidable. KASHIBA *v.* SHRIPAT NARSHIV . . . **I. L. R. 19 Bom. 697**

14. ————**Death of judgment-debtor**—*Civil Procedure Code (Act XIV of 1882), ss. 336, 349—Release of judgment-debtor on finding a surety for his production at a specified time—Death of judgment-debtor before the expiration of that time—Release of surety—Execution of decree as against surety—Illegality.* A judgment-debtor was released from custody on finding a surety for his production at a specified time. Before the expiration of that time the judgment-debtor died. The decree-holder thereupon obtained an order enforcing the decree as against the surety. *Held,* that the order was illegal. The Court had no jurisdiction to enforce the obligation as a decree against the surety. Moreover, the obligation of the surety was discharged by the death of the judgment-debtor. Appeal by the surety to the High Court treated as a revision petition. KRISHNAN NAYAR *v.* ITTINAN NAYAR (1901) **I. L. R. 24 Mad. 637**

15. ———— **Insolvency**—*Civil Procedure Code (Act XIV of 1882), s. 336—Surety undertaking that judgment-debtor should apply to be declared an insolvent—Application in insolvency by judgment-debtor—Subsequent failure to appear—Release of surety.* *E* became surety for a judgment-debtor undertaking to produce the judgment-debtor in Court when called upon, and that he should apply to be declared an insolvent. The judgment-debtor, in due time, filed a petition in insolvency. Subsequently, he failed to appear when called upon to do so, and the petition was dismissed. On application being made for execution as against the surety : *Held,* that the decree could not be executed against him. IMBICHUNNI NAYAR *v.* LALJI RAM DOSS SAIT (1901) . **I. L. R. 24 Mad. 560**

16. ———— **Production of judgment-debtor**—*Civil Procedure Code (Act XIV of 1882), s. 336.* Where a surety enters into a bond, under s. 336 of the Code of Civil Procedure, undertaking to produce a judgment-debtor when ordered to do so within a month, in order to render the surety liable for the non-production of the judgment-debtor, the order to produce the judgment-debtor should be made on the surety. A bond providing that the surety will produce the judgment-debtor does not mean that the surety will produce him when the judgment debtor is directed to appear. KRISHNAIYAR *v.* KRISHNASAMY AYYAR (1902) **I. L. R. 26 Mad. 366**

SURETY—*contd.*

1. LIABILITY OF SURETY—*concld.*

2. ENFORCEMENT OF SECURITY.

1. ———— **Mode of enforcement**—*Act XXIII of 1861, s. 8—Surety-bond—Execution.* A surety-bond taken by the Court under s. 8 of Act XXIII of 1861, after judgment had been pronounced, could be enforced under s. 204 of Act VIII of 1859. ABDUL KARIM *v.* ABDUL HUQ KAZEE **8 B. L. R. 205 : 15 W. R. 21**

2. ———— *Execution of decree against surety—Surety-bond for payment of costs under s. 342.* A bond given as security for costs under s. 342 of Act VIII of 1859 could be enforced in a summary way by proceedings in execution. CHUTTERDHAREE LALL *v.* RAMBELASHEE KOER **I. L. R. 3 Calc. 318 : 1 C. L. R. 347**

3. ———— *Civil Procedure Code, 1859, s. 204—Execution of decree against surety—Stay of execution on security being given.* Where a sale in execution of a decree was stayed on the security given by a third party :—*Held,* that, on default by the defendant, the decree could not be summarily enforced against such surety under s. 204 of Act VIII of 1859. GAJENDRANARAYAN ROY *v.* HEMANGINI DASI **4 B. L. R. Ap. 27 : 13 W. R. 35**

4. ———— *Civil Procedure Code, 1859, s. 204—Sureties under Civil Procedure Code, 1859, ss. 76, 83—Sureties after decree.* S. 204, Act VIII of 1859, applied to cases such as that of parties who became sureties under s. 76 or s. 83, but not to parties who became securities after a decree was passed. RAM KISSEN DOSS *v.* HURKHOO SINGH . . . **7 W. R. 329**

Rejecting a review in HURKHOO SINGH *v.* RAM KISHEN . . . . **6 W. R. Mis. 44**

5. ———— *Civil Procedure Code, 1859, s. 204—Compromise embodied in decree—Execution against surety.* A compromise embodied in a decree was to the effect that defendant should pay to plaintiff the principal sum within a specified period, and that, if he (defendant) were successful in another suit against a different party, he would also pay the interest. He succeeded in his suit in the first Court, but his suit was dismissed on appeal. The judgment-debtor subsequently paid the principal, but was afterwards arrested, and *M H* became surety for his production and for the payment of the interest, if the order of the Munsif releasing the judgment-debtor were set aside on appeal. *Held* (by MARKBY, *J.*), that the decree on the compromise was not one upon which execution could be carried out, at any rate for

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SURETY—*contd.*

2. ENFORCEMENT OF SECURITY—*contd.*

the sum which was only conditionally due, as the inquiry relative to the fulfilment of the condition could only be made in a regular suit; and that execution could not be taken out against *M H*, the surety, the arrangement between him and the judgment-creditor not falling within s. 204, Act VIII of 1859, which applied to persons who had become security for the performance of a decree or any part thereof. BOLAKEE LALL *v.* MAHOMED HOSSEIN KHAN . . . **14 W. R. 63**

6. ——— *Civil Procedure Code, 1859, s. 204—Surety for performance of decree—Suit on surety-bond.* When a person has become liable as security for the performance of a decree, s. 204 of Act VIII of 1859 gives a remedy to the decree-holder against the surety in addition to any remedy which he may have on the surety-bond. It does not prevent the decree-holder from bringing a suit on the surety-bond to enforce the contract made with him by the surety, and the lien on the property mortgaged to secure the performance of that contract. ABDUL KADIR *v.* HURREE MOHUN . . . . . **6. N. W. 261**

7. ——— *Civil Procedure Code, 1859, s. 204—Surety executing bond for payment of decree by instalments—Alteration of terms of decree.* Where, by an arrangement sanctioned by the proper Court, the terms of a decree were varied, and provision was made for its payment by instalments, for the payment of a portion of which instalment a surety executed a bond hypothocating his property: *Held*, that the terms of s. 204 of the Civil Procedure Code were not application to such an arrangement. CHUNDEE DEEN *v.* HUSSUN ALI **3 N. W. 88**

8. ——— *Civil Procedure Code, 1877, ss. 210, 253—Execution of decree against surety—Payment of decree by instalments.* A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale, and applied for its postponement, producing a surety and a bond, in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instalments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year. The judgment-debtor did not pay the amount of the decree within the time fixed and the decree-holder therefore applied for execution of the decree against such surety. *Held*, that, inasmuch as the decree-holder had not been a party to the proceedings of the sale-officer or of the District Judge, and as the parties had not appeared before the Munsif, and as such surety had not

SURETY—*contd.*

2. ENFORCEMENT OF SECURITY—*contd.*

agreed to pay the amount of the decree by instalments, the provisions of s. 210 of Act X of 1877 were not applicable, and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year; and that therefore his liability was not one which could be enforced in execution of the decree under s. 253 of Act X of 1877. CHANDAN KUAR *v.* TIRKHA RAM . **I. L. R. 3 All. 809**

9. ——— *Civil Procedure Code, 1882, s. 253—Surety for execution of appellate decree, remedy against.* In 1874 the execution of the decree of an Appellate Court was stayed pending an application for review of judgment, upon the judgment-debtor giving security for the execution of the decree, and a surety was accepted on his behalf. *Held*, that the judgment-creditor could not proceed summarily against the surety under the provisions of s. 253 of the Code of Civil Procedure, 1882. BALAJI *v.* RAMASAMI **I. L. R. 7 Mad. 284**

10. ——— *Civil Procedure Code, 1882, s. 253—Execution of decree against surety.* A surety entered into a bond, undertaking to produce certain debt bonds in case the defendant in a suit should fail to produce them, or to pay the amount mentioned therein. Upon an application being made that execution should issue against the surety:—*Held*, that a bond so worded did not make the surety liable for the performance of the decree so as to bring the case within s. 253 of the Code of Civil Procedure, and that the liability of the surety could not be enforced in execution. NARAYANAMMA *v.* RAMAYYA CHETTI **I. L. R. 22 Mad. 268**

11. ——— **Right to enforce security—** *Civil Procedure Code, 1859, s. 204—Order cancelling security bond.* Where a person became a surety in the course of the proceedings on an appeal to pay all such sums as might be decreed against the plaintiff on appeal, the decree when passed could be executed against the surety under s. 204 of the Civil Procedure Code, and an appeal would lie from an order made in execution of such decree against the surety. Where a person became surety, and gave a security bond undertaking to pay all sums of money that might be decreed against the plaintiff on the defendant's appeal, and the appeal was dismissed for default, and on the application of the plaintiff the Recorder made an order cancelling the bond, and returned it to the surety without notice to the defendant, and afterwards the defendant's appeal was on application restored, and a decree passed against the plaintiff:—*Held*, that the Recorder's order was invalid, and execution could issue against the surety notwithstanding that order. AKHUT RAMANA *v.* AHMED YOUSAFFJI **7 B. L. R. 81: 15 W. R. 538**

12. ——— *Security for restitution of property taken in execution—Reversal*

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SURETY—*contd.*

2. ENFORCEMENT OF SECURITY—*contd.*

of decree—Execution against surety—Civil Procedure Code, 1882, ss. 253, 545, 546. S. 258 of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal had been instituted in the High Court when security is given. The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety. *Held*, that the Court executing the High Court's decree had no jurisdiction to execute it against the surety. HARDEO DAS *v.* ZAMAN KHAN **I. L. R. 8 All. 639**

13. ——— *Execution of decree against surety pending appeal.* *H* obtained a decree in the High Court against *S* for certain moveable and immoveable property. *S* appealed to the Privy Council. While that decree was pending, *H* applied for the execution of her decree, and *N* became her surety for R10,000. The decree, however, was not executed. The Privy Council reversed the decision of the High Court and dismissed the suit of *H* with costs. *S* then sought to execute his decree for costs against *N*, the surety. *Held*, that *N* was not liable. *In the matter of the petition of* NAFAR CHAND PAL CHOWDHRY **6 B. L. R. Ap. 126**

S.C. NUFFER CHUNDER PAUL CHOWDHRY *v.* SOORENDRO NATH ROY . . **14 W. R. 410**

14. ——— *Execution of decree against surety—Civil Procedure Code, 1859, s. 204.* In consideration of the plaintiffs being allowed to proceed with the execution of a decree which they had obtained in the High Court, *A* became surety upon a bond for the payment of what might be due to the defendants by such plaintiffs in the event of their decree being reversed or modified by the Privy Council, to which an appeal was then pending. *Held*, that the summary procedure under s. 204 of Act VIII of 1859 might be enforced against *A* as such surety. Compare Act X of 1877, s. 253. CHUNDER KANT MOOKERJEE *v.* RAM COOMAR COONDOO . . **3 C. L. R. 505**

15. ——— *Civil Procedure Code, 1877, s. 253—Execution of decree against surety—Execution of decree of Privy Council—Security for costs of respondent—Civil Procedure Code, 1877, s. 610.* An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and *B* and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against *B* and the other persons as sureties. *Held* by STUART, *C.J.*, PEARSON, *J.*, and OLDFIELD, *J.*, that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties. *Per* SPANKIE, *J.*, and STRAIGHT, *J.* (*Contra*). BANS BAHADUR SINGH *v.* MUGHLA BEGAM . . **I. L. R. 2 All. 604**

16. ——— *Appeal to Privy Council—Security for costs of respondent—Execution of decree against surety—Civil Procedure Code (Act XIV of 1882), ss. 253, 602, 603, 610.* A plaintiff, having preferred an appeal to Her Majesty in Council, was called upon to furnish security. Thereupon *A*, on behalf of the appellant, executed a security bond for the costs of the respondent. The appeal was dismissed with the costs by Her Majesty in Council. On an application (by the respondent in the appeal) for execution to issue against the estate of *A*, the surety (who died in the meantime) :—*Held*, that the liability of the surety under the security bond could not be enforced in execution of the decree of Her Majesty in Council. *Bans Bahadur Singh* v. *Mughla Begam, I. L. R. 2 All. 604*, dissented from. RADHA PERSHAD SINGH *v.* PHULJURI KOER **I. L. R. 12 Calc. 402**

17. ——— *Execution of decree against surety—Surety for costs of appeal—Separate suit—Summary procedure—Civil Procedure Code, 1882, ss. 253, 549.* S. 253 of the Civil Procedure Code is not applicable to a surety who has become security in an Appellate Court. A security-bond, therefore, executed by a surety on behalf of appellant for the costs of an appeal under s. 549 of the Code, cannot be summarily enforced against the surety in the execution-proceeding : the remedy is by separate suit. *Bans Bahadur Singh* v. *Mughla Begam, I. L. R. 2 All. 604*, dissented from. *Radha Pershad Singh* v. *Phuljuri Koer, I. L. R. 12 Calc. 402*, followed. KALI CHARUN SINGH *v.* BALGOBIND SINGH . . . **I. L. R. 15 Calc. 497**

18. ——— *Surety for amount of decree pending appeal—Execution of decree—Separate suit—Civil Procedure Code, 1882, ss. 244, 253, and 545.* Where a surety has become security for the appellant in an Appellate Court under s. 545 of the Code of Civil Procedure, the security bond cannot be enforced in execution of the decree under s. 253, but a separate suit must be brought against the surety. *Kali Charun Singh v. Balgobind Singh, I. L. R. 15 Calc. 497*, referred to. TOKHAN SINGH *v.* UDWANT SINGH . **I. L. R. 22 Calc. 25**

19. ——— *Civil Procedure Code, 1882, ss. 253, 545, 582, and 583—Execution of decree—Security for performance of decree of Appellate Court—Method of enforcing such security.* Where in an appeal security has been given to the

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SURETY—*contd.*

2. ENFORCEMENT OF SECURITY—*contd.*

Appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such security in the manner provided for by s. 253 of the Code of Civil Procedure. *Bans Bahadur Singh* v. *Mughla Begam, I. L. R. 2 All. 604*, followed. *Thirumalai* v. *Ramayyar, I. L. R. 13 Mad. 1*, and *Venkapa Naik* v. *Baslingapa, I. L. R. 12 Bom. 411*, approved. *Kali Charun Singh* v. *Balgobind Singh, I. L. R. 15 Calc. 497*, and *Tokhan Singh* v. *Udwant Singh, I. L. R. 22 Calc. 25*, dissented from. JANKI KUAR *v.* SARUP RANI . . . . **I. L. R. 17 All. 99**

20. ——— *Execution of decree against surety—Security for due performance of appellate decree, enforcement of—Civil Procedure Code (1882, as amended by Act VII of 1888), s. 546.* A security bond given by a third party for the due performance of the decree of the Appellate Court under s. 546 of the Civil Procedure Code cannot be enforced in execution of that decree. *Radha Pershad Singh* v. *Phuljuri Koer, I. L. R. 12 Calc. 402; Kali Charun Singh* v. *Balgobind Singh, I. L. R. 15 Calc. 497;* and *Tokhan Singh* v. *Udwant Singh, I. L. R. 22 Calc. 25*, followed in principle. *Venkapa Naik* v. *Baslingapa, I. L. R. 12 Bom. 411*, dissented from. *Thirumalai* v. *Ramayyar, I. L. R. 13 Mad. 1*, and *Arunachellam* v. *Arunachellam, I. L. R. 15 Mad. 203*, referred to. SURJOO DAS *v.* BALMAKUND DAS **I. L. R. 23 Calc. 212**

21. ——— *Civil Procedure Code, ss. 253 and 583—Stay of execution of decree appealed against on giving security—Surety for fulfilment of appellate decree—His liability—Mode of enforcing it—Execution-proceedings—Separate suit.* Under Act VIII of 1859 and the supplemental Act XXIII of 1861, the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject. Reading s. 253 with s. 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under s. 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of first instance. The words "in an original suit" in s. 253 may be treated as a superfluous expression. VENKAPA NAIK *v.* BASLINGAPA . **I. L. R. 12 Bom. 411**

22. ——— *Civil Procedure Code, 1882, ss. 253, 546, 583—Surety for the due performance of appellate decree—Mode of enforcing liability of such surety—Execution of decree.* When security had been given on behalf of the respondent to an appeal under s. 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful:—*Held*, that, under the provisions of ss. 253, 583, the decree of the Appellate Court could be enforced agatinst the sureties in execution-proceedings. *Venkapa Naik* v. *Baslingapa, I. L. R. 12 Bom. 411*, approved. THIRUMALAI *v.* RAMAYYAR . . . **I. L. R. 13 Mad. 1**

23. ——— *Security for costs—Security-bond, enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1888, s. 46—General Clauses Act (I of 1868), s. 6.* On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force. *Held*, on appeal, that the application should have been allowed. ABDUL WAHAB *v.* FAREEDOONNISSA . **I. L. R. 16 Calc. 323**

24. ——— *Execution of decree—Surety.* A suit was instituted by *C* against *H S* in the Hooghly Court, and was dismissed with costs. On appeal by the plaintiff, the defendants obtained an order in the High Court calling on *C* to give security for costs in the Court below and on appeal, and one *R* had, as surety, charged his house in Calcutta with the payment of costs to the extent of R2,000. The appeal was dismissed with costs amounting to more than R2,000. On an application by the defendants for execution against *R* under s. 204, Act VIII of 1859, by attachment and sale of the house, the Court granted the application, HIRALAL SEAL *v.* CARAPIET . **9 B. L. R. Ap. 17**

25. ——— *Civil Procedure Code, 1889, s. 336—Surety, liability of—Execution-proceedings.* The liability of a surety under s. 336 of the Civil Procedure Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end. *D*, a judgment-debtor, was committed to jail on the 8th August 1884, and he applied, under s. 336 of the Civil Procedure Code, to be released. On the 16th of November 1884 *B* and *C* stood security for him under the provisions of s. 336 of the Civil Procedure Code that he would appear when called on, and that he would within one month apply under s. 344 to be declared an insolvent, and *D* was thereupon released. Instead of applying under s. 344 to be declared an insolvent, he applied to have the decree, which has been obtained *ex parte*, set aside. This application was disallowed, and the decree-holder was directed to take further steps. On the 21st of February 1885 the application for

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SURETY—*contd.*

2. ENFORCEMENT OF SECURITY—*contd.*

execution of the decree was struck off. The decree-holder on the 20th of July made a fresh application to execute the decree against the sureties, unless they should produce the judgment-debtor in Court. *Held*, that the power reserved to the Court, under s. 336 of the Civil Procedure Code, to realize the security in execution of the decree could not be exercised when the execution-proceedings wherein the security was furnished was no longer in existence. LALJI SAHOY *v.* ODOYA SUNDERI MITRA
I. L. R. 14 Calc. 757

26. ——— *Right of sureties to appeal—Extent of their liability—Attachment before judgment—Security under s. 484 of Civil Procedure Code (Act XIV of 1882)—Decree—Stay of execution by Appellate Court—Fresh security under s. 545 of Civil Procedure Code (Act XIV of 1882)—Liability of original sureties.* A surety against whom a decree is sought to be enforced under s. 253 of the Code of the Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution-proceedings. *A* and *B* became sureties under s. 484 of the Code of Civil Procedure (Act XIV of 1882) for the production of property attached before judgment by the Court of first instance. Under their surety-bonds they were bound, in default, "to pay the said Court such sum as the said Court may adjudge against the said defendant." The Court of first instance passed a decree in the plaintiff's favour for R229-14-0. Against this decree both parties appealed to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security, under s. 545, "for the due performance of such decree or order as may ultimately be binding on him." He accordingly gave fresh security. The Appellate Court passed a decree in plaintiff's favour for R800 and costs. Thereupon the decree-holder sought to enforce the apppellate decree against the sureties *A* and *B* under s. 253 of the Civil Procedure Code. The sureties contended, first, that the original decree having merged in the appellate decree, they were not liable at all under their bond which related only to the decree of the Court of first instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant; and, thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the Appellate Court on defendant's furnishing a fresh security. *Held*, that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. That and no other sum was such "as the said Court may adjudge against the said defendant." The security given to the Court of first instance was for the satisfaction of its decree, not the possible decree of a higher Court. If an appeal was made, it was left to the Appellate Court to regulate the terms on which it would take security for the execution of its own decree. *Held*, also, that, so soon as the

SURETY—*contd.*

2. ENFORCEMENT OF SECURITY—*contd.*

decree of the Court of first instance was made, the liability of the securities was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability, having been incurred was not extinguished by the fact that an appea. had been brought against the decree. If thel amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent; or, if the decree was reversed, their liability did not cease, because the decree of the first Court merged in that of the appellate Court. SULEMAN *v.* SHIVRAM BHIKAJI
I. L. R. 12 Bom. 71

27. ——— *Surety after passing of decree—Mode of realization of security—Civil Procedure Code, s. 253—Jurisdiction of Revenue Court.* Where, after the passing of a decree for arrears of rent, a friend of the judgment-debtor entered into a security-bond whereby he rendered himself personally liable and hypothecated a share in certain zamindari property to secure the performance of the decree, it was *held* that the obligation created by such security-bond could not be enforced by a Court of revenue by the sale of the hypothecated property. BEHARI LAL *v.* JAGNANDAN SINGH . **I. L. R. 19 All. 247**

28. ——— *Surety under Civil Procedure Code, 1882, s. 349—Surety for insolvent judgment-debtor—Default of principal—Liability of surety—Mode of enforcing liability of surety.* The Civil Procedure Code (Act XIV of 1882) provides no means for enforcing in execution a surety-bond passed under s. 349. The proper course of the plaintiff is to obtain an assignment of the bond with a view to suing on it. MINGALE ANTONE KANE *v.* RAMCHANDRA BAJE
I. L. R. 19 Bom. 694

29. ——— *Liability of surety after decree passed in original suit—Civil Procedure Code (Act XIV of 1882), s. 253—Execution of decree against surety.* An *ex parte* decree was set aside on condition that the defendant should find a surety who would be responsible for any amount that might be found due from the defendant by any decree to be subsequently made in the suit. On an application to execute the decree, which was subsequently made against the defendant by the decree-holder both against the defendant and the surety, objection was taken to the execution by the surety, and was allowed by the Court below. *Held*, that under s. 253 of the Code of Civil Procedure the decree-holder was entitled to take out execution against the surety. SONATUN SHAHA *v.* DINO NATH SHAHA **I. L. R. 26 Calc. 222**
3 C. W. N. 228

30. ——— **Mode of enforcement—***Liability, mode of enforcing—Civil Procedure Code (Act XIV of 1882), ss. 545-546.* The mode of enforcing payment by a surety who has rendered

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SURETY—*contd*

2. ENFORCEMENT OF SECURITY—*concld.*

himself liable under s. 545 (*c*) or s. 546 of the Civil Procedure Code (Act XIV of 1882) is by a summary process in execution, and not by means of a separate suit. JAMSEDJI *v.* BAWABHAI (1900) **I. L. R. 25 Bom. 409**

31. ——— *Execution of decree—Security bond—Mortgage—Sale of mortgaged property—Civil Procedure Code (Act XIV of 1882), s. 545—Transfer of Property Act (IV of 1882), s. 67 and s. 99.* The relationship between a decree-holder and a judgment-debtor who has executed a security-bond under s. 545, cl. (*c*), of the Civil Procedure Code, mortgaging certain properties for the due performance of the decree or order that may ultimately be passed by the Appellate Court, is not that of mortgagee and mortgagor; and, in the event of the appeal being dismissed, the decree-holder is entitled to realise his decretal money by sale of the properties given in security, without instituting a suit under s. 67 of the Transfer of Property Act. SHYAM SUNDAR LAL *v.* BAJPAI JAINARAYAN (1903) **I. L. R. 30 Calc. 1060 s.c. 7 C. W. N. 914**

3. DISCHARGE OF SURETY.

1. ——— **Appearance of debtor**—*Act XXIII of 1861, s. 8—Discharge of defendant on bail.* Where a Court during the pending of an inquiry under Act XXIII of 1861, s. 8, allowed the defendant to be at large upon security for his appearance when called upon, and when the Court had concluded the inquiry t was found that the defendant had appeared, the liability of the surety was *held* to be at an end. BALMER, LAWRIE & Co. *v.* HUREE NARAIN PODDAR **24 W. R. 292**

2. ——— **Change in circumstances under which security was given**—*Guarantee for good conduct of gomashta—Transfer of property guaranteed.* Where two parties executed a surety-bond addressed to *J*, *R*, and *M*, owners of certain property, binding themselves to be answerable for the good conduct and proper discharge of duties of their gomashta, *B*, and the property was afterwards transferred to *R* alone, it was *held* that, when *J* and *M* ceased to have any interest in the property, there was such entire change in the nature of the service that the sureties' liability did not continue, and they were not liable to be sued upon their bond. RAJKRISTO MOOKERJEE *v.* ISSUR CHUNDER MOOKERJEE **23 W. R. 90**

3. ——— *Alteration of position and risk of salt darogah—Liability of surety for performance of duties.* When a salt darogah deposits security for the due performance of his duties to be appropriated by Government in case of loss to the State from his failure to perform them, and the Government, without his consent, alters his position and risk, such alteration relieves him from his engagement as surety. SHIB NARAIN BANERJEE *v.* GOVERNMENT . **W. R. 1864, 138**

SURETY—*contd.*

3. DISCHARGE OF SURETY—*contd.*

4. ——— **Surety for insolvent judgment-debtor filing petition**—*Civil Procedure Code, ss. 336, 344—Insolvency*—One *B M* became surety under s. 336 of the Code of Civil Procedure on behalf of one *G R*, a judgment-debtor, to the effect that *G R* would appear before the Court when called on and would within one month file an application to be declared an insolvent. *G R* did so apply, but on the surety's asking the Court to declare him discharged of his liability the Court refused to do so. *Held*, that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent. *Koylash Chandra Shaha v. Christophoridi, I. L. R. 15 Calc. 171*, referred to. BANNA MAL *v.* JAMNA DAS **I. L. R. 15 All. 183**

5. ——— **Insolvency**—*Civil Procedure Code (Act XIV of 1882), s. 336—Surety that judgment-debtor will apply to be declared insolvent—Due application by judgment-debtor.* Where a surety entered into a bond that a judgment-debtor would, within a certain time, file a petition in insolvency, and the judgment-debtor, within that time, filed his petition, but subsequently withdrew it: *Held*, that the surety was discharged. KRISHNAIYAR *v.* KRISHNASAMY AYYAR (1902) **I. L. R. 26 Mad. 366**

6. ——— **Acceptance of further security**—*Security signed by surety—Security-bond.* A security, voluntarily signed, existing upon the record, and even taken off the file, is a valid and subsisting security. The intentions and motives of the obligor in giving the security must be judged by what is mentioned in the instrument. The acceptance of the separate security of one surety is not invalidated by the acceptance of separate securities of five other sureties. GOPAL INDER NARAIN ROY *v.* JAGAR NATH GURG **5 W. R. P. C. 129: 2 Moo. I. A. 311**

7. ——— **Notice of intention to cease to be surety**—*Security for payment of rent.* A surety for the due payment of rent by a third person must, if he wish to discharge himself, give notice to the person to whom the guarantee has been given. GUNESH KOOER *v.* OOMDUTOONNISSA BEGUM **6 N. W. 77**

8. ——— **Administration**—*Probate and Administration Act (V of 1881), ss. 51 and 78—Surety-bond, Power of a District Court to take a second—Administratix, mal-administration of the estate by—Contract Act (IX of 1872), s. 130—Application by a surety, who is not a beneficiary, to be discharged from his suretyship.* Under the Probate and Administration Act (V of 1881), a District Court, after once having taken a bond with sureties, has jurisdiction to take a second bond with fresh sureties, if the necessity arises. A surety (who is not a beneficiary) for the administrartix of an estate can, so far as relates to the future, by giving notice, be released from his obligation as surety on account of mal-administration of the estate by the administratrix. S. 130 of the Con-

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SURETY—*contd.*

3. DISCHARGE OF SURETY—*concld.*

tract Act (IX of 1872) applies to such a case. RAJ NARAIN MOOKERJEE *v.* FUL KUMARI DEBI (1901) . . . . **I. L. R. 29 Calc. 68**
s.c. 6 C. W. N. 7

9. ——— **Limitation**—*Contract Act (IX of 1872), ss. 134 and 137—Creditor allowing remedy against principal debtor to become barred by limitation.* "Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him," as these words are used in s. 137 of the Indian Contract Act, 1872, indicate a forbearance, for a more or less limited period, to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation. Hence, where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by instalments, certain persons becoming sureties for the due payment of such instalments, and the judgment-debtor, having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, it was *held* that the creditor had forfeited his remedy against the sureties also. *Hazari Lal v. Chunni Lal, I. L. R. 8 All. 259,* and *Radha* v. *Kinlock, I. L. R. 11 All. 310,* followed. *Hajarimal* v. *Krishnarav, I.L. R. 5 Bom, 647,* dissented from. RANJIT SINGH *v.* NAUBAT (1902)
I. L. R. 24 All. 504

4. MISCELLANEOUS CASES.

1. ——— **Surety of lessee afterwards becoming his partner**—*Suit by surety for illegal ejectment of lessee—Suit for damages.* Where a person became surety for the due performance by the lesseee of the obligations contained in a lease for a term of years, and afterwards became a partner with the lessee, and the lessor evicted the lessee before the expiration of the lease:—*Held*, that a suit would lie by the surety for damages arising from the illegal ejectment, although the surety was not a party to the original contract with the lessor. BURRODAKANT ROY *v.* RAM TUNNOO BOSE . . **7 W. R. P. C. 15**
s.c. BURDAKANTH ROY *v.* ALUK MUNJOOREE DASIAH . . . . **4 Moo. I. A. 321**

1 ——— **Suit by surety after satisfaction of bond**—*Cause of action—Limitation.* The plaintiff executed a bond jointly with a servant of the defendants on 10th July 1861. The proceeds were expended for the defendant on the 30th August 1864. The creditor obtained a decree upon the bond for principal and interest, which the plaintiff satisfied by two payments made on 4th July 1866 and 30th June 1868, respectively. He brought a suit against the defendant for the amount on 22nd June 1869. *Held,* that the plaintiff could maintain his suit against the defendant for the amount paid by him, and that the suit was not

SURETY—*concld.*

4. MISCELLANEOUS CASES—*concld.*

barred by the law of limitation. BHAGIRATH ADHIKARI *v.* TARINI CHANDRA PAKRASI
7 B. L. R. 35 ; 15 W. R. 413
Reversing on appeal s.c. BHOGEERUTH ADHIKAREE *v.* TARINEE CHUNDER PAKRASEE
14 W. R. 174

3. ——— **Suit on bond to recover money of which a third party has in fact had the benefit**—*Limitation Act (XV of 1877), Sch. II, Arts. 61, 83—Limitation—Compromise of suit by heirs of obligor—Suit to recover money paid under compromise.* *U. S.* borrowed money on a bond from *U. R.* The sole obligor of the bond was *U. S.* but the money was in fact borrowed for the use of, and was paid to, one *M.* From time to time the original bond was renewed, and ultimately *U. R.* sued upon the last bond and obtained a decree for a large sum of money against the heirs of *U. S.* The defendants appealed to the High Court, but, pending the appeal, entered into a compromise with the plaintiff on the 2nd of January 1900, whereby they agreed to pay to the plaintiff the sum of R51,000 and costs of the High Court. Upon the 5th of November 1902, the heirs of *U. S.* paid to the plaintiff decree-holder in pursuance of this compromise R40,000, and on the 17th of July 1903 they instituted a suit against *M* to recover the amount so paid and their costs. *Held,* that, on the facts, *U. S.* was not a surety for *M*, but the principal debtor, although the money was borrowed for *M's* benefit; that the payment made on the 5th of November 1902, in pursuance of the compromise referred to above, was not gratuitous, and that the heirs of *U. S.* were entitled to recover from *M* the sum of R40,000 so paid with interest, but not the costs of the High Court in respect of which the suit was barred. *Lewis* v. *Campbell, 8 C. B. 545,* and *Ram Tuhul Singh* v. *Biseswar Lall Sahoo, L. R. 2 I. A. 131,* referred to by KNOX, *A. C. J.* GIRRAJ SINGH *v.* MUL CHAND (1907) . **I. L. R. 29 All. 627**

SURETY BOND.

——— *Liability of surety on forfeiture of bond by principal—Recovery of amounts of bonds from both principal and surety—Criminal Procedure Code (Act V of 1908), s. 514, and Sch. V, Form XI.* Upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal. *Emperor* v. *Nga Kaung, U. B. R. 31 ; 2 Cr. L. J. Ind. 463,* dissented from. The requiring a surety to such a bond is not to ensure the recovery of the object of amount of the bond from the principal, but to serve as an additional security for his keeping the peace. *Queen-Empress* v. *Rahim Bakhsh, I. L. R. 20 All. 206,* referred to. SALIGRAM SINGH *v.* EMPEROR (1909)
I. L. R. 36 Calc. 562

SURPLUS SALE-PROCEEDS.

See SALE FOR ARREARS OF RENT.
I. L. R. 34 Calc. 724

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SURRENDER.

——— by raiyat—

See BENGAL TENANCY ACT, s. 171.
13 C. W. N. 97

——— doctrine of—

See HINDU LAW—WIDOW.
13 C. W. N. 544

——— of lease—

See TRANSFER OF PROPERTY ACT, s. 118.
6 C. W. N. 905

——— of tenancy—

See BENGAL TENANCY ACT, 1885, s. 86.
I. L. R. 28 Calc. 256

See LANDLORD AND TENANT—ABANDONMENT, RELINQUISHMENT OR SURRENDER, OF TENANCY.

See LANDLORD AND TENANT—LIABILITY FOR RENT . **I. L. R. 19 Calc. 790**

See LANDLORD AND TENANT—PAYMENT OF RENT—NON-PAYMENT.
I. L. R. 18 Bom. 250

SURVEY.

1. ——— **Survey proceedings, power of Collector to re-open.** Where a survey is once concluded, the map completed, and the thakbust proceedings brought to a close, a Deputy Collector has no authority to re-open the proceedings; and if he does so on the application of one party and issues a notice to the opposite party, the latter is not bound to appear. KALEE NARAIN BOSE *v.* ANUND MOYEE GOOPTA . . **21 W. R. 79**

2. ——— **Excess lands founds after survey**—*Presumption.* Where the admitted *mileek* lands of a raiyat were found by survey to be somewhat in excess of the land re-leased to him by resumption proceedings based on a former survey, it was *held* that the excess could not be assumed as a matter of course to be *mâl* lands. DINOBUNDHOO SUHAYE *v.* COURT OF WARDS
11 W. R. 347

SURVEY ACT.

See BENGAL SURVEY ACT.

SURVEY ACT (BOMBAY).

See BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865).

SURVEY AWARD.

See ACT XIII, OF 1848.

See LIMITATION ACT, 1877, SCH. II, ARTS. 45, 46 (1859, S. 1, CL. 6).

1. ——— **Requisites for survey award**—*Decision on bonâ fide contention.* To constitute a survey award, there must be a decision on a *bonâ fide* contention between the parties after a proper investigation into the points of issue between them. NUBO KISHEN ROY *v.* GOBIND CHUNDER SEIN
6 W. R. 317

SURVEY AWARD—*contd.*

2. ——— **Decision on fact not disputed**—*Beng. Reg. VII of 1822—Summary award.* The finding of a Survey Deputy Collector that a party has been in possession of certain land for more than a year, where the fact is not disputed, is not a "summary award" under Regulation VII of 1822. RADHAPERSHAD SINGH *v.* RAMJEEWUN SINGH . . . . **11 W. R. 389**

3. ——— **Striking off complaint in Survey Department.** On a complaint being made in the Survey Department as to a demarcation of land, the Deputy Collector, instead of investigating the circumstances, ordered a local inquiry by an Ameen, and on the plaintiff omitting to deposit the Ameen's fees, struck the case off his file. *Held*, that the decision was not an award on which a cause of action could be based. KRISTO CHUNDER DOSS *v.* SOUDAMONEE DOSSEE
12 W. R. 174

4. ——— **Order of settlement-officer without inquiry**—An entry made in the settlement papers was objected to on the merits. The objection was disallowed summarily without inquiry, on the ground that the papers had been drawn out more than a year before the objection was taken. *Held*, that such an order was not "an award," inasmuch as it did not adjudicate on the rights of the parties or on the question of possession and therefore that it was not an order on which a Court could found its judgment rejecting the suit without disposal of the point at issue upon the evidence. HEERA DASS *v.* HURMOO SINGH
1 N. W. Part II p. 17: Ed. 1873, 77

5. ——— **Act XIII of 1848, operation of**—*Effect of award.*—Act XIII of 1848 operates in certain cases to give to a survey award the full effect of a decree of a Civil Court, by taking away from the Courts the power of entertaining any suit for contesting the justice of such award after a limited time. MOKHUND MOORAREE BISWAS *v.* WOOMA CHURN MOOKERJEE . **23 W. R. 173**

6. ——— **Sanction by Collector**—*Acceptance of proceedings as correct.*—To make a survey demarcation effective, it is not absolutely necessary that there should be any more special sanction by the collector than a general acceptance of the survey proceedings as correct. HANOOMAN CHOWBAY *v.* BINDOO TORABA . **10 W. R. 336**

7. ——— **Right to benefit under award**—*Person representing party to award.*—The representatives of a party to a survey award are entitled to the benefits thereof. RAJMOHAN MITTER *v.* COMMISSIONER OF THE SUNDERBUNS **1 W. R. 344**

ALI ASHRUF *v.* CHONGA GOBIND ROY.
5 W. R. 220

8. ——— **Effect of award**—*Act IV of 1840, award under—Evidence of title.*—An award under Act IV of 1840 between a intervenor and a party other than the plaintiff, was no evidence against the plaintiff. AMEEROONISSA KHATOON *v.* JUGGUR NATH ROY . . . **11 W. R. 113**

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SURVEY AWARD—*contd.*

9. ——— *Effect of survey award on purchaser—Evidence of title.*—A purchaser is bound by a survey award passed against the persons from whom the derived his title. ALLYA ALLYAT *v.* JUGGUT CHUNDER ROY **5 W. R. 242**

10. ——— *Act IV of 1840, award under. Semble:* Where a zamindar let his estate in farm for a term of years, and so delegated the whole of his rights, privileges, and immunities to another person, he was *held* to become himself bound by an adverse decision under Act IV of 1840, to which the former was a party. LEKHRAJ ROY *v.* COURT OF WARDS . . **14 W. R. 395**

11. ——— *Act IV of 1840, award under, failure to set aside. Held,* that the plaintiff having failed to set aside an award made under Act IV of 1840 within the period of limitation, could not claim in opposition to the award GOPAL NATH *v.* ABDUL GHANEE . **1 Agra 120**

12. ——— *Notice of survey proceedings—Joint proprietors.*—A co-proprietor of a joint undivided estate was *held* to be bound by a survey award and compromise to which the other joint proprietors were parties when notice of the survey proceedings was served on the proprietors jointly, and not on him individually. HUR LAL ROY *v.* SOORAJ NARAIN ROY . . **3 W. R. 7**

13. ——— *Proceedings under Act IV of 1840—Evidence of possession.*—Proceedings under Act IV of 1840, to which both litigants have been parties, was *held* to be properly treated as evidence between them on the question of possession. RADHA CHURN DASS GOSSAMEE *v.* AKRANKHOOTIA. . . . **20 W. R. 420**

KASHI KISHORE ROY *v.* BAMA SOONDAREE DEBIA . . . . . **23 W. R. 27**

14. ——— *Effect as against decree for possession.*—A survey award cannot override the decree of a competent Court awarding possession. HURO NATH ROY *v.* ANUND CHUNDER ROY . . . . . **I W. R. 329**

15. ——— *Evidence of possession—Evidence of title.*—Survey proceedings are evidence of actual possession, and must be regarded as correct, so far as the appearance of the country is recorded thereon; but if questioned in time, are not conclusive on the question of title. LEELANUND SINGH *v.* MOHENDRA NARAIN SINGH **13 W. R. P. C. 7**

16. ——— *Proof of possession—Suit to set aside survey award.*—In a case for setting aside the survey award which declared the plaintiff and the opposite party entitled to certain chur lands to the extent they had respectively lost by deluvion, and the residue to be held jointly according to their shares:—*Held,* that the opposite party had no right to sue for rents on the plea of joint possession, for he must first have fixed what by the intervenor separately, for the loss suffered by each party by diluvion; and after that how much, and what, of the remainder is entitled to be held jointly.

TARINEE KANT LAHOOREE *v.* HANEE MUNDUL **7 W. R. 203**

SURVEY AWARD—*concld.*

17. ——— *Award by superintendent of survey—Evidence of title.*—An award by the superintendent of survey is not conclusive evidence of a contested right in a regular suit. KOYLASH CHUNDER GHOSE *v.* RAJ CHUNDER BANERJEE . . . . **12 W. R. 180**

18. ——— *Decision on Act VI of 1640—Evidence of title.*—A decision in an Act IV of 1840 case was no evidence of title one way or the other. GUDADHUR KOONDOO *v.* RAMKOOMAR BOSE . . . . **6 W. R. 155**

19. ——— *Award under Act IV of 1840—Proof of title.* An award under Act IV of 1840 was not sufficient proof of title when the person in whose favour it was given did not maintain his possession under the award before the survey authorities, and allowed his adversary to take actual possession. JOOGAL KISHORE SHAHA *v.* RAJ KISHEN SURMAH . **3 W. R. 129**

20. ——— *Suit to set aside award under Act IV of 1840—Proof of title.* In a suit to set aside an award under Act IV of 1840, —*Held,* that the plaintiff ought to furnish some decisive proof of his title, to justify the Court in disturbing the award of a competent authority, and that resumption proceedings instituted by Government, which declared only that the lands were unfit for resumption and therefore left them in the plaintiff's possession, were not such convincing proof of title. BAMA SSOONDAREE DABEA CHOWDHRANEE *v.* BHUGRATTEE DABEA CHOWDHRANEE; GREESH CHUNDER CHOWDHRY *v.* BHUGRUTTEE DABEA CHOWDHRANEE . **1 Hay 495**

21. ——— *Award under Beng. Reg. VII of 1882, s. 33—Power of Court to set aside award. Held,* that an order of arbitrators under s. 33, Regulation VII of 1822, could not be set aside by the Courts of Judicature. FURZUND ALI *v.* AHMED HOSSEIN . . **1 Agra 267**

22. ——— *Award for more than amount of land claimed.*—A survey award, if given for more than is claimed, is not binding as to the excess. It is not conclusive as to title. LULEET NARAIN *v.* NARAIN SINGH . . **1 W. R. 333**

SURVEY MAP.

See POSSESSION . **12 C. W. N. 273**

——— *Documentary Evidence —Julkur.* Upon the documentary evidence it was *held* that the lower Appellate Court was in error in finding that plaintiff had proved an independent julkur. MATHURA NATH CHATTOPADHAYA *v.* SIB CHANDRA BOSE (1907) . **12 C. W. N. 334**

SURVEY OFFICER.

See KHOTI SETTLEMENT ACT.

See SETTLEMENT OFFICER.

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SURVEY OFFICER—*concld.*

See SPECIAL OR SECOND APPEAL—ORDERS SUBJECT OR NOT TO APPEAL.
I. L. R. 21 Calc. 935

See SUPERINTENDENCE OF HIGH COURT —CIVIL PROCEDURE CODE, 1882, s. 622.
I. L. R. 21 Calc. 935

SURVEY AND SETTLEMENT MANUAL.

——— **part iii, chap. xvi, rule 7—**

See REVENUE SALE LAW, s. 2.
13 C. W. N. 633

SURVEYORS.

——— **opinion of—**

——— *Objections to surveyors' reports—Land Acquisition Act (I of 1894), s. 18 —Compensation—Mode of valuation when no recent sales—Market value. Held*, that in addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument. The practice which has grown up in reference under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence. *In the matter of* KARIM TAR MAHOMED (1908).
I. L. R. 33 Bom. 325

SURVIVING DEFENDANT AND PLAINTIFFS.

——— **agreement between—**

See LEGAL REPRESENTATIVE.
I. L. R. 36 Calc. 418

SURVIVORSHIP.

See ATTACHMENT—ATTACHMENT BEFORE JUDGMENT I. L. R. 17 Mad. 144

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.
I. L. R. 19 Bom. 338
I. L. R. 17 All. 578
I. L. R. 23 Calc. 912
I. L. R. 22 Mad. 380

See CONVERTS . I. L. R. 10 Mad. 69

See COURT FEES ACT, 1870, s. 19D.
I. L. R. 23 Calc. 980

See GRANT—POWER OF ALIENATION BY GRANTEE . I. L. R. 11 Calc. 1

See HINDU LAW—INHERITANCE.
I. L. R. 34 Calc. 642; 929

See HINDU LAW—INHERITANCE—IMPARTIBLE PROPERTY . 6 Mad. 93
I. L. R. 4 Mad. 250
I. L. R. 19 Mad. 451
L. R. 23 I. A. 128

See HINDU LAW—INHERITANCE—JOINT PROPERTY AND SURVIVORSHIP.

SURVIVORSHIP—*concld.*

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—FEMALES—DAUGHTERS.
I. L. R. 6 Bom. 85
15 B. L. R. 10
L. R. 2 I. A. 113

See HINDU LAW—INHERITANCE—SPECIAL HEIRS—MALES—AFFILIATED SON.
I. L. R. 17 Mad. 48

See HINDU LAW—INHERITANCE—SPECIAL LAWS—NIHANGS.
I. L. R. 16 All. 191
L. R. 21 I. A. 17

See HINDU LAW—JOINT FAMILY—POWERS OF ALIENATION BY MEMBERS—OTHER MEMBERS . 3 B. L. R. F. B. 31
6 B. L. R. 555
I. L. R. 1 Calc. 226
L. R. 3 I. A. 7
I. L. R. 18 Calc. 157
L. R. 17 I. A. 194
I. L. R. 21 Bom. 797

See HINDU LAW—MITAKSHARA.
I. L. R. 33 Calc. 676

See HINDU LAW—PARTITION—REQUISITES FOR PARTITION.
I. L. R. 19 Mad. 345

See HINDU LAW—PARTITION—SHARES ON PARTITION—GENERAL MODE OF DIVISION . . I. L. R. 5 Calc. 142

See HINDU LAW—WILL—CONSTRUCTION —SURVIVORSHIP. I. L.R. 15 Bom. 443
I. L. R. 23 Calc. 563
L. R. 23 I. A. 18

See HUSBAND AND WIFE.
I. L. R. 16 Bom. 630

See REPRESENTATIVE OF DECEASED PERSON . I. L. R. 19 Mad. 345

See WILL—CONSTRUCTION.
I. L. R. 5 Calc. 59

——— **Joint tenancy**—*Joint speculation on improving land—Real and personal property.* A joint speculation in improving land on a hazard of profit and loss is treated in equity as in the nature of merchandise and *jus accrescendi* not allowed. The survivorship in the case of joint tenancy is not an incident to it in the case of leasehold property and personal estate. WEBBE *v.* LESTER . . 2 Bom. 55 : 2nd Ed. 52

SUSPENSION.

See ADVOCATE.
I. L. R. 29 All. 95. L. R. 34 I. A. 41

——— **of rent—**

See LANDLORD AND TENANT.
13 C. W. N. 702

"SWARAJ"

See SEDITION . I. L. R. 34 Calc. 991

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SWINGING.

——— by hooks—

See RASH AND NEGLIGENT ACT.
5 C. W. N. 376

SWORD-STICK.

——— *"Arms," meaning of—License, Necessity of—Indian Arms Act (XI of 1878), ss. 4, 13 and 19 (e).* A sword-stick is a "sword" within the meaning of the term in s. 4 of the Indian Arms Act. Neither the length, breadth, or the form of the blade of a weapon, nor the handle, afford any certain test of its classification as "arms." Whatever can be used as an instrument of attack or defence, for cutting as well as for thrusting, and is not an ordinary implement for domestic purposes, falls within the purview of the Act. EMPEROR *v.* SATISH CHANDRA ROY (1907) . . . I. L. R. 34 Calc. 749

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——— succession to—

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TALUKHDAR.

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——— conduct of, as indicating his successor.

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I. L. R. 3 Calc. 626
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——— registered interest of—

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I. L. R. 3 Calc. 522
L. R. 4 I. A. 178

——— right of, to eject lessee—

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TALUKHDARI TENURE.

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9 C. W. N. 852

TANJORE CUSTOM.

——— *Free occupation of manaikats belonging to mirasidars by artisans—Conditional, on rendering services.* There is a practice in the Tanjore district by which purakudis or artizans are allowed to occupy manaikats belonging to misrasidars, free of rent, so long as they cultivate the lands of the mirasidars or render them services in other ways. LAKSHMANA PADAYACHI *v.* RAMANATHAN CHETTIAR (1904) . I. L. R. 27 Mad. 517

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——— **damage by overflow of—**

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——— **order as to—**

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——— **repairs of—**

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See ZAMINDAR, DUTY OF.
14 B. L. R. 209
L. R. 1 I. A. 364

——— *Revenue Court—Rent of tank, suit for—"Land"—Fishery, Right of.* A suit for recovery of arrears of rent of a tank, which is not a part of an agricultural holding, but is used for rearing and preserving firsh is not maintainable in a Revenue Court, the provision of Act X of 1859 not being applicable to such a suit. The term "land" in s. 6 of Act X of 1859 means cultivated land and does not include a tank regarded as land covered with water. *Siboo Jelya* v. *Gopal Chunder Chowdhry, 19 W. R. 200; Nidhi Krishna Bose* v. *Ram Doss Sen, 20 W. R. 341; Nidhi Krisna Bose* v. *Nistarini Dossee, 21 W. R. 386;* and *Durga Soonduree Dossee* v. *Oomdutoonissa, 18 W. R. 235,* referred to. *Semble:* Where the grant is merely of a right of fishery, the lessee acquires no interest in the sub-soil nor is entitled to retain possession, when the water dries up. *Duke of Somerset* v. *Fogwell, 5 B. & C. 875: 26 W. R. 449; Suroop Chunder Mozoomdar* v. *Jardine Skinner & Co., Marsh. 334; Bessen Lal Dass* v. *Khyrunissa Begum, 1 W. R. 79; Munchur Chowdhry* v. *Nursing Chowdhry, 11 W. R. 272; Radha Mohun Mundul* v. *Neel Madhub Mundul, 24 W. R. 200,* and *David* v. *Girish Chunder Guha, I. L. R. 9 Calc. 183,* referred to. MAHANANDA CHAKRAVATI *v.* MANGALA KEOTANI (1904) . . **I. L. R. 31 Calc. 937**

TARAI REGULATION (IV OF 1876).

See JURISDICTION—SUITS FOR LAND—PROPERTY IN DIFFERENT DISTRICTS.
I. L. R. 17 All. 483

TARIFF ACT (VIII OF 1894).

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See CONTRACT—CONSTRUCTION OF CONTRACTS . **I. L. R. 21 Bom. 628**

TARWAD.

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——— **drawback on—**

See BOMBAY MUNICIPAL ACT, 1888, s. 158.
I. L. R. 17 Bom. 394

——— **legality of—**

See BOMBAY DISTRICT MUNICIPAL ACT, 1873, s. 21 . **I. L. R. 21 Bom. 630**

See MADRAS DISTRICT MUNICIPALITIES ACT, s. 63 . **I. L. R. 24 Mad. 195**

See N.-W. P. AND OUDH MUNICIPALITIES ACT, 1883, s. 29.
I. L. R. 21 All. 348

——— **liability of Government to—**

See MADRAS CITY MUNICIPAL ACT, s. 341.
I. L. R. 25 Mad. 457

——— **liability to—**

See BENGAL MUNICIPAL ACT, 1884, ss. 113, 116 . **I. L. R. 21 Calc. 319,**

See BOMBAY DISTRICT MUNICIPAL ACT, 1873, ss. 11 AND 84.
I. L. R. 20 Bom. 732
I. L. R. 23 Bom. 446

See BOMBAY MUNICIPAL ACT, 1865, s. 2.
9 Bom. 217

See BOMBAY MUNICIPAL ACT, 1888, s. 143.
I. L. R. 16 Bom. 217

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, 1888, s. 87.
I. L. R. 22 Calc. 581
I. L. R. 25 Calc. 483

See MADRAS DISTRICT MUNICIPALITIES ACT, 1884, ss. 47, 53, 55.
I. L. R. 18 Mad. 310
I. L. R. 17 Mad. 100; 453
I. L. R. 18 Mad. 183
I. L. R. 21 Mad. 5
I. L. R. 22 Mad. 145

See MADRAS DISTRICT MUNICIPALITIES ACT—

s. 53 AND SCH. A, PROVISO 4;
I. L. R. 24 Mad. 644

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SCH. A. . **I. L. R. 25 Mad. 747**

See MADRAS MUNICIPAL ACT, 1878, s. 103.
I. L. R. 8 Mad. 429

See MADRAS MUNICIPAL ACT, 1884, s. 103.
I. L. R. 14 Mad. 140
I. L. R. 17 Mad. 453
I. L. R. 22 Mad. 145
I. L. R. 23 Mad. 529

See MADRAS MUNICIPAL ACT, 1884, SCH. A
I. L. R. 11 Mad. 238

See MADRAS MUNICIPAL ACT, 1884, SCH. B.
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TAX—*contd.*

——— liability to—*concld.*

See MADRAS TOWNS IMPROVEMENT ACT, 1871, ss. 51, 58, 62, 64, AND SCH. C.
7 Mad. 332
I. L. R. 3 Mad. 129
I. L. R. 5 Mad. 269
I. L. R. 7 Mad. 74
I. L. R. 8 Mad. 327
I. L. R. 9 Mad. 38
I. L. R. 14 Mad. 467

——— non-payment of—

See BOMBAY DISTRICT MUNICIPAL ACT. 1884, s. 49 . I. L. R. 18 Bom. 400

——— objections to valuation for assessment of—

See BOMBAY DISTRICT MUNICIPAL ACT, 1873, s 21 . . I. L. R. 7 Bom. 399
I. L. R. 9 Rom. 51

See JURISDICTION OF CIVIL COURT—MUNICIPAL BODIES . . 3 C. W. N. 73
I. L. R. 27 Calc. 849
I. L. R. 23 Bom. 446

——— order for payment of—

See FINE . . 8 W. R. Cr. 17

——— proceedings to recover—

See BOMBAY DISTRICT MUNICIPAL ACT, 1873, s. 84 . .I. L. R. 17 Bom. 731

See MADRAS DISTRICT MUNICIPAL ACT, 1884, s. 103 . I. L. R. 9 Mad. 429
I. L. R. 13 Mad. 518
I. L. R. 14 Mad. 467

——— right to levy—

See MADRAS MUNICIPAL ACT, 1878, ss. 119, 120, 123, AND 192.
I. L. R. 6 Mad. 287
I. L. R. 7 Mad. 63
I. L. R. 10 Mad. 38
I. L. R. 2 Mad. 362

——— suit for—

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I. L. R. 9 Mad. 110
I. L. R. 23 Calc. 835

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS—TAX.
I. L. R. 22 Calc. 680

——— suit for injunction to restrain levy of—

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), ss. 82 (*c*) AND 86 . I. L. R. 27 Bom. 403

TAX—*contd.*

suit to recover, illegally levied—

See BENGAL MUNICIPAL ACT, 1884, s. 85.
2 C. W. N. 689

See ESTOPPEL—ESTOPPEL BY CONDUCT.
I. L. R. 17 Bom. 510

See JURISDICTION OF CIVIL COURT—MUNICIPAL BODIES . I. L. R. 2 Mad. 37

See MADRAS DISTRICT MUNICIPALITIES ACT, 1884, s. 53 . I. L. R. 13 Mad. 78
I. L. R. 15 Mad. 153

See MADRAS DISTRICT MUNICIPALITIES ACT, ss. 53 AND 262.
I. L. R. 24 Mad. 205

See MADRAS DISTRICT MUNICIPALITIES ACT, 1884, s. 63.
I. L. R. 21 Mad. 367

See MADRAS DISTRICT MUNICIPALITIES ACT, 1884, s. 71.
I. L. R. 23 Mad. 523

See MADRAS DISTRICT MUNICIPALITIES ACT, 1884, s. 262.
I. L. R. 19 Mad. 10

See MADRAS LOCAL BOARDS ACT, ss. 57, 64 AND 149 . I. L. R. 24 Mad. 114

See MADRAS TOWNS IMPROVEMENT ACT, 1871, ss. 38 AND 85 . 7 Mad. 249
I. L. R. 1 Mad. 158

See PENSIONS ACT, s. 4.
I. L. R. 14 Bom. 573

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MUNICIPAL TAX.
I. L. R. 13 Mad. 78

See STATUTES, CONSTRUCTION OF.
I. L. R. 1 Mad. 158
8 Bom. A. C. 213

1. **——— Certificate tax**—*Neglect to take out certificate—Fine.* The fine imposed under s. 17, Act IX of 1868, for neglect to take out a certificate must not be less than twice the amount for which such certificate should be taken out. QUEEN *v.* RAM GOBIND CHUCKERBUTTY.
2 B. L. R. Ap. 40
11 W. R. Cr. 13

2. **——— Complaint for neglecting to take out certificate**—*Collector also Magistrate.* Where it is sought to recover the penalty described in s. 17, Act IX of 1868, from any person who omits to take out a certificate, the Collector who issued the notice should prefer a complaint before a Magistrate, and the Collector cannot prefer the complaint before himself in his capacity of Magistrate. ANONYMOUS . . 4 Mad. Ap. 62

3. **——— Magistrate, powers of.** A Magistrate was *held* to have acted rightly in dismissing complaint under s. 17 of Act IX of 1868, because there was no evidence that the names of the accused were included in the list mentioned in s. 17. In a prosecution under this Act, a Magistrate must proceed in the manner laid down in Ch. XV

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TAX—*concld.*

of the Code of Criminal Procedure, 1861, and must require proof of all the facts which go to constitute the offence. QUEEN *v.* KHETTRO MOHUN GHOSE **11 W. R. Cr. 56**

4. ——— **Muhtarafa**—*Trade tax, zamindar's right to collect—Mad. Reg. XXV of 1802, s. 4—Mad. Reg. XXV of 1832.* The right of collecting the *muhtaraja* of trade tax from artizans in his zamindari has not been delegated by Government to the zamindar of Karvaitnagar, and cannot be legally exercised by his assignees. *Quœre:* Whether it was competent for Government to delegate the collection of the *muhtaraja* to zamindars for their own use. VEDANTA *v.* KANNIYAPPA **I. L. R. 9 Mad. 14**

5. ——— **House-valuation by—Municipality**—*Levy of house-tax—Fair selling value—Absence of malâ fides, perversity or manifest error—Civil Courts—Jurisdiction.* In the absence of proof of *malâ fides*, perversity or manifest error, Civil Courts ought not to interfere with the house valuation made by a Municipality for the purpose of taxation, unless there is a breach of the rules prescribed by law for making the valuation. KASANDAS RAGHUNATHDAS *v.* ANKLESHVAR MUNICIPALITY (1901) . **I. L. R. 26 Bom. 294**

TAXATION OF ATTORNEY'S BILLS.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 2 . **12 C. W. N. 1102**

TAXATION OF PLEADER'S FEES.

See PRACTICE . **I. L. R. 33 Bom. 256**

TAXATION OF COSTS.

See ATTORNEY AND CLIENT.
I. L. R. 3 Calc. 473
I. L. R. 33 Bom. 667

See COMMISSION—CIVIL CASES.
I. L. R. 15 Bom. 209

See COSTS—TAXATION OF COSTS.

See LIMITATION ACT, 1877, SCH. II, ART. 84 (1871, ART. 85) **I. L. R. 1 Bom. 253**
I. L. R. 7 Mad. 1
I. L. R. 22 Calc. 943 ; 952 note

See RULES OF HIGH COURT, BOMBAY—RULE NO. 183 . **I. L. R. 16 Bom. 152**
I. L. R. 17 Bom. 514

——— **order for—**

See HIGH COURT RULES.
I. L. R. 32 Bom. 428

——— **summons for—**

See COSTS—TAXATION OF COSTS.
7 B. L. R. Ap. 50

See LIMITATION ACT, 1877, S. 4.
I. L. R. 20 Calc. 899

1. ——— **Excessive fee to Counsel**—*Practice—Attorney and client's costs payable out of estate—Disallowance on taxation—Bel-*

TAXATION OF COSTS—*concld.*

chambers' Rules and Orders, 780, 785. Where on a motion for discharge of guardians the Court ordered the guardian's cost of opposing the application to be taxed as between attorney and client and paid out of the estate. *Held*, that the Taxing officer was right in disallowing as against the estate an excessive fee paid to counsel for appearing on the application, and should only allow the excess even as against the client, when it was manifestly shown that the client knew that the fee was excessive and that he might be called upon personally for the excess. The duties of a Taxing Master explained. *In the matter of* THAKUR DASSEE DASSEE (1906).
I. L. R. 33 Calc. 827

2. ——— **Work not ordinarily falling upon Solicitors**—*Solicitor's costs—Work of meritorious character.* *K* was the Solicitor for the defendant in a suit brought to obtain probate of the will of one Damji Lakhmichand. The defence set up was that the will was a forgery. Being unable to procure the services of an expert, *K*, after special study for the purpose, himself carefully studied every letter of the alleged will and despite counsel's opinion that he had no chance of succeeding, he eventually succeeded in satisfying the trying Judge that the will was a forgery. In his bill for attorney and client's costs, *K* claimed extra payment for the additional and unusual work incurred by him: *Held*, in review of taxation, that *K* was entitled to be separately remunerated for the special work done by him, as it was in fact a charge for work done which would not ordinarily fall upon a solicitor in the preparation of the brief. DAHIBAI *v.* SOONDERJI (1907)
I. L. R. 31 Bom. 430

TAXING OFFICER.

——— **decision of—**

See COURT FEES ACT, S. 5.
I. L. R. 12 All. 129
I. L. R. 20 Mad. 398
I. L. R. 21 Mad. 269

See HIGH COURT RULES (BOMBAY).
I. L. R. 32 Bom. 262

See HIGH COURT RULES (BOMBAY), S. 544.
I. L. R. 33 Bom. 667

——— **discretion of—**

See COSTS—TAXATION OF COSTS.
I. L. R. 24 Calc. 891

——— **mistake of—**

See COURT FEES ACT, 1870, S. 5.
I. L. R. 15 All. 117

——— **power of—**

See COSTS—TAXATION OF COSTS.
I. L. R. 15 Mad. 405

TEHSILDAR.

See TAHSILDAR.

See LIMITATION ACT, 1877, ART. 7 (1859, S. 1, CL. 2).
1 B. L. R. S N. 20; 10 W. R. 260

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TEMPLE.

See JURISDICTION . I. L. R. 30 Mad. 158

——— management of—

See ENDOWMENT.
I. L. R. 30 Mad. 138; L. R. 34 I. A. 78

——— suits concerning—

See ACT XX OF 1863.

See HINDU LAW—ENDOWMENT.

See MAHOMEDAN LAW—ENDOWMENT.

See MAHOMEDAN LAW—MOSQUE.

——— trustees of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 9 . I. L. R. 33 Bom. 387

TEMPORARY OCCUPATION.

See RIOTING . I. L. R. 35 Calc. 103

TEMPORARY SETTLEMENT.

See NOABAD TALUK . 13 C. W. N. 235

TENANCY.

See LANDLORD AND TENANT.

——— acknowledgment of—

See LANDLORD AND TENANT—CONSTITUTION OF RELATION—ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT.

——— determination of incidents of—

See BENGAL TENANCY ACT, S. 158.

See RES JUDICATA—MATTERS IN ISSUE.
I. L. R. 20 Calc. 249

——— nature of—

See LANDLORD AND TENANT—NATURE OF TENANCY.

——— period of—

See LEASE . I. L. R. 30 Mad. 109

——— relinquishment of—

See LANDLORD AND TENANT—ABANDONMENT, RELINQUISHMENT, OR SURRENDER OF TENURE.

——— sub-division of—

See BENGAL TENANCY ACT, S. 88.
6 C. W. N. 823

TENANCY-AT-WILL.

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT. 1 Mad. 109
24 W. R. 461
8 C. L. R. 50
I. L. R. 3 Calc. 696
I. L. R. 19 Bom. 150
I. L. R. 23 Calc. 200
4 C. W. N. 792

TENANCY-AT-WILL—*contd.*

See LIMITATION ACT, 1877, SCH. II, ART. 139 . . I. L. R. 8 Mad. 424
I. L. R. 22 Bom. 893
I. L. R. 24 Bom. 504

See REGISTRATION ACT, 1877, S. 17.
I. L. R. 14 Bom. 319

TENANCY IN COMMON.

See HINDU LAW—

INHERITANCE—JOINT PROPERTY AND SURVIVORSHIP.
I. L. R. 26 Bom. 445

PARTITION—RIGHT TO PARTITION——WIDOW. I. L. R. 24 Mad. 441

See WILL—CONSTRUCTION OF WILLS—VESTED AND CONTINGENT INTERESTS.
I. L. R. 11 Bom. 69; 573

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY.
I. L. R. 25 Bom. 248

See WILL—CONSTRUCTION.
I. L. R. 15 Mad. 448
I. L. R. 23 Bom. 80

TENANT.

See AGRA TENANCY ACT, 1901, SS. 4 (5), 32 (2) . . . I. L. R. 31 All. 49

See CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT-PROPERTY—KABULIATS.

See CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—RENT.

See JOINT TENANCY.

See LANDLORD AND TENANT.

See MAGISTRATE . 9 C. W. N. 935

——— at will—

See LANDLORD AND TENANT.
I. L. R. 34 Calc. 57

——— for life, apportionment of rent after death of—

See LANDLORD AND TENANT—PAYMENT OF RENT—GENERALLY.
I. L. R. 26 Mad. 540

——— from year to year—

See LANDLORD AND TENANT.
I. L. R. 34 Calc. 57
13 C. W. N. 949

——— improvement by—

See CO-SHARER—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY.
I. L. R. 28 Calc. 223

——— suit against, for share of rent.

See CO-SHARERS—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY—ENHANCEMENT OF RENT.

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TENANTS-IN-COMMON.

——— **Adverse Possession**—*Exclusive receipt of profits by one tenant continuously for a long time—Presumption as to actual ouster of other tenants-in-common.* To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed. GUNGADHAR *v.* PARASHRAM (1905) . . . . **I. L. R. 29 Bom. 300**

TENDER.

See BENGAL RENT ACT, 1869, S. 46.
1 B. L. R. S. N. 7 : 10 W. R. 101
16 W. R. 79
2 W. R., Act X, 88

See CONTRACT ACT (IX OF 1872), S. 51.
I. L. R. 30 Calc. 865

See INTEREST . **I. L. R. 35 Calc. 34**

See LEGAL TENDER.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—IMMOVEABLE PROPERTY . **I. L. R. 17 Mad. 216**

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 82. **I. L. R. 32 Bom. 521**

See TRANSFER OF PROPERTY ACT, S. 83.
I. L. R. 17 Mad. 267

See TRANSFER OF PROPERTY ACT, S. 135.
I. L. R. 22 Calc. 792
2 C. W. N. 147

——— **by money order—**

See EXECUTION OF DECREE—MODE OF EXECUTION—INSTALMENTS.
I. L. R. 24 All. 85

——— **of patta—**

See MADRAS RENT RECOVERY ACT—
SS. 3 AND 80 **I. L. R. 26 Mad. 589**
S. 4 . . **I. L. R. 26 Mad. 363**
S. 10 . . **I. L. R. 25 Mad. 613**
S. 11 . . **I. L. R. 26 Mad. 456**

——— **of rent—**

See INTEREST.
11 C. W. N. 983 : I. L. R. 34 Calc. 34

1. ——— **Validity of tender**—*Contract Act, s.* 38—*Tender of interest on mortgage-debt.* Under a mortgage-deed taken to secure the repayment within three years of a sum of R16,000 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874, the date of the mortgage, it was stipulated that interest should be paid every six months, but that, if a year's interest should be unpaid, then the whole amount due for principal and interest should become payable at once ; and also that the mortgagor might after payment of interest, pay towards satisfaction of the principal any sum not less than R1,000. The first year's interest was allowed to get into arrear, but in September 1875 the defendant went to the plaintiff with R19,000, a greater sum than was due for principal and interest, and told him to repay himself from that sum. The offer was refused, and the plaintiff thereupon brought a suit on the 9th July 1877 for R16,000, with interest from the date of the mortgage to the date of the suit and subsequent interest. *Held*, that the tender made by the defendant, although not valid according to English law, was valid under s. 38 of the Contract Act. *Per* WILSON, *J.*—S. 38 of the Contract Act substantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay. KANYE LALL KHAN *v.* KHETTERMONEY DOSSEE . **5 C. L. R. 105**

2. ——— *Offer by letter to pay debt.* A mere offer by a debtor by letter to pay an amount cannot be treated as a tender either in law or in equity. In order to stop interest, a strict tender should be proved. KAMAYA NAIK *v.* DEVAPA RUDRA NAIK . **I. L. R. 22 Bom. 440**

3. ——— *Unconditional tender—Costs.* In a suit to recover R1,323-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of R1,043-5, stating in the letter of tender that the sum so tendered was the only sum due. At the trial the plaintiff obtained a decree for the full amount claimed by him. *Held*, both in the Court below and on appeal, that the tender was bad, and therefore the plaintiffs were entitled to their costs. *Held, per* KENNEDY, *J.*, that the tender was bad, being a tender of part of an entire debt. *Held, per* GARTH, *C. J.* (MARKBY, *J.*, concurring), that the tender was also bad, as the plaintiffs could not have accepted the sum tendered without giving up the remainder of their claim. CHUNDER CAUNT MOOKERJEE *v.* JODOONATH KHAN . **I. L. R. 3 Calc. 468 : 1 C. L. R. 470**

4. ——— *Tender of part of debt, rule as to—Plea of tender—Payment into Court.* The rule laid down in *Dixon* v. *Clark, 5 C. B., 365*, that the tender of only a part of a debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered. A plea of tender before action must be accompanied by a payment into Court after action, otherwise the tender is ineffectual. ABDUL RAHMAN *v.* NOOR MAHOMED . . . **I. L. R. 16 Bom. 141**

5. ——— *Agent—Cheque in payment of debt for rent—Suit for rent—Costs.* The landlord of a house through his agent sent in rent-bills to his lessee. The lessee gave the agent a cheque payable to her attorney for the amount demanded. The attorney realized the amount of the cheque and gave the money to the agent, who

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TENDER—*concld.*

tendered it to the landlord's attorney, who refused to accept, and the money was returned to the lessee's attorney. *Held*, in a suit for the rent, that, under the circumstances, the tender amounted to payment. *Held*, further, that although, as a general rule, the amount of a tender not accepted ought to be paid into Court in order to entitle the defendant to costs, yet that, as the tender in this case amounted to payment, the defendant was entitled to have the suit dismissed with costs. BOLYE CHUND SINGH *v.* MOULARD
I. L. R. 4 Calc. 572

TENURE.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 566

See MOKURARI ISTEMRARI TENURE.

——— **condition in lease for—**

See BENGAL RENT ACT, 1869, s. 52 (ACT X OF 1859, s. 78).
10 W. R. 156
11 W. R. 201
6 N. W. 326
4 C. L. R. 469
12 B. L. R. 439
B. L. R. Sup. Vol. 972
I. L. R. 9 Calc. 88; 808

——— **created under Court of Wards.**

See COURT OF WARDS . **15 B. L. R. 343**

——— **forfeiture of—**

See LANDLORD AND TENANT—ABANDONMENT, RELINQUISHMENT, OR SURRENDER OF TENURE.

See LANDLORD AND TENANT—FORFEITURE.

——— **incidents of—**

See INTEREST—MISCELLANEOUS CASES—ARREARS OF RENT. . **7 C. W. N. 203**

——— **interest on arrears of rent of—**

See INTEREST—MISCELLANEOUS CASES—ARREARS OF RENT.
I. L. R. 29 Calc. 674

——— **relief against—**

See LANDLORD AND TENANT—FORFEITURE.

——— **service—**

See GHATWALI TENURE.

See SERVICE TENURE.

——— **tenure and raiyati holding, distinction between—**

See BENGAL CESS ACT, s. 4.
5 C. W. N. 535

——— **transfer of—**

See BENGAL REGULATION VIII OF 1819.
3 B. L. R. P. C. 48
I. L. R. 17 Calc. 162

TENURE—*contd.*

——— **transfer of**—*concld.*

See BENGAL TENANCY ACT, s. 12.
I. L. R. 16 Calc. 642
I. L. R. 19 Calc. 17; 774

See BENGAL TENANCY ACT, SS. 65 AND 188
I. L. R. 29 Calc. 219

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
I. L. R. 14 Mad. 98

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.
I. L. R. 17 Calc. 826

See LANDLORD AND TENANT—FORFEITURE—TRANSFER OF TENANCY.
I. L. R. 20 Calc. 590

See LANDLORD AND TENANT—TRANSFER BY LANDLORD.

See LANDLORD AND TENANT—TRANSFER BY TENANT.

See LEASE—CONSTRUCTION.
I. L. R. 17 Calc. 826

See ONUS OF PROOF—LANDLORD AND TANANT . **I. L. R. 13 Mad. 60**

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT.

See STAMP ACT, 1862, s. 14.
3 B. L. R. Ap. 30

——— **what constitutes—**

See BENGAL TENANCY ACT (VIII OF 1885), s. 5 (*5*) . . .**6 C. W. N. 825**

1. ——— **Grant for purpose of living on the land.** *Per* PEACOCK,—*C.J.* If one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of evidence to the contrary, is assignable. BENI MADHUB BANERJEE *v.* JAI KRISHNA MOOKERJEE
7 B. L. R. 152 : 12 W. R. 495

Upholding, on appeal, KEMP, *J.*, in BANEE MADHUB BANERJEE *v.* JOY KISHEN MOOKERJEE
11 W. R. 354

2. ——— *Homestead land—Transferability under the law before the Transfer of Property Act (IV of 1882)—Custom.* Where a non-agricultural holding was transferred before the passing of the Transfer of Property Act:—*Held*, that it could not be inferred that the holding was transferable from the mere fact that it was used for residential purposes, having regard to the law as it then stood. S. 108, cl. (*j*), of the Transfer of Property Act (IV of 1882), does not apply to transfers which took place before the Act. *Beni Madhub Banerjee* v. *Jai Krishna Mookerjee*, *7 B. L. R. 152*, followed. HARI NATH KARMAKAR *v.* RAJ CHANDRA KARMAKAR . **2 C. W. N. 122**

NABU MONDUL *v.* CHOLIM MULLICK.
I. L. R. 25 Calc. 896

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TENURE—*concld.*

3. ——— **Mokurari tenure.** It is necessary that a tenure should be mokurari in order to be transferable. HUROMOHUN MOOKERJEE *v.* LALUNMONEE DASSEE . . . **1 W. R. 5**

4. ——— **Surburakari tenure in Cuttack**—*Consent of zamindar.* The alienation of surburakari tenure in Cuttack is not practicable without the consent of the zamindar. DOORJODHUN DOSS *v.* CHOOYA DAYE . **1 W. R. 322**

5. ——— **Raiyatwari tenure**—*Consent of zamindar or talukhdar. Quœre:* Whether a transfer of a raiyatwari tenure can be effected without the consent of the zamindar or talukhdar, as the case might be, the immediate successor in estate. SHIBESSUREE DEBIA *v.* MOTHOORANATH ACHARJEE **13 W. R. P. C. 18 : 13 Moo. I. A. 270**

6. ——— **Mukaddami tenure**—*Landholder and tenant—Nature of Mukaddami tenure considered.* In the absence of any special evidence to the contrary, the fact of a person holding land under what is known as a "*mukaddami*" tenure does not imply that the *mukaddam* has any heritable or transferable interest in the tenement. BHAGWATI PRASAD *v.* HANUMAN PRASAD SINGH (1900) . . . . **I. L. R. 23 All. 67**

TENURE-HOLDER.

See BABUANA GRANT. . **13 C. W. N. 118**

TERM OF YEAR

See ENGLISH LAW—PERSONALTY, LAW RELATING TO . **I. L. R. 24 Calc. 216**

TERRITORIAL JURISDICTION.

——— effect of cession on—

See CESSION OF BRITISH TERRITORY IN INDIA . . **I. L. R. 1 Bom. 367**
L. R. 3 I. A. 102
10 Bom. 37

TERRITORIAL LAW OF BRITISH INDIA.

——— Nature of territorial law—*English law.* The territorial law of British India is a modified form of English law. SECRETARY OF STATE *v.* ADMINISTRATOR-GENERAL OF BENGAL. **1 B. L. R. O. C. 87**

TERRITORY, TRANSFER OF—

——— **District of Kanara**—*16 & 17 Vict., c. 95; 21 & 22 Vict., c. 106—Indian Councils Act, 24 & 25 Vict., c. 67.* The power given by 16 & 17 Vict., c. 95, to alter the distribution of territories among the presidencies, was vested by 21 & 22 Vict., c. 106, in the Secretary of State for India, by whose order of 28th of February 1862 North Kanara was annexed, the new arrangement of territory to take effect from such date as the Governor-General of India in Council should by proclamation appoint for the purposes of the Councils Act, 1861, which Act has reference solely to the constitution

TERRITORY, TRANSFER OF—*concld.*

and functions of the Legislative Councils, and does not purport to effect in any way the exercise of the general powers of Government, or the administration of justice, and the jurisdiction and authority of the Courts of Justice, the annexation of those purposes being made by the Secretary of State, and not being qualified or controlled by the proviso in s. 47 of 24 & 25 Vict., c. 67, which cannot be construed as a substantive enactment, or as qualifying or restraining the power vested in the Secretary of State. REG. *v.* VYANKATSVAMI **2 Bom. 112 : 2nd Ed. 106**

TEST CASE.

See PRACTICE—CIVIL CASES—TEST CASE.

TESTAMENTARY CAPACITY.

See WILL . **13 C. W. N. 1128**
See WILL—EXECUTION.

TESTATOR.

See COSTS—SPECIAL CASES—ATTORNEY AND CLIENT . **6 C. W. N. 306**
See HINDU LAW—WILL.
See MAHOMEDAN LAW—WILL.
See WILL.

——— acknowledgment of signature by—

See WILL—ATTESTATION.
I. L. R. 1 Bom. 547

——— creditor of—

See PROBATE—OPPOSITION TO, AND REVOCATION OF, GRANT.
I. L. R. 2 Calc. 208
I. L. R. 6 Calc. 429 ; 460
I. L. R. 10 Calc. 19, 413
L. R. 10 I. A. 80
I. L. R. 19 Calc. 48
I. L. R. 17 Mad. 373

——— debts of Hindu—

See VENDOR AND PURCHASER—NOTICE.
I. L. R. 4 Calc. 897

——— power of—

See HINDU LAW—WILL—POWER OF DISPOSITION.
See MAHOMEDAN LAW—WILL.

——— signature of—

See WILL—EXECUTION.

TEXTS.

——— construction of—*Hindu law—Marriage—Asura form—Brahma form.* It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes. CHUNILAL *v.* SURAJRAM (1909) . **I. L. R. 33 Bom. 433**

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TEZI-MANDI CHITTIS

See CONTRACT—WAGERING CONTRACTS.
4 Moo. I. A. 339
5 Moo. I. A. 109
6 Moo. I. A. 251

——— **Principal and agent**—*Gambling Act (XXI of 1848).* Where the plaintiff had expended money at the request of the defendant in the purchase or settlement of tezi-mandi chittis:—*Held*, he was entitled to recover notwithstanding Act XXI of 1848. KANAYALAL *v.* CHAGMAL BATTIA . . . 8 B. L. R. 412
BHAIRABNATH KHETTRI *v.* JUMANRAM DHANDARIA . . . . 8 B. L. R. 415 note

THAKBUST AWARD.

See ACT XIII OF 1848.
2 B. L. R. P. C. 111: 12 W. R. P. C. 6

THAK MAP.

1. ——— **Thak and Revenue-Survey Maps, evidentiary value of**—*Statement recorded in the presence of parties, effect of.* In a dispute, whether certain land belonged to the estate of the plaintiff or to that of the defendant, the plaintiff produced *thakbust* as also survey maps of the year 1852-53; the *thakbust* map contained a statement, which supported the plaintiff's case. The predecessor of the appellant defendant had full notice of the *thak* proceedings, and he objected to the boundary lines as laid between his and the plaintiff's estate, but the objection was disallowed. The defendant produced a survey map of 1855-56 of the district, which contained his estate, in support of his case, but he did not produce any *thakbust* map of the same year, and there was no evidence to support the accuracy of the survey map. *Held*, that the evidentiary value of the *thakbust* map, and the survey map produced on behalf of the plaintiff, was greater than that of the survey map produced on behalf of the defendant. *Jagadindra Nath Roy* v. *Secretary of State for India, I. L. R. 30 Calc. 291; L. R. 30 I. A. 44; Syama Sundri Dassya* v. *Jagobundhu Sooter, I. L. R. 16 Calc. 186*, and *Nobo Coomer Dass* v. *Gobind Chunder Roy, 9. C. L. R. 305*, referred to. DUNNE *v.* DHARANI KANTA LAHIRI (1908)
I. L. R. 35 Calc. 621

2. ——— *Estate—Lands.* Because certain lands are shown in the *thak* map as comprised in a certain estate that ought not to be taken as conclusive evidence that the lands are a part of that estate. GOPAL CHANDRA DAS *v.* HARA SUNDARI DASI (1905) . 9 C. W. N. 383

THEATRE.

See BOMBAY CITY MUNICIPAL ACT, s. 249.
I. L. R. 30 Bom. 392

——— **Place of public resort**—*City of Bombay Municipal Act (Bombay Act III of 1888), s. 249.* A theatre is a place of pubilc resort and as such falls within the purview of s. 144 of the City of Bombay Municipal Act (Bombay Act III of 1888). EMPEROR *v.* DWARKADAS (1905) . . . I. L. R. 30 Bom. 392

THEFT.

See CATTLE TRESPASS ACT, s. 22.
I. L. R. 22 Calc. 139

See CHARGE—ALTERATION, OR AMENDMENT OF CHARGE.
I. L. R. 17 Bom. 369
I. L. R. 27 Calc. 660; 990

See CRIMINAL PROCEDURE CODE, ss. 233, 239 . . I. L. R. 29 Bom. 449

See PARTNERSHIP PROPERTY.
13 B. L. R. 307, 308 note, 310 note

See PENAL CODE, ss. 378 TO 382.

See POST OFFICE ACT, s. 48.
I. L. R. 14 Mad. 229

See STOLEN PROPERTY.

——— **committed outside jurisdiction.**

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—RECEIVING STOLEN PROPERTY.

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—THEFT.

——— **damages for—**

See HINDU LAW—JOINT FAMILY—SALE OF JOINT FAMILY PROPERTY IN EXECUTION OF DECREE, ETC.
I. L. R. 24 Calc. 672

——— **if continuing offence—**

See RESCUE FROM LAWFUL CUSTODY.
I. L. R. 35 Calc. 361

——— **suspicion of—**

See FOREST ACT, ss. 52, 73.
I. L. R. 15 Bom. 229

1. ——— **Penal Code, s. 378—Definition of theft.** As to what constitutes theft as defined in the Penal Code. QUEEN *v.* MADAREE
3 W. R. Cr. 2

2. ——— *Moving property and severing it.* The moving by the same act which effects the severance may constitute a theft. ANONYMOUS . . . . . 5 Mad. Ap. 36

3. ——— *Removal of property against wish of ostensible purchaser thereof—Apparent title or colour of right to property.* To constitute theft, it is sufficient if property is removed against his wish from the custody of a person who has an apparent title or even a colour of right to such property. *Cape* v. *Scott, L. R. 2 Q. B. 269*, followed. QUEEN-EMPRESS *v.* GANGARAM SANTRAM
I. L. R. 9 Bom. 135

4. ——— **Giving up right of possession in property by owner.** A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the subject of the alleged theft. ANONYMOUS
4 Mad. Ap. 30

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THEFT—*contd.*

5. ——— **Making away with property lawfully possessed.** The making away with property of which a person has been put in lawful possession by superior authority is not theft, but criminal breach of trust. QUEEN *v.* BHARUT CHUNDER . . . **1 W. R. Cr. 2**

6. ——— **Unexplained possession of rice**—*Meaning of corpus delicti.* Where a prisoner was found in possession of rice not thrashed in the usual way, and having no paddy land of his own he failed to account satisfactorily for his possession of the rice:—*Held*, that he could not be convicted of theft without more evidence. The meaning of the term "*corpus delicti*" explained. ANONYMOUS . . . . **7 Mad. Ap. 19**

7. ——— **Dishonest taking, omission of allegation of.** The prisoner was convicted of theft on his own confession. The charge to which the prisoner pleaded did not allege the taking out of the possession of some person dishonestly and there was no evidence of such taking. *Held*, that the conviction was bad. ANONYMOUS **5 Mad. Ap. 37**

8. ——— **Theft of joint property by co-parcener.** Theft of joint property may be committed by a co-parcener if he takes it from joint possession and converts such possession into separate possession. QUEEN-EMPRESS *v.* PONNURANGAM . . **I. L. R. 10 Mad. 186**

9. ——— *Abetment of theft—Receiving stolen property—Joint undivided Hindu family.* A Hindu, intending to separate himself from his family, emigrated to Demerara as a coolie. After an absence of thirty years, he returned to his family, bringing with him money and other moveable property which he had acquired in Demerara by manual labour as a coolie. On his return to his family, he lived in commensality with it, but he did not treat such property as joint family property, but as his own property. *Held*, that such property was his sole property, and his brother was not a joint owner of it, and could properly be convicted of theft in respect of it. It is irregular to convict and punish a person for abetment of theft, and at the same time to convict and punish him for receiving the stolen property. EMPRESS *v.* SITA RAM RAI . **I. L. R. 3 All. 181**

10. ——— **Bonâ fide belief as to title**—*Dispute as to possession of land—Cutting and carrying away crops sown by another—Facts constituting theft—Dishonest intention—Code of Criminal Procedure (Act V of 1898), ss. 429 and 439.* An accused person alleged and claimed that certain paddy was grown upon his jote, and that he cut and removed it as a matter of right and in an assertion of a *bonâ fide* claim to the land. It was admitted by the complainant who also claimed the paddy and the land, that there had been a boundary dispute between his landlord and the landlord of the accused. The accused was convicted in a summary trial of the theft of the paddy. In an application for revision and to set aside the conviction:—*Held per* PRINSEP, *J.*, declining to interfere, that, if the complainant's bargadars had grown the crops as found and nevertheless the accused cut and carried them off, there could be no *bonâ fide* belief that he was entitled to do so, to justify his action in regard to the complainant. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without justification in thus taking the law into his hands, even if he was entitled to hold the lands, because he was not in actual possession of them. *Per* STEVENS, *J.*, —The findings of the lower Court taken as a whole amounted to a finding that the accused acted *malâ fides*, and the mere fact that he brought some witnesses to speak to his long possession of the land, and the cultivation of the crops by him, could not be taken as showing that a *bonâ fide* dispute as to title existed between the complainant and himself. To constitute theft, it is sufficient if property is removed against his wish from the custody of a person who has an apparent title or even a colour of right to such property. In the present case the complainant had an apparent title as tenant of the land, together with long possession, and he had on the strength of that apparent title and long possession raised the crops which the accused removed. The application should be dismissed. *Queen-Empress* v. *Gangaram Santram, I. L. R. 9 Bom. 135*, referred to. *Per* STANLEY, *J.*,(*contra*).—That the evidence as well for the prosecution as for the defence conclusively established that there was a *bonâ fide* dispute as to the title to the land upon which the paddy was sown. Once this was sown, the criminal charge failed. The fact, if it be the fact, that the paddy was sown by the complainant, would not give him the property in the crop, if it were sown on the land of the accused. If the land was the land of the accused, it was an act of trespass on the part of the complainant and to sow it with paddy, and the complainant had no right to complain if the accused resented his act of aggression by cutting and removing the crop. A dishonest intent is a necessary ingredient in the offence of theft. No such intention has been found on the part of the accused. The conviction and sentence should be set aside. PANDITA *alias* RAHMATULLA PRAMANIK *v.* RAHIMULLA AKUNDO . . **I. L. R. 27 Calc. 501 4 C. W. N. 480**

11. ——— *Cutting and removing crops under claim not to the crop, but to the land on which it was grown—Charge, framing of—Penal Code, ss. 143, 379.* The accused in a body cut and took away certain paddy found by the Court to have been sown by the complainant. At the trial they alleged that the land on which the paddy was grown was theirs, and that the crop was sown by one of their tenants, and not by the complainant. A suit by the complainant's landlord against some of the accused was then pending in a Civil Court. *Held*, that whatever might be the legal claim of the accused in respect of the land on which the paddy was sown, and they had never claimed the crop as belonging to them, they did not

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THEFT—*contd.*

act in good faith believing the crop to be their own property, and were therefore guilty of the offences under ss. 143 and 379. *Abdool Biswas* v. *Khator Mondal, 3 C. W. N. 332*, distinguished. JAGAT CHANDRA ROY *v.* RAKHAL CHANDRA ROY . . . . . **4 C. W. N. 190**

12. ——— **Taking property of husband by a Mahomedan married woman**—*Husband and wife.* A Mahomedan married woman may be convicted of theft, or abetment of theft, in respect of the property of her husband. REG. *v.* KHATABAI . . . **6 Bom. Cr. 9**

13. ——— **Hindu woman removing stridhan from possession of her husband.** A Hindu woman who removes from the possession of her husband, and without his consent, her *palla* or stridhan, cannot be convicted of theft, nor can any person who joins her in removing it be convicted of that offence. REG. *v.* NATHA KALYAN **8 Bom. Cr. 11**

14. ——— **Removal by a wife her husband's property left in her custody.** There is no presumption of law that a wife and husband constitute one person in India for the purposes of Criminal law. If the wife, removing her husband's property, from his house, does so with dishonest intention, she is guilty of theft. QUEEN-EMPRESS *v.* BUTCHI . . . **I. L. R. 17 Mad. 401**

15. ——— **Removal of family jewels by wife and persons coming to commit adultery with her.** Two persons were committed for trial, the first prisoner for adultery, enticing away a married woman, and theft, and the second prisoner for abetment of the enticing away and theft. The first prisoner was acquitted of the charges of adultery and enticing away. The case for the prosecution was that the prosecutor's wife left her husband's house in company with the first prisoner, and that previous to her departure she, by means of false keys, supplied to her by the second prisoner, opened the room where the family jewels and money were kept and removed them. The jewels were deposited with the second prisoner for safe custody. Part of the money was handed to the first prisoner. *Held*, that notwithstanding the acquittal, the prisoners were not entitled to be discharged without trial on the charge of theft. ANONYMOUS . . . . **5 Mad. Ap. 23**

16 ——— **and s. 114—Forcibly carrying off crop**—*Want of consent of owner.* Where a Court finds that parties came with a number of armed men, and carried off a crop, the finding amounts to that of a forcible carrying off without the consent of the owner. Even if they took no part in the actual taking, they must, with reference to s. 114, Penal Code, be considered guilty of the substantive offence under s. 378. QUEEN *v.* SHIB CHUNDER MUNDLE . . **8 W. R. Cr. 59**

17. ——— **Removal of crop under attachment**—*Dishonest intention—Madras Rent Recovery Act, s. 8—Notice of distraint.* Certain crops which had been distrained for arrears of revenue were harvested and removed by the owners and occupiers of the land, who were thereupon charged with theft. The accused were not the defaulters, the demand having been made upon certain other persons in whose names the pottahs stood as the registered proprietors. The accused were acquitted. *Held*, that the acquittal was wrong in the absence of a finding whether or not the accused were aware of the distraint, and dishonestly removed the crops with such knowledge, on the ground that, under s. 8 of the Madras Rent Recovery Act, they were entitled to notice of the distraint which had not been served on them. QUEEN-EMPRESS *v.* RAMASAMI **I. L. R. 16 Mad. 364**

18. ——— **Person acting under ill-founded claim of right.** A person acting under a claim of right (however ill-founded such claim may be) is not guilty of theft by asserting it. QUEEN *v.* RAM CHURN SINGH . **7 W. R. Cr. 57**

19. ——— **Removing a thing with the object of causing trouble to the owner**—*Wrongful loss.* The accused, who was charged by his master with having committed theft of a box, stated that he had removed the box and left it concealed in the cowshed to give a lesson to his master. The Sessions Judge in his charge to the jury said: "If the jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft;" and the jury returned a verdict of guilty finding "that the taking was with the intention of putting the owner to trouble." *Held*, that the above charge and verdict were based on an erroneous view of the law. It cannot be said that removing a thing to put the owner to trouble is necessarily and in every case causing "wrongful loss." NABI BAKSH *v.* QUEEN-EMPRESS **I. L. R. 25 Calc. 416 2 C. W. N. 347**

20. ——— **Dishonest intention**—*Wrongful gain—Wrongful loss.* A charge of theft will lie under s. 378 of the Penal Code (Act XLV of 1860) even where there is no intention to assume entire dominion over the property taken, or to retain it permanently. When a person takes another man's property, believing under a mistake of fact and in ignorance of law that he has a right to take it, he is not guilty of theft, because there is no dishonest intention, even though he may cause wrongful loss within the meaning of the Penal Code. The accused was the brother of a farmer or contractor of a public ferry on the Tadri river. He seized a boat belonging to the complainant while conveying passengers across the creek which flows into the river at a point within three miles from the public ferry. His intention was apparently to compel persons who had to cross the creek to use the ferry in the absence of the complainant's boat, and thereby increase his brother's income derived from fees to be paid by passengers crossing the creek. The accused had no reason to believe that he was justified in seizing the boat. *Held*,

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THEFT—*contd.*

that the accused was guilty of theft, though it was not his intention to convert the boat to his own use, or deprive the complainant permanently of its possession. QUEEN-EMPRESS *v.* NAGAPPA
I. L. R. 15 Bom. 344

21. ——— *Absence of dishonest intent—Cutting paddy under claim of right.* The accused cut and removed paddy from certain land alleging that the land and paddy belonged to his uncle. He cited witnesses in support of his story, and also produced a deed of compromise in support of title. The Magistrate disbelieved the defence witnesses, and found that the land and paddy belonged to the complainant, and that the deed related to other land, but there was nothing in his judgment to show that the petitioner did not *bonâ fide* believe that the paddy belonged to his uncle. *Held*, that the findings did not support the conviction for theft. To constitute the offence, it was necessary that the taking away of the paddy should have been done dishonestly, *i.e.*, with the knowledge that it belonged to the complainant and not to his uncle. ABDOOL BISWAS *v.* KHATER MONDAL . . . . **3 C. W. N. 332**

22. ——— **and s. 143—Unlawful assembly and theft**—*Property in crop grown on another's land on contract to pay latter a certain sum for the crop when grown—Removal of such crop by owner of land.* An indigo planter agreed with some cultivators that the former would grow rice on their land at his own expense and take the whole crop paying them R16 for each bigha. The owners of the land cut and carried away the crop so grown. *Held*, that on the agreement the crop remained the property of the owners of the land which the factory merely agreed to purchase, and that a removal of the crop did not constitute theft, but merely a breach of contract remediable in damages. As the acts did not amount to theft, which was said to be the common object of the accused, conviction for being members of an unlawful assembly could not stand. PARMESHWAR SINGH *v.* EMPRESS . . . . . **4 C. W. N. 345**

23. ——— **Removal of debtor's property by the creditor**—*Penal Code as drafted in 1837, s. 363.* With a view to coerce the complainant to pay a sum of R14, which he owed to the accused, three head of cattle worth R60 were removed from the complainant's homestead under the order of the accused. *Held*, that the offence of theft was not committed by the accused. The illustration of s. 378 of the Penal Code indicate that it was the intention of the Legislature that, in order to have committed theft within the meaning of the section, the taker must have taken the thing with intention of keeping it himself, or disposing of it for his own benefit or in some way which would compel the owner to pay him money which he did not owe him in order to regain his property. The words "in order to take dishonestly any moveable property" in the above section, read with s. 23 and s. 24 of the Penal Code, mean "with the intention of gaining by unlawful means property to which he is not legally entitled." "To gain property

THEFT—*contd.*

by unlawful means" means "to gain the thing moved for the use of the gainer," and not "the gaining possession of it for a time for a temporary purpose." S. 163 of the Penal Code as drafted in 1837 discussed. PROSONNO KUMAR PATRA *v.* UDOY SANT . . **I. L. R. 22 Calc. 669**

24. ——— *Removal of debtor's property by creditor to enforce payment of debt—Wrongful gain—Wrongful loss.* A creditor, by taking any moveable property of his debtor from the debtor's possession or without his consent, with the intention of coercing him to pay his debt, commits the offence of theft as defined in s. 378 of the Penal Code. Ss. 23 and 24 of the Penal Code discussed and explained. *Prosonno Kumar Patra* v. *Udoy Sant, I. L. R. 22 Calc. 669*, overruled. QUEEN-EMPRESS *v.* SRI CHURN CHUNGO . . . **I. L. R. 22 Calc. 1017**

25. ——— *Removal by creditor of his debtor's property with a view to obtaining payment of his debt. Held*, that the removal by a creditor against the will of his debtor of property belonging to such debtor, with the view of compelling such debtor to discharge his debt, amounts to theft within the meaning of s. 379 of the Penal Code. *Queen-Empress* v. *Surmeshar Bai, All. Weekly Notes (1888), 97*, referred to. *Prosonno Kumar Patra* v. *Udoy Sant, I. L. R. 22 Calc. 669*, dissented from. QUEEN-EMPRESS *v.* AGHA MUHAMMAD YUSUF . . **I. L. R. 18 All. 88**

26. ——— **Assertion of right by accused**—*Defence to charge of theft.* A bare assertion by an accused charged with committing theft of a proprietary right in the alleged stolen property is no reason for a Magistrate to refuse to entertain a charge of theft. QUEEN *v.* KALICHARAN MISSER . . **7 B. L. R. Ap. 55**

S. C. RUNNOO SINGH *v.* KALI CHURN MISSER.
16 W. R. Cr. 18

See KHETTER NATH DUTT *v.* INDRO JALIA.
16 W. R. Cr. 78

HURIS CHUNDRA DAS *v.* BOLAI AUDHICAREE.
16 W. R. Cr. 75

27. ——— *Plunder of crops—Assertion of right to crops.* The mere assertion of a fair claim of property or right, or the mere existence of a doubt as to right, is not sufficient to justify an acquittal in a case of plunder of crops. The claim to the property must be proved by evidence to be fair and good. NASSIB CHOWDRY *v.* NANNOO CHOWDHRY . . **15 W. R. Cr. 47**

28. ——— **and s. 442—Boat—Moveable property.** A boat may be the subject of theft. Although, under s. 422 of the Penal Code, it is for certain purposes classed with houses, it does not cease to be moveable property under s. 378. QUEEN *v.* MEHAR DOWALIA **16 W. R. Cr. 63**

29. ——— *Intention to convert to his own use, want of—Temporary use.* When an accused charged with murder was alleged to have taken a boat from the place where it had

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THEFT—*contd.*

been secured by its owner, and after proceeding some distance in it had abandoned it, and when he was charged with the theft of the boat:—*Held*, that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping. ADU SHIKDAR *v.* QUEEN-EMPRESS . . . **I. L. R. 11 Calc. 635**

30. ——— **Property removed with criminal intent, but with consent of owner.** *A* sought the aid of *B* with the intention of committing a theft of the property of *B's* master. *B* with the knowledge and consent of his master, and for the purpose of procuring *A's* punishment, aided *A* in carrying out his object. On the prosecution of *A* for theft:—*Held*, that as the property removed was so taken with the knowledge of the owner, the offence of theft had not been committed. EMPRESS *v.* TROYLUKHONATH CHOWDHRY **I. L. R. 4 Calc. 366: 3 C. L. R. 525**

31. ——— **Possession of wood by Forest Inspector**—*Removal of wood without payment of fees.* Possession of wood by a Forest Inspector, who is a servant of Government, is possession of the Government itself; and a dishonest removal of it, without payment of the necessary fees, from his possession, albeit with his actual consent, constitutes theft within the meaning of s. 378 of the Penal Code, if that consent was unauthorised or fraudulent. REG. *v.* HANMANTA **I. L. R. 1 Bom. 610**

32. ——— **Earth—Moveable property.** Earth, that is, soil, and all the component parts of the soil, inclusive of stones and minerals when severed from the earth or land to which it was attached, is moveable property capable of being the subject of theft. Whoever dishonesty severs such earth from the earth commits theft. Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land:—*Held*, that he was guilty of theft. *Queen-Empress* v. *Kotayya*, *I. L. R. 10 Mad. 255*, dissented from. QUEEN-EMPRESS *v.* SHIVRAM **I. L. R. 15 Bom. 702**

33. ——— *Moveable property.* *A* dug up and immediately carried away without any authority or right several cart-loads of earth, part of unassessed lands of a village. *Held*, that *A* was not guilty of theft. QUEEN EMPRESS *v.* KOTAYYA . **I. L. R. 10 Mad. 255**

34. ——— **and s. 95—Valueless produce**—*Property almost valueless.* Conviction and sentence by a Magistrate reversed, as the act of which the accused was convicted—taking pods (almost valueless) from a tree standing upon Government waste ground—came within the meaning of s. 95 of the Penal Code, and did not therefore amount to theft. REG. *v.* KASYA BIN RAVJI . . . . . **5 Bom. Cr. 35**

35. ——— **Retaining possession of nets of poachers.** The prisoner, acting *bonâ fide* in the interest of his employers and finding a party of fishermen poaching on his master's fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers. *Held*, that the prisoner was not guilty of theft. QUEEN *v.* NOBIN CHUNDER HOLDAR **6 W. R. Cr. 79**

36. ——— **Taking fish in navigable river.** The taking fish in that portion of a navigable river over which a right of julkur exists in another person does not fall within s. 378 of the Penal Code. HURI MOTI MODDOCK *v.* DENO NATH MALO . . . **19 W. R. Cr. 47**

BHUSUN PARUI *v.* DENONATH BANERJEE **20 W. R. Cr. 15**

37. ——— **Taking fish from creek.** The wrongful taking of fish from a creek is not theft. QUEEN *v.* REVU POTHADU **I. L. R. 5 Mad. 390**

38. ——— **Fishery right, infringement of**—*Fishing in tank connected with a running stream—Criminal trespass.* Accused were charged with having taken fish from a tank belonging to the complainant, and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not enclosed on all sides, and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish; that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high and the tank was connected with the streams, so that the fish could leave it at pleasure. *Held*, that the fish were *feræ naturæ* and not in "the possession of" the complainant, and consequently no offence had been committed. *Held*, further, that, had the fish been taken at a time when they were restrained of their natural liberty, and were liable to be taken at the pleasure of the owner of the tank, the conviction would have been upheld. *In the matter of the petition of Madhab Hari*, *I. L. R. 15 Calc. 390*, distinguished. MAYA RAM SURMA *v.* NICHALA KATANI . . . **I. L. R. 15 Calc. 402**

39. ——— **and ss. 143, 404, 426 and 447**—*Infringement of exclusive right of fishery in public river—Criminal misappropriation—Mischief—Criminal trespass—Unlawful assembly.* Fish in a public river cannot be said to be property in the possession of the person who may have the fishery right, and the infringement of that right is not theft under s. 378 of the Indian Penal Code. The accused were charged with unlawfully taking fish along with some eleven others in a public river, the right of fishing in which had been let out by the Government to the complainant, and the lower Court, amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass, and unlawful assembly. *Held*, that the conviction was wrong, and that no offence had been committed. BHAGIRAM DOME *v.* ABAR DOME **I. L. R. 15 Calc. 388**

In the matter of the petition of MADHAB HARI **I. L. R. 15 Calc. 398 note**

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THEFT—*contd.*

(*Contra*) MADHOO MUNDLE *v.* UMESH PARNI. **I. L. R. 15 Calc. 392 note**

40. ——— s. 379—*Possession—Fish in an enclosed tank.* Where the accused were found fishing without permission in an enclosed tank belonging to the Municipality of the town of Sirsi, it was *held* that they could be convicted of theft, as the tank from which the fish were taken was apparently an enclosed tank, and the fish were therefore restrained of their natural liberty, and liable to be taken at any time according to the pleasure of the owner, and were therefore subjects of theft. *Bhusun Parui* v. *Denonath Banerjee, 20 W. R. Cr. 15* and *Queen* v. *Revu Pothadu, I. L. R. 5 Mad. 390*, distinguished. QUEEN-EMPRESS *v.* ADAM valad SHAIK FARID **I. L. R. 10 Bom. 193**

41. ——— and ss. 206, 403, 424—Harvesting crops under attachment. A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force, and was convicted of theft. *Held*, that the accused was not guilty of theft, but of the offence of dishonestly removing the property under Penal Code, s. 424. *Per* BENSON, *C.J.*—The offence was also criminal misappropriation within the meaning of Indian Penal Code, s. 403. QUEEN-EMPRESS *v.* OBAYYA **I. L. R. 22 Mad. 151**

42. ——— and ss. 403, 425—Brahmini bull—*Criminal misappropriation—Mischief—Taking bull set at large at Sradha festival in accordance with Hindu religious usage—Res nullius—Property in Brahmini bull.* A bull dedicated and set at large at the Sradha of a Hindu in accordance with religious usage is not "moveable property" within the meaning of ss. 378 and 403, or "property" within the meaning of s. 425 of the Penal Code, and could not therefore be the subject of theft, criminal misappropriation, or mischief. The fact that such a bull receives some attention from the cowherd of the persons who set it at liberty and is daily fed by him by direction of his employers, and is not used for breeding purposes without their permission being asked, is not inconsistent with a total surrender by those who set it at liberty of all their rights as proprietors. *Queen-Empress* v. *Bandhu, I. L. R. 8 All. 51*, followed. *Queen-Empress* v. *Nalla, I. L. R. 11 Mad. 45*, referred to and commented on. ROMESH CHUNDER SANNYAL *v.* HIRU MONDAL **I. L. R. 17 Calc. 852**

43. ——— Illegal seizure and impounding of cattle. The illegal seizure and impounding of cattle is not theft within the meaning of the Penal Code, even if effected with the malicious intent of subjecting the owners to additional expense, inconvenience, and annoyance. ARADHUN MUNDUL *v* MYAN KHAN TAKADGEER **24 W. R. Cr. 7**

44. ——— Removal of salt naturally formed—*Bombay Salt Acts (XXVII of 1837 and XXXI of 1850).* Dishonest removal of salt naturally formed in a creek which was under the supervision of an officer belonging to the Customs

THEFT—*contd.*

Department constitutes theft, the salt having been legally appropriated by such officer. *Per* BAYLE, and WEST, *JJ.*—But removal for one's own use from a creek of such salt not legally appropriated constitutes no offence under the Penal Code or the Salt Acts, though the salt becomes liable to detention. REG. *v.* MANSANG BHAVSANG . **10 Bom. 74**

45. ——— *Taking salt from swamp surrounded by police—Possession.* A swamp, the property of Government, having been surrounded with police guards by Government to prevent salt being removed:—*Held*, that the taking against the will of Government, and with the intention of obtaining an unlawful gain, of salt which had been spontaneously produced on the swamp was theft. QUEEN *v.* TAMMA GHANTAYA . . . . **I. L. R. 4 Mad. 228**

46. ——— and s. 204—Secreting document produced before arbitrator—*Intention—Remoteness of object.* Where the plaintiff in a suit referred to arbitration by consent, with a view to prevent a witness from referring to an endorsement on a bond (which tended to show that defendant had paid more than it was alleged had been paid by him), snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it:—*Held*, that the offence committed was not theft, but secreting a document under s. 204 of the Penal Code. SUBRAMANIA GHANAPATI *v.* QUEEN **I. L. R. 3 Mad. 261**

47. ——— s. 380—Theft in a building—*Requisites for offence.* All that is necessary in order to constitute the offence of theft in a building is that the property should be under the protection of the building: it is not necessary to show unlawful entrance into the building. QUEEN *v.* ISHREE PERSHAD . . **24 W. R. Cr. 46**

48. ——— and s. 409—Constables taking property from house under their charge. Theft by constables of property from the house they were employed to gaurd is punishable under s. 380, and not s. 409, Penal Code. QUEEN *v* BOIDNATH SINGH . . . . . **3 W. R. Cr. 29**

49. ——— s. 381—Theft by hired boatman—*Theft by servant*—A hired boatman does not come within the definition of a clerk or servant under s. 381 of the Penal Code. Theft by such a person on board a boat comes under s. 380. QUEEN *v.* BAWOOL MANJEE **8 W. R. Cr. 32**

50. ——— ss. 381, 409—Stealing money in accused's charge—*Criminal breach of trust.* The prisoners were charged with having stolen a sum of money shut up in a box and placed in the police treasury buildings, over which they, as barkundauzes, were placed on guard. *Held*, that the charge should have been made under s. 381 of the Penal Code (theft by servant in possession of property), and not under s. 409 (criminal breach of trust by public servant). QUEEN *v.* JUGGURNATH SINGH . . . . . **2 W. R. Cr. 55**

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THEFT—*contd.*

51. ——— s. 401—Belonging to a gang of persons associated for the purpose of habitually committing theft—*Evidence of bad character—Evidence Act (I of 1872), s. 14 and s. 54 as amended by Act III of 1891.* The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, punishable under s. 401 of the Indian Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting melas together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses :—*Held*, that they could not be convicted under s. 401 of the Penal Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft. MANKURA PASI *v.* QUEEN-EMPRESS . . . I. L. R. 27 Calc. 139

DWARKA BUNIA *v.* EMPRESS . 4 C. W. N. 97

52. ——— Corpse—*Penal Code (Act XLV of 1860), s. 378—Human body not capable of being the subject of theft. Held*, that a human body, whether living or dead (except, perhaps, bodies, or portions thereof, or mummies, preserved in museums or scientific institutions), cannot be the subject of theft, as defined in s. 378 of the Indian Penal Code. EMPEROR *v.* RAMADHIN (1902) . . . . I. L. R. 25 All. 129

53. ——— Fish—*Penal Code (Act XLV of 1860), 379 s. —Removal of a fish from an ordinary irrigation tank—Charge of theft—Maintainability of charge.* Fish in an ordinary irrigation tank are not in the possession of any person, so as to be capable of being the subject of theft. Nor does the removal of such fish constitute any other offence, *Queen* v. *Revu Pothadu, I. L. R. 5 Mad. 391n.* and *Bhagiram Dome* v. *Abar Dome, I. L. R. 15 Calc. 388*, referred to. SUBBA REDDI *v.* MUNSHOOR ALI SAHEB (1900) . I. L. R. 24 Mad. 81

54. ——— Theft from a railway van—*Penal Code—(Act XLV of 1860), s. 380—Theft from a railway van—Property found in an adjoining van in which four railway coolies were travelling—Evidence.* On suspicion of theft of certain articles from a running goods train, a van on the train, in which four railway coolies were travelling, was searched. The property missed was not found, but, hidden under a heap of clothing belonging to the four coolies, were discovered 10 *thans* of cloth, which, on investigation, were ascertained to have been abstracted from the next van. *Held*, that none of the four coolies travelling in the van where the 10 *thans* of stolen property were found could be convicted of the theft of the cloth, in the absence of evidence to connect one or more of them individually with the possession of the cloth. KING-EMPEROR *v.* ALI HUSAIN (1901) I. L. R. 23 All. 303

THEFT—*concld.*

55. ——— Cutting embankment of channel and diverting running water—*Mischief—Penal Code (Act XLV of 1860), ss. 379, 430.* Where the accused cut the embankment of a *pyne* and drew the water to their own lands and were convicted of theft and mischief under ss. 379 and 430 of the Penal Code :—*Held*, that running water not reduced into possession could not be the subject of theft. *Per* GEIDT, *J.* (WOODROFFE, *J.*, *dubitante*), that the cutting of the embankment constituted an offence under s. 430 of the Penal Code. *Ferens* v. *O'Brien, 11 Q. B. D. 21*, distinguished. EMPEROR *v.* SHEIK ARIF (1908) I. L. R. 35 Calc. 437

56. ——— Entrustment of land with standing crops—Cutting and disposing of the Crops—*Criminal Breach of Trust—Moveable or Immoveable Property—Penal Code (Act XLV of 1860), ss. 379, 405.* Where certain land on which there was a standing crop of paddy was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who would reap it :—*Held*, that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust. *Jugdown Sinha* v. *Queen-Empress, I. L. R. 23 Calc. 372*, and *Reg.* v. *Girdhar Dharmdas, 6 Bom. H. C. 33*, distinguished. *Queen-Empress* v. *Bhagu, Ratanlal's Unrep. Cr. C. 928*, followed. DURGA TEWARI *v.* EMPEROR (1909) I. L. R. 36 Calc. 758

THEKADAR.

See TICCADAR.

1. ——— Meaning of term. The term "thekadar" is properly applicable to hereditary cultivators only when they have also a theka or lease of a share in, or the whole of, the profits of an estate. BAIJ NATH *v.* MUNGLEE . 2 N. W. 411

2. ——— Mode of creation of thekadar's interest—*Effect of accepting theka.* A thekadar is ordinarily a person who holds a theka or lease of the whole of a zamindar's interest in a village. There is nothing in the law which renders a writing necessary to the creation of such an interest. It is not to be inferred from the mere circumstance that persons accepted a theka that they forewent their existing right. LEELA DHUR *v.* BHUGWUNT . . . . 3 N. W. 39

THEORY.

——— of prosecution started before collection of evidence—

See EVIDENCE 13 C. W. N. 622

THIRD APPEAL.

See AGRA TENANCY ACT (II of 1901) I. L. R. 29 All. 69

THIRD CLASS MAGISTRATE.

See WITNESS. I. L. R. 35 Calc. 1093

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THIRD-PARTY PROCEDURE.

See PRACTICE . **I. L. R. 31 Bom. 465**

THREAT.

See ADVOCATE . **I. L. R. 34 Calc. 729**

THUMB IMPRESSIONS.

See CONFESSION. **I. L. R. 32 Calc. 550**

See EVIDENCE—CRIMINAL CASES—THUMB IMPRESSIONS . . **1 C. W. N. 33**

See POLICE OFFICER. **I. L. R. 30 Calc. 97**

1. _____ **Rule in Police Code, effect of**—*Assault to deter public servant from discharge of his duty—Right of private defence—Penal Code (Act XLVI of 1860), ss. 99, 351 and 353.* —A rule in the Police Code, to the effect that when any *surveillé* is at home, proof of his presence can be secured by taking a thumb impression on the report, does not impose any obligation on the *surveillé* to give the thumb impression ; and he cannot be forced to do so. Before an act can amount to an assault, under s. 351 of the Penal Code, it is necessary that a gesture or preparation should be made by a person which would cause another to apprehend that the person was about to use criminal force to him then and there. A preparation taken with words which would cause him to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault. Where a *surveillé* on a domiciliary visit being paid to him by a police officer, refused to allow his thumb impression to be taken, and, on the officer attempting to take it, produced a *lathi*, saying he would not allow the impression to be taken, and, if anyone asked for it, he would break his head : *Held*, that the act of the *surveillé* did not amount to an assault, and that his conviction under s. 353 of the Penal Code should be set aside. *Held*, further, that, if his act had in itself amounted to an offence, s. 99 of the Penal Code would apply. BIRBAL KHALIFA *v.* EMPEROR (1902)

I. L. R. 30 Calc. 97 ; s.c. 6 C. W. N. 342

2. _____ **Blurred impressions**—*Expert opinion, grounds of—Judge—Jury—Power of judge to question the Jury—Criminal Procedure Code (Act V of 1898), s. 303.* Where certain thumb impressions were blurred, and many of the characteristic marks, therefore, far from clear, thus rendering it difficult to trace the features enumerated by an expert as showing the identity of the impressions, and the Court could only find a distinct similarity in some respects, *e.g.*, pattern and central core :—*Held*, that the Jury were not wrong in refusing to accept the opinion of the expert. *Per* GEIDT, *J.*—A Jury may decline to accept the opinion of an expert without the corroboration of their own intelligence as to the reasons which guided him to his conclusion with respect to the identity of the impressions. *Per* HENDERSON, *J.*—It is only when it is necessary to ascertain what the verdict really is that s. 303 of the Criminal Procedure Code justifies the Judge in putting questions to the Jury. Where, therefore, on a charge under s. 82 (*c*) of the Registration Act (III of 1877), the verdict was a plain and simple one of not guilty, the Judge was not empowered to ask the Jurors whether they found that the thumb impression on the bond alleged to have been forged was that of the accused. EMPEROR *v.* ABDUL HAMID (1905)

I. L. R. 32 Calc. 759

THUMB IMPRESSIONS—*concld.*

3. _____ **Thumb mark by an accused able to write**—*Signature—General Clauses Act (X of 1897), s. 3, cl. 52—Criminal Procedure Code (Act V of 1898), s. 164.* A thumb mark affixed to a confession by an accused able to write his name is not a " signature " within the meaning of s. 3, cl. 52, of the General Clauses Act, or s. 164 of the Criminal Procedure Code. SADANANDA PAL. *v.* EMPEROR (1905) . . **I. L. R. 32 Calc. 550**

TICCADAR.

See FIRST CHARGE.

I. L. R. 31 Calc. 550

TICKET.

_____ **refusal to produce—**

See RAILWAYS ACT, 1871, s. 2.

I. L. R. 1 Bom. 25

See RAILWAYS ACT, 1879, ss. 17, 31.

I. L. R. 1 Calc. 192

TIDAL RIVER.

See FISHERY . **10 C. W. N. 540**
12 C. W. N. 105 ; 334 ; 559

TILED HUTS.

See SMALL CAUSE COURT, PRESIDENCY TOWNS . **I. L. R. 26 Calc. 778**
I. L. R. 31 Calc. 340

_____ *Calcutta Small Cause Court, jurisdiction of—Execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 278 to 283.* The Calcutta Small Cause Court has jurisdiction to try the question of title in tiled-hut cases, and in executing a decree of another Court transferred to it has the same power as it possesses in regard to its own decrees. All questions arising in execution of a decree under s. 28 of the Presidency Small Cause Courts Act can be decided by the Small Cause Court Court. *Deno Nath Batabyal* v. *Nuffer Chunder Nundy, I. L. R. 26 Calc. 778* and *Deno Nath Batabyal* v. *Audher Chunder Sett, 4 C. W. N. 470*, referred to. GUNAPPUTY ROY AGARWALLA *v.* THAKURDYE THAKURANI (1907)

I. L. R. 34 Calc. 823

TIMBER.

_____ **right to—**

See CUSTOM—EVIDENCE OF CUSTOM **9 W. R. 97**

See TREES . **I. L. R. 24 Bom. 31**

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TIME.

——— application for extension of—

See ARBITRATION ACT, s. 19.
I. L. R. 34 Calc. 443

——— if essence of contract—

See SPECIFIC PERFORMANCE.
11 C. W. N. 946

TIME BARGAIN.

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . I. L. R. 9 Calc. 791

TIPNIS PANSARE RIGHT.

See JURISDICTION.
I. L. R. 33 Bom. 373

TIPPERAH RAJ.

Immoveable property in India, succession to—Jurisdiction of Court in British India—Foreign sovereign State—Act of State—Appointment of Jubraj or immediate successor, contrary to alleged kulachar—Suit for declaration—Right of suit—Contingent interest—Specific Relief Act (I of 1877), s. 42—Negative declaration. Per CURIAM: The Courts in British India have no jurisdiction to decide the question as to who is entitled to succeed to the Raj of a foreign sovereign State. Where a suit was brought ostensibly for a declaration in regard to rights to immoveable property within British territory belonging to a foreign soveriegn, but with the real object of setting aside the appointment by such sovereign of his son as his immediate successor:—*Held*, that the Court had no jurisdiction to go into the question of the validity of such appointment. A person cannot sue for a declaration of his right, unless he has an existing right, and a mere contingent right, which may never ripen into an actual existing right is not sufficient to ground an action for such a declaration. A negative declaration that the defendant had no right on the ground amongst others that the defendant was illegitimate was, in the Court's discretions, refused, especially as the Raja, who was deepy interested in the question, was not made a party the suit having been instituted against the son. *Neel Kristo Deb Burmono* v. *Beer Chunder Thakoor, 12 Moo. I. A. 523*, referred to. *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep Chunder Deb Burmono, I. L. R. 9 Calc. 535*, followed. *Per* DOSS, *J.*—When the question is one of succession to immoveable property on the demise of the owner, the fact that such owner is a foreign sovereign does not deprive the Court of its jurisdiction to decide the question; nor, in deciding such question, is the Court bound merely to register the decree of the foreign sovereign however opposed it may be to the law of the land. An act of state of the foreign sovereign has no operation beyond his own territory. *Quære:* Whether the State in the exercise of its executive functions can settle a question of disputed succession to land forming part of its territory and thereby oust Municipal Courts of their jurisdiction to decide it, without

TIPPERAH RAJ—*concld.*

encroaching upon its legislative functions or derogating from its legislative powers. SAMARENDRA CHANDRA DEB BARMAN *v.* BIRENDRA KISHORE DEB BARMAN (1908) I. L. R. 35 Calc. 777

TITLE.

Col.

1. EVIDENCE AND PROOF OF TITLE—
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8 C. W. N. 248
9 C. W. N. 492

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12 Moo. I. A. 136
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See COURT-FEE—SUCCESSION CERTIFICATE. . I. L. R. 11 Calc. 133; 511

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See JURISDICTION
I. L. R. 32 Calc. 602

See LANDLORD AND TENANT—NATURE OF TENANCY . I. L. R. 28 Calc. 693

See LETTERS PATENT, ART. 12.
I. L. R. 29 Bom. 249

See LIMITATION ACT, 1877, SCH. II, ART. 142 . . . 10 C. W. N. 630

See LIS PENDENS.
I. L. R. 32 Calc. 198

See MORTGAGE . I. L. R. 29 All. 163

See ONUS OF PROOF—POSSESSION AND PROOF OF TITLE.

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I. L. R. 33 Bom. 712

See POSSESSION—EVIDENCE OF TITLE.

See POSSESSION—SUITS FOR POSSESSION.
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See POSSESSION—SUITS FOR POSSESSION—PROOF OF PARTICULAR TITLE.

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I. L. R. 33 Calc. 1101

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TITLE—*contd.*

See SALE IN EXECUTION OF DECREE. I. L. R. 32 Calc. 296

See SALE IN EXECUTION OF DECREE—PURCHASERS TITLE OF.

See VENDOR AND PURCHASER—TITLE.

——— abstract of, not corresponding with original—

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS—RECOVERY OF PURCHASE-MONEY . I. L. R. 30 Calc. 468

——— acknowledgment of—

See LIMITATION ACT, 1877, s. 19 (1871, ART. 148)—ACKNOWLEDGMENT OF OTHER RIGHTS.

——— approval of, by solicitor.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER. I. L. R. 17 Calc. 919

——— decision of Revenue Court as to—

See RES JUDICATA—COMPETENT COURT—REVENUE COURTS.

——— declaration of suit for—

See DECLARATORY DECREE, SUIT FOR.

See ONUS OF PROOF—DECLARATION OF TITLE.

——— denial of—

See CO-SHARER—SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY I. L. R. 28 Calc. 223

See ESTOPPEL—DENIAL OF TITLE.

See LANDLORD AND TENANT. I. L. R. 36 Calc. 927

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT. I. L. R. 12 Bom. 678; I. L. R. 15 Bom. 407; 414 note, 415 note; I. L. R. 17 Bom. 631; I. L. R. 18 Bom. 110; I. L. R. 17 All. 45; I. L. R. 20 Bom. 759; I. L. R. 24 Bom. 426; I. L. R. 34 Calc. 922

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.

——— evidence of—

See POSSESSION—EVIDENCE OF TITLE.

——— extinction of—

See LIMITATION ACT, 1877, s. 28.

See RELINQUISHMENT OF TENURE. I. L. R. 1 Bom. 91; 208

——— inquiry into—

See BENGAL PRIVATE FISHERIES PROTECTION ACT . . 6 C. W. N. 113

TITLE—*contd.*

——— notice of—

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——— proof of—

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See POSSESSION—EVIDENCE OF TITLE.

——— question of—

See APPEAL—NORTH-WEST PROVINCES ACTS . . I. L. R. 1 All. 366; I. L. R. 3 All. 63; I. L. R. 4 All. 237; I. L. R. 9 All 445; I. L. R. 11 All. 328; I. L. R. 13 All 364; I. L. R. 14 All. 500; I. L. R. 18 All. 210

See BENGAL RENT ACT, 1869, s. 27. I. L. R. 8 Calc. 365; I. L. R. 9 Calc. 280; 423; 9 C. L. R. 253; I. L. R. 12 Calc. 606; I. L. R. 14 Calc. 624

See BENGAL RENT ACT, 1869, s. 102.

See BENGAL TENANCY ACT, s. 149. I. L. R. 17 Calc. 829; I. L. R. 14 Calc. 537

See BENGAL TENANCY ACT, SCH. III, ART. 3 . . I. L. R. 16 Calc. 741

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See INSOLVENCY ACT, s. 26. I. L. R. 3 Calc. 434

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See JURISDICTION OF REVENUE COURT—BOMBAY REGULATIONS AND ACTS. I. L. R. 1 Bom. 624

See JURISDICTION OF REVENUE COURT—MADRAS REGULATIONS AND ACTS. I. L. R. 15 Mad. 223; I. L. R. 17 Mad. 140

See JURISDICTION OF REVENUE COURT—N.-W. P. RENT AND REVENUE CASE. W. R. 1864, Act X, 116; 1 W. R. 36; 2 Agra Rev. 9; 3 N. W. 141; I. L. R. 9 Calc. 925

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TITLE—*contd.*

——— question of—*concld.*

See LETTERS OF ADMINISTRATION.
I. L. R. 21 Calc. 344

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION.
I. L. R. 14 Calc. 169

See REGISTRAR OF HIGH COURT—SALE BY REGISTRAR . 5 C. W. N. 593

See RES JUDICATA—
ESTOPPEL BY JUDGMENT.
6 C. W. N. 66

COMPETENT COURT:—
SMALL CAUSE COURT CASES.
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See RESISTANCE OR OBSTRUCTION TO EXECUTION OF DECREE.
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See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—TITLE, QUESTION OF.

See SMALL CAUSE COURT PRESIDENCY TOWNS—JURISDICTION—IMMOVEABLE-PROPERTY.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURTS SUITS—TITLE, QUESTION OF.

——— slander of—

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.
I. L. R. 1 Mad. 65

——— warranty of—

See SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF—GENERALLY.
4 Bom. A. C. 111
6 Bom. A. C. 258
12 W. R. 41
I. L. R. 2 All. 108; 828

See VENDOR AND PURCHASER.

1. EVIDENCE AND PROOF OF TITLE.

(a) GANERALLY.

1. ——— **Evidence of title**—*Oral evidence.* Where the Principal Sudder Ameen, reversing the decision of the Munsif, dismissed a claim to the possession of certain land, on the ground that "mere oral evidence unsupported by any documentary evidence was not admissible to establish a man's title to landed property," the High Court on appeal reversed his decision, and *held* that oral evidence, if believed, may be as good for proving a man's title as documentary evidence. DURBAN FAKEER *v.* NOBINCHANDRA MAZUMDAR
1 B. L. R. S. N. 16: 10 W. R. 217

2. ——— *Documentary evidence in India.* The presumption in favour of the genuineness of documents offered in evidence in

TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(a) GENERALLY—*contd.*

India is very weak, but it must not be held that the presumption is in favour of forgery, and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title and a possession consistent with it confirmed by the fact of such possession existing at the time of the commencement of the respondent's title by purchase in 1883, the evidence of extrinsic improbability should be very strong indeed to counterbalance the weight of such testimony. WISE *v.* BHOOBUN MOYEE DEBIA . 3 W. R. P. C. 5: 10 Moo. I. A. 165

3. ——— *Pottah granted by Collector.* A pottah of land in Calcutta granted by the Collector is not a muniment of title, but only evidence of a holding according to a local and fiscal regulation. FREEMAN *v.* FAIRLIE
1 Moo. I. A. 305

4. ——— *Forged documents.* If a party put in evidence in support of his title documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and, if satisfied, adjudicate thereon. SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISHNAN GOPALAR *v.* CHINNA NAYANA CHETTI 15 Moo. I. A. 151

5. ——— *Suit for possession.* In a suit to recover possession of land which both the plaintiff and defendant claimed to have reclaimed from jungle and to have possessed many years, and for which each claimed to have obtained a pottah from Government, the mere fact that the land was included in plaintiff's pottah was held to be insufficient, without going into the facts to ascertain possession, to entitle him to a decree. GOLAM REZA CHOWDHRY *v.* CHANDOO MEAH LUSHKUR . . . . . 15 W. R. 45

6. ——— *Possession—Presumption.* The ordinary presumption that possession goes with the title would be of no avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession on one side opposed by evidence apparently strong also on the other side, the Privy Council held that in estimating the weight due to the evidence on both sides, the presumption might, under the circumstances of the case, be regarded, and that with the aid of it there is stronger probability that the case of the side that had possession was true than that of the party out of possession. RUNJEET RAM PANDAY *v.* GOBERDHUN RAM PANDAY
20 W. R. P. C. 25

7. ——— *Possession—Limitation Act (XV of 1877), Arts. 143, 144—Conflicting evidence of possession—Presumption of title.* Where two adverse parties are each trying to make out a possession of twelve years, and the evidence is conflicting and not conclusive on either

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TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*a*) GENERALLY—*contd.*

side :—*Held*, that the presumption that possession goes with the title must prevail. DHARM SINGH *v.* HUR PERSHAD SINGH . **I. L. R. 12 Calc. 38**

8. ——— It is only when the evidence of possession is strong on both sides and apparently equally balanced that the presumption that possession goes with title should prevail. The principle does not apply when the evidence of possession is equally unworthy of reliance on both sides. *Dharm Singh* v. *Hurpershad Singh, I. L. R. 12 Calc. 38*, explained. THAKUR SINGH *v.* BHOGERAJ SINGH . . . **I. L. R. 27 Calc. 25**

9. ——— *Possession, presumption of—Waste lands.* In disputes as to the right to the possession of jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession. RAM BANDHU *v.* KUSU BHATTU **5 C. L. R. 481**

10. ——— *Suit for possession—Possession of title-deeds and receipts for rent.* In a case involving the alternative question of fact whether certain land belonged to *R* or *C*, neither the one nor the other of the opposite party venturing to state who is opponent was, and the testimoney of the witnesses on this point being doubtful :—*Held*, that *R*, who was in possession of the title-deeds and of the receipts of rent, ought to succeed, unless there was something on the record to countervail such strong evidence. KODA BUKSH KHAN *v.* CHOA . . . **19 W. R. 162**

11. ——— *Suit for declaration of title—Onus probandi—Production of title-deeds.* The plaintiff sued for declation of her title to property of which the defendant was in possession, but of which she produced the title-deeds in favour of herself. *Held*, that the onus was on the defendant to disprove the plaintiff's title, and the defendant was not allowed to raise certain fresh issues ; but the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title-deeds in her favour. SWARNAMAYI RAUR *v.* SRINIBASH KOYAL **6 B. L. R. 144**

12. ——— *Possession—Uninterrupted and undisputed possession.* Uninterrupted and undisputed possession for a long time constitutes sufficient *primâ facie* evidence of title ; but if this possession is admitted to be under an adoption, it will avail nothing if the adoption fails. HAIMUNCHULL SINGH *v.* GUNSHEAM SINGH **5 W. R. P. C. 69**

13. ——— *Suit for possession.* Where, in a suit to recover possession of land, the plaintiff succeeded in proving that he had been in possession up to a recent date, and that he had been forcibly disposed by the defendant, the lower Appellate Court threw upon the defendant the burden of proving his title, and, on his failing to do so, decreed the case : *Held*, that this was a fair inference of title and of a right to be replaced in possession without going further into the title, that is, to the mode of its acquisition. TRILOCHUN GHOSE *v.* KAILAS NATH SIDHANTO BHOWMIK BHUTTACHARJI **3 B. L. R. A. C. 298 : 12 W. R. 175**

14. ——— *Proof of title—Suit for possession.* In a suit to recover possession on the allegation that plaintiff had been illegally ousted, though holding under a lease from defendant, the latter urged that, though plaintiff had been allowed to hold the tenure as a tehsildar or collector of rents, he had never been the ijaradar or farmer in possession. The judge found that the estate was really let out in ijara to the plaintiff by the defendant, who had recovered rents and granted him receipts on account of the ijara mehal :—*Held*, that this was a complete finding in favour of the plaintiff's title, and that it was not necessary for him to sue for the pottah which had been wrongfully denied him by defendant. JOHEEROODDEEN MAHOMED *v.* DABEE PERSHAD SINGH . . . . . **13 W. R. 21**

15. ——— *Proof of title—Evidence of possession.* In a suit to establish title, evidence of plaintiff's possession prior to the summary award under s. 15, Act XIV of 1859, under which he was dispossessed, may be good evidence of his title, and must be considered. BULLUBEE KANT BHUTTACHARJEE *v.* DOORJO DHUN SIKDAR **7 W. R. 89**

16. ——— *Possession—Evidence Act, s. 110—Specific Relief Act, 1877, s. 9.* In a suit for possession, where the plaintiff proved that he had been in possession of the lands in dispute, and that he had been ousted by the defendants who were unable to give any proof of their right so to oust him, or of a superior title :—*Held*, (PRINSEP, *J.*, *dissentient*), that the prior possession of the plaintiff was *primâ facie* evidence of title, and that he was entitled to a decree. *Per* PRINSEP, *J.*—Proof of prior possession and of illegal dispossession are in themselves no evidence of title, except in a possessory suit under the Specific Relief Act (I of 1877). S. 110 of the Evidence Act applies only to actual and present possession, and does no declare generally that possession shall always be *primâ facie* evidence of title. KAWA MANJI *v.* KHOWAZ NUSSIO. . . . **5 C. L. R. 278**

17. ——— *Possession—Lands attached by Government as being disputed lands.* Disputes respecting the boundaries of the zamindaris of Yettiapooram and Ramnad in the district of Madura having led to acts of violence by the raiyats, the Government, in the year 1836, to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially

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TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*a*) GENERALLY—*contd.*

awarded. At and before the time of the Government taking such possession, the zamindar of Yettiapooram was in possession of certain lands adjacent to, and taken as a party of, the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years, no steps having been taken regarding them till the year 1855, when the zamindar of Yettiapooram brought a suit against the Collector of Madura and the zamindar of Ramnand to recover possession of the land so formerly occupied by him, and for the mesne profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either zaminder, it was held by the Courts in India, and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the zamindar of Yettiapooram before and at the time of the attachment by Government was, under the circumstances, evidence of title, and the Government was ordered to restore the lands to him. ZEMINDAR OF RAMNAD *v.* ZEMINDAR OF YETTIAPOORAM
10 Moo. I. A. 47

18. ——— *Proof of possession—Suit for possession.* In a suit to recover possession of two plots as parcels of the plaintiff's ancestral jammai lands, the Court of first instance found that one plot was parcel, but was not satisfied that the other was so also. The lower Appellate Court agreed with the first finding, but further found that there was sufficient evidence of possession to show that both plots were parcels of the jammai:—*Held*, reversing the decision of Field, *J.*, that on second appeal the High Court was not entitled to question the sufficiency of that evidence; and, further, that one plot having been found to be parcel of the jammai, it was sufficient to give evidence of possession and ownership to prove that the other plot was also parcel. *Dadabhai Narsidas* v. *Sub-Collector of Broach, 7 Bom., A. C.* 82, distinguished. BARODA KANTO BEEPARI *v.* JODHISTEER NATH
10 C. L. R. 99

19. ——— *Registration after proclamation—Evidence of assertion of title.* The act of registration after a proclamation under s. 20, Regulation XXXVII of 1793, amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignornace, affords an equally strong presumption of the non-existence of any title on the other. USUDOOLLAH *v.* IMAMAN
5 W. R. P. C. 26: 1 Moo. I. A. 19

20. ——— *Proof of title—Registration in Collector's books.* Registration in the Collector's books is not of itself a proof of title. GOBIND NATH SEIN *v.* GOBIND CHUNDER SEIN
10 W. R. 393

AMEEROONISSA BIBEE *v.* WOOMAROODDEEN MAHOMED CHOWDHRY. . . . **14 W. R. 49**

TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*a*) GENERALLY—*contd.*

21. ——— *Entry in Collector's books—Proof of title.* The Collector's book is kept for purposes of revenue, not for purposes of title, and the fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. FATMA KOM NUBI SAHEB *v.* DARYA SAHEB
10 Bom. 187

COLLECTOR OF POONA *v.* BHAVANRAV BALKRISHNA
10 Bom. 192

SANGAPA MALAPA *v.* BHIMANGOWDA MARIAPA
10 Bom. 194

22. ——— *Entry of name in Collector's book.* The fact of a person's name being entered in Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person. The Collector's book is kept for purposes of revenue, not for purposes of title. *Fatma* v. *Darya Saheb, 10 Bom. 187*, followed. BHAGOJI *v.* BAPUJI
I. L. R. 13 Bom. 75

23. ——— *Co-proprietors—Registration of shares in land.* Registration of land under Bengal Act VII of 1876 is not only no conclusive proof, but no evidence at all, upon the question of title of a proprietor so registered. Such registration does not relieve a plaintiff from the onus of proving his title to land claimed by him. RAM BHUSAN MAHTO *v.* JEBLI MAHTO
I. L. R. 8 Calc. 853

See also SARASWATI DASI *v.* DHANPUT SINGH
I. L. R. 9 Calc. 431: 12 C. L. R. 12

24. ——— *Resumption chittas.* Government resumption chittas, in the absence of the resumption-proceedings, are not conclusive evidence of title as against third persons. *Ram Chunder Rao* v. *Bunsee Dhur Naik, I. L. R. 9 Calc. 741*, followed. DWARKA NATH MISSER *v.* TARITA MOYI DABIA . **I. L. R. 14 Calc. 120**

25. ——— *Dispute as to ownership of property—Trespasser—Onus of proof.* A person sued as a trespasser cannot, without proof of his own right, oust an apparent owner by pointing out some defect in the title of the latter. TULJARAM *v.* BAMANJI KHARSEDJI.
I. L. R. 19 Bom. 828

26. ——— *Possession—Alleged title by adverse possession for more than the period of limitation.* Land bordered by the estate of each of the parties contesting its ownership was registered in the Collectorate as a separate mouzah, as it also was represented to be in revenue survey map of 1856. In a subsequent survey map of 1865 it appeared as being within the limits of the defendants' adjoining talukh. Neither from these maps nor any other documents was there evidence of title in either party, so that possession

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TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*a*) GENERALLY—*contd.*

was all that could be resorted to as the ultimate test of right. The plaintiff relied on limitation. She asserted more than twelve years' adverse possession by having settled tenants on the disputed ground. To entitle her, it was necessary for her, the burden of proof being upon her, to prove that she had held a possession adequate in continuity, in publicity, and in extent of area. Upon all these points her case was deficient, and therefore her claim failed. It was also in evidence, which was the more substantial, that the defendant had occupied during that period a part of the land by tenants; and this, as proof of possession on his part, applied not only to the plots actually tenanted under him, but was contradictory to the whole theory of the plaintiffs' claim. RADHAMONI DEBI *v.* COLLECTOR OF KHULNA . . **I. L. R. 27 Calc. 943**
L. R. 27 I. A. 136
4 C. W. N. 597

27. ——— *Ownership, evidence of—Evidence of titles contested between rival purchasers—Benami transaction—Declaratory decree, suit for.* Under the Land Registration Act (Bengal Act VII of 1876), registration of ownership was refused on the application of two rival purchasers of the same property, and a reference concering them was made to the High Court under s. 55. The one purchaser then sued the other claiming a decree declaratory of this title, under conveyances made to him in 1890 by a Mahomedan widow, since deceased, and by assignees and lessees from her of parts of her interest in the property. He alleged that a hiba-bilewaz, executed by her in 1858 to her son-in-law for no substantial consideration, was nothing more than a benami transfer, after which she had remained the owner with her former title. On that hiba, however, the defence was founded, the defendant averring that it was a real conveyance by the widow, and that through the son-in-law, from whose sons the defendant had purchased the property, the latter had obtained a good title. No actual possession was established by either of the parties. The property had been let in parcels to different tenants. Among other things disputed, it was the subject of conflicting evidence whether leases had been made in the past by the then real owner, or upon assumption of title by the adverse party. The Courts below differed in their conclusion as to which of the parties was entitled to a decree. The Judicial Committee maintained the decision of the Original Court in favour of the plaintiff. NIRMAL CHUNDER BANERJEE *v.* MAHOMED SIDDIK
I. L. R. 26 Calc. 11
L. R. 25 I. A. 225

28. ——— *Survey map—Suit for possession—Ejectment—Evidence of possession and title.* In a suit for possession of certain land as appertaining to a certain estate and for ejectment of the defendant, brought by a purchaser

TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*b*) GENERALLY—*contd.*

at a revenue-sale, the only evidence adduced by the plaintiff was two survey maps of the years 1846-47 and 1865-66. The lower Court gave the plaintiff a decree for only a portion of the land claimed, such portion being included in both of the maps. The remainder of the land claimed was not included in the map of 1846-47. *Held*, that a survey map is evidence of possession at a particular time, *viz.*, the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in each particular case. *Held*, further, that, as the two maps showed that the portion of the land decreed to the plaintiff was in his predecessor's possession at the date of both surveys—that is to say, at two periods with an interval of nearly twenty years between them—they might be sufficient evidence of title, and the decree of the lower Court was correct. *Mohesh Chundra Sen* v. *Juggut Chundra Sen, I. L. R. 5 Calc. 212*, discussed. SYAM LAL SAHU *v.* LUCHMAN CHOWDHRY
I. L. R. 15 Calc. 353

29. ——— *Transfer of property—Surrender of dar-mokurari lease—Formal deed unnecessary.* Where a mokuraridar granted a dar-mokurari lease of part of his holding which was afterwards surrendered for good consideration, ikrarnamas to this effect were executed, but, not being registered, were not receiveable in evidence:—*Held*, that to prove a formal deed of reconveyance was not necessary, the receipt of the money and the relinquishment of possession sufficiently showing what had become of the dar-mokurari interest. IMAMBANDI BEGUM *v.* KAMALESWARI PERSHAD. . . **I. L. R. 14 Calc. 109**
L. R. 13 I. A. 160

30. ——— *Hypothecation—Decree for enforcement of lien—Objection to attachment and sale raised by person not a party to decree—Release of property from attachment—Suit by decree-holder for declaration of right based on decree—Defence based on sale-deed found to be fraudulent—Plaintiff entitled to succeed on basis of his decree without further proof of title.* An objection to the attachment and sale of a house which was advertised for sale in execution of a decree for enforcement of lien was allowed, upon the ground that the objector had purchased the house from the mortgagor, and his purchase was not subject to the decree, to which he was not a party. The decree-holder then brought a suit against the objector, claiming a declaration of his right to recover the amount due under his decree by enforcement of lien against the house, and that the order releasing the property from attachment should be set aside. The Courts below, holding that the deed of the sale set up by the defendant was fraudulent and collusive, decreed the claim. *Held*, that although the defendant was not a party to the decree obtained against the mortgagor, yet, as the basis of his title to claim the property had

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TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*a*) GENERALLY—*contd.*

been found to be a mere nullity, the plaintiff was entitled to succeed on the basis of the decree, which stood unimpeached, without being put to proof of the mortgage-deed as against the defendant. KADIR BAKHSH *v* SALIG RAM **I. L. R. 9 All. 474**

31. ———— *Commission of partition.* Under a commission of partition issued by the Supreme Court, land in Calcutta was apportioned among the members of a family, and the allotments were confirmed by final decree in 1825. In this suit, brought in 1884, the plaintiff claimed through one of the family, a parcel of land, by reference to one of the allotments so made. The defence, which was made by setting up a title, through the widow of him who received the allotment, was not proved; but the correctness of the area allotted was also in dispute, and the Appellate Court excluded part from the decree, made by the first Court for the whole. It appeared to the Judicial Committee that there was no ground for assuming that the members of the family, who were parties to the partition suit, were under any mistake as to the family property, or that there was any error, or want of due care, on the part of the commissioners of partition, whose proceedings had been regular; nor had there been any adverse claim to any part of the allotted land. The first Court's decree was restored. SARODA PROSUNNO PAL *v.* SHAM LAL PAL . . **I. L. R. 19 Calc. 618**
L. R. 19 I. A. 75

32. ———— *Mirasi title—Payment of rent—Presumption.* Continuous payment of rent for about a hundred years held to give rise to a presumption that the tenant held under a mirasi title. BRAJANATH KUNDU CHOWDHRY *v.* LAKHI NARAYAN ADDI **7 B. L. R. 211**

33. ———— *Title confirmed by decree.* Where a proprietary title is affirmed by a decree, the property is not subsequently held under the decree alone, but under the original title. AMRIT KOOER *v.* ROOP KOOER
2 N. W. 459: Agra, F. B. Ed. 1874, 240

33a. ———— **Evidence Act, 1874, s. 32** (*5*)(*6*)—*Title as reversionary heirs—Proof of pedigree—Admission of relationship—Actual reversioners not bound by acts of contingent reversioners. Held,* that the appellant had, in the absence of counter-evidence, sufficiently proved their title, as reversionary heirs to the estate of the deceased, by oral evidence of reputed common descent, admissible under Act I of 1872, s. 32, sub-s. (*5*), and by documentary evidence, that his widow had recoginsed fifty years before suit, under conditions, that her husband's heirs were entitled to succeed her, and that she was not prepared to contest the claim of the appellant's predecessor to be such heirs. Those conditions were not binding on the appellants, who claimed in their own right, and were not bound by contracts made with those through whom they

TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*a*) GENERALLY—*concld.*

traced their descent. BAHADUR SINGH *v.* MOHAR SINGH (1901) . . . **I. L. R. 24 All. 94: L. R. 29 I. A. 1 s.c. 6 C. W. N. 169**

(*b*) LONG POSSESSION.

34. ———— *Title by long possession—Adverse possession—Limitation.* Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer. *Semble:* Such title may be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by possession. GOSSAIN DAS CHUNDER *v.* ISSUR CHUNDER NATH **I. L. R. 3 Calc. 224**

See GOLUCK CHUNDER MASANTA *v.* NUNDO COOMER ROY
I. L. R. 4 Calc. 699: 3 C. L. R. 450

35. ———— *Title by long possession—Adverse possession—Limitation—Grant made by wife during absence of husband.* A wife during the prolonged absence of her husband, who was erroneously supposed to be dead, acting in excess of the limited powers of a wife in possession of her absent husband's property, made a mirasi grant of a portion of her husband's estate. The grantee entered into and remained in possession for upwards of twelve years. *Held,* that the position of the grantee was not that of a lessee, and that his possession (although in its inception an act of trespass against the husband), having continued for upwards of twelve years, had perfected his title to the lands. One who holds possession on behalf of another does not, by mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the statute of limitation. BEJOY CHUNDER BANERJEE *v.* KALLY PROSONNO MOOKERJEE . . . . **I. L. R. 4 Calc. 327**

36. ———— *Declaration of title—Adverse possession—Variation between pleading and proof.* A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues. SHIRO KUMRAI DEBI *v.* GOVIND SHAW TANTI . . . . **I. L. R. 2 Calc. 418**

37. ———— *Suit for declaration of title—Failure to prove stated title—Title by long possession.* In a suit for a declaration of title to a share of landed estate, although the plaintiffs fail to satisfy the Court that their title to the land has been acquired in the way they state, yet if it is admitted that they have been in possession for more than twelve years, the effect of such possession is to extinguish other titles, if these existed, and the plaintiffs ought to have the declaration sought. RAM LOCUHN CHUCKERBUTTY *v.* RAM SOONDER CHUCKERBUTTY **20 W. R. 14**

JUGGUT CHUNDER *v.* BANEE MADHUB BANERJEE . . . **23 W. R. 205**

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TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*contd.*

(*b*) LONG POSSESSION—*contd.*

38. ——— *Proof of title—Possession for period of limitation.* Plaintiff, stating that he was obstructed in the cultivation of certain land which belonged to him, asked that the obstruction be removed and damages granted. The damages were disallowed, but the Civil Judge made a declaration of title in the plaintiff's favour, basing that entitlement on the statute of limitation. *Held*, that, where a man seeks a declaration of a title other than the possession which he has, mere possession for the period of the statute will not justify the declaration, which, allowing it to be made, ought to be based upon a finding of the title alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Accordingly, the lower Appellate Court was required to return a finding on the issue "whether the title asserted by plaintiff is proved." TIRUMALASAMI REDDI *v.* RAMA SAMI REDDI
6 Mad. 420

39. ——— *Presumption arising from possession—Issue as to identity of land re-formed on a site formerly submerged.* In a suit for the possession of a chur formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. This issue was found in favour of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than twelve years, concluded that, at all events, they had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiffs' claim being founded on an original title to the site of the chur, a title denied by the defendants, and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favour of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs. Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held*, that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro*. ANANGAMANJARI CHOWDHRANI *v.* TRIPURA SUNDARI CHOWDHRANI . **I. L. R. 14 Calc. 740**
L. R. 14 I. A. 101

40. ——— *Mokurari maurarasi title, evidence of—Presumption of permanent tenure.* A person claimed to hold a mokurari maurasi title to certain land which was acquired under the Land Acquisition Act, but could produce no pottah of evidence of title, other than certain rent receipts, which showed that he or his predecessors in title had held the land in question for nearly one hundred years at, presumably, a fixed rent, the nature of the tenure not being mentioned in such receipt. *Held*, that the presumption was, in the absence of any evidence to the contrary, that the claimant had a permanent and transferable interest in the tenure and not merely an interest in the nature of a tenancy at will; and that this presumption was strengthened by the fact that his superior landlord, the lakhirajdar had made no attempt to eject him or his predecessors in title during this long period. DUNNE *v.* NOBO KRISHNA MOOKERJEE
I. L. R. 17 Calc. 144

41. ——— *Suit to oust shebait from office—Tenure of office for a period greater than that provided by law of limitation.* The plaintiff, as shebait of a certain Hindu endowment, instituted a suit to set aside certain leases and alienations created by one who had formerly been shebait, but who, it was alleged, had relinquished and abandoned the office on the ground that such leases and alienation were void and not binding on the endowment, and he sought to obtain khas possession of the lands occupied by the defendants under such leases and alienations. Although it was admitted that the plaintiff had held possession as shebait, and managed the property connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality, the defendants put the plaintiff to proof of his title as shebait. The lower Courts found that the plaintiff had failed to prove his title, and, holding that on this ground he had no *locus standi*, dismissed the suit. *Held*, that, as a suit to oust the plaintiff from his office would have been barred by limitation, by reason of his having held the office for a period exceeding that provided by the law of limitation, he had acquired a complete title for the purposes of any litigation connected with the affairs of the endowment, and that the suit had been wrongly dismissed on the ground that the plaintiff had failed to prove his title. JAGAN NATH DAS *v.* BIRBHADRA DAS
I. L. R. 19 Calc. 776

42. ——— *Presumption of title—Onus of proof—Madras Forest Act (Mad. Act V of 1882), s. 6.* Certain land was notified under the Madras Forest Act, 1882, to be constituted a reserved forest. A person, alleging that the jenm title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been escheated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession for the previous sixty years at least, and that the alleged escheat was not proved. *Held*,

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TITLE—*contd.*

1. EVIDENCE AND PROOF OF TITLE—*concld.*

(*b*) LONG POSSESSION.—*concld.*

that the claim should be allowed. Observations on the burden of proof and on the presumption of title arising out of possession. SECRETARY OF STATE FOR INDIA *v.* BAVOTTI HAJI **I. L. R. 15 Mad. 315**

43. ——— **Proof of title**—*Suit for declaration of title—Adverse possession—Case made in plaint.* Where a specific title has been alleged, but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised on the Court of first instance with sufficient clearness to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. KRISHNA CHURN BAISACK *v.* PROTAB CHUNDER SURMA **I. L. R. 7 Calc. 560**

44. ——— *Adverse possession—Unregistered deed of sale.* On the 18th January 1876 plaintiff became purchaser at a Court's sale of the right, title, and interest of *G* and *N* in a shop, and, having been obstructed by defendant in obtaining possession of it, sued to recover it from him. The plaint was filed on the 27th January 1877. Defendant answered that he purchased it from *G* under a deed of sale dated 5th January 1865, and that he had been in possession since that day. The deed of sale was not admitted in evidence for want of registration, but it was found that defendant had been in possession as owner since 5th January 1865. *Held*, that, although the defendant could not prove a title by purchase, it was open to him to establish his title without the aid of the deed of sale ; that his possession of the premises for more than twelve years prior to the institution of the suit was adverse both to *G* and *N*, and that the claim of the plaintiff, who was assignee of their interest, was consequently barred. *Balaram Nemchand* v. *Appa*, *9 Bom. 121*, explained. *Somu Gurrukal* v. *Rangammal*, *7 Mad. 13*, referred to and followed. SAMBHUBHAI KARSANDASS *s.* SHIVLALDASS SADASHIVDASS . . . **I. L. R. 4 Bom. 89**

45. ——— *Long possession—Liability to assessment of revenue.* A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue-free. SECRETARY OF STATE FOR INDIA *v.* RAM UGRAH SINGH . . . **I. L. R. 7 All. 140**

2. MISCELLANEOUS CASES.

1. ——— **Right to raise question of title**—*Boundary dispute—Suit for possession.* In a boundary dispute the title of the plaintiff is not, except under very peculiar circumstances, open to attack ; but when the plaintiff sues for possession of property in the defendant's hands, not as forming part of another estate, but claiming a right thereto under a superior title, then the defendant has a right to call the plaintiff's title in question. RAMCHUNDER BANERJEE *v.* MUDDUNMOHUN TEWAREE . . . . **W. R. 1864, 355**

2. ——— *Suit for possession of land held under superior holders.* The plaintiff sued to recover possession of certain lands said to have been included in a talukh pottah given him by the zamindars, alleging that the defendants were obstructing his possession. For the defence it was averred that these lands fell within a 9 annas share which belonged to one *D*, and that by process of sale they became the right of other parties under whom defendants held as lessees. *Held*, that, notwithstanding the parties to this suit held under a superior landholder, plaintiff was entitled to have his title put in issue and determined. NAGUR CHAND *v.* DOORGA DOSS CHOWDHRY **11 W. R. 137**

See DINOMONEE BANERJEE *v.* GYRUTOOLLAH KHAN **2 W. R. 138**

3. ——— **Onus probandi**—*Proof of title—Suit for confirmation of title and declaratory decree.* When a plaintiff sues for confirmation of possession and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Court. TORAB ALI *v.* MAHOMMED TUKKEE . . **19 W. R. P. C. 1**

4. ——— *Claim under particular title—Presumption.* Where a plaintiff claims not under any general right of inheritance, but expressly under a deed, he must prove that deed ; no legal presumption as to the contents of the deed can arise from a consideration of what the party, through whom he claims, would have been entitled to by the law of inheritance, had there been such a deed. MOOAD MULLICK *v.* BELAT MULLICK . . . . . **9 W. R. 385**

5. ——— *Possession—Proof of the title and possession—Suit for injunction—Hindu law.* *K C*, a Hindu, died in March 1864, possessed among certain other property, of a house, and leaving three sons, *R*, *B*, and *T*. He also left a will, of which he appointed *R* executor, and declared that "the whole of my estate, both real and personal, and the existing shop, you, *R*, are the proprietor of the whole." *R* was directed to furnish the expenses of the household and carry on the shop, and pay for religious observances, etc. The testator then left legacies to his daughters and others, but made no mention of his sons *B* and *T*. *R* applied for probate of the will, and a caveat was entered by *B*, but the opposition was withdrawn on a compromise, and the will was proved ; the compromise, however, was never carried out. In August 1866 *R* died, leaving a

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TITLE—*contd.*

2. MISCELLANEOUS CASES—*contd.*

son, *M*, and his two brothers, *B* and *T*, surviving him, and having made a will appointing *T* executor, and giving him the power of dealing with all the property. *T* applied for probate, but was opposed by *M*; but on 23rd May 1867 probate was granted. On 26th March 1867 *B* and *T* mortgaged a two-thirds share in the house to the defendant, and, on default in payment of the mortgage-debt, the defendant obtained a decree for payment or sale on 6th January 1868. On 17th August 1867 *T* mortgaged the whole house to the plaintiffs to secure payment of money borrowed to carry out *A's* will. The plaintiffs obtained a decree for foreclosure on 15th July 1869, and subsequently a decree for possession. In a suit brought by the plaintiffs in possession alleging that the defendant's mortgage and decree threw a cloud on their title, and that they would be injured by the sale, the plaint prayed that the defendant might be restrained by injunction from proceeding to sale, and his mortgage be brought into Court and cancelled. *Held*, that, to entitle them to relief, they must prove their title as well as their possession, and, on failure to do so, the suit must be dismissed. ROOPLAL KHETTRY *v.* MOHENDRA NATH ROY
10 B. L. R. 271 note

8. ——— **False deed set up in support of rightful claim.** A party is not precluded from succeeding upon a title established by a genuine deed, because he sets up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title. PATTABHIRAMIER *v.* VENCATAROW NAICKEN . **7 B. L. R. P. C. 136 : 15 W. R. 35 13 Moo. I. A. 560**

7. ——— **Transfer of property**—*Relinquishment of dar-mokurari lease—Necessity for conveyance.* Where a dar-mokurari has been granted and then relinquished for valuable consideration to the grantors, no formal reconveyance is necessary to revest the title in the latter. IMAMBANDI BEGUM *v.* KUMLESWARI PERSHAD
I. L. R. 14 Calc. 109. L. R. 13 I. A. 160

8. ——— **Suit for land**—*Specific Relief Act (I of 1877), s. 9—Suit for land, based on title—Claim of title set up in defence—Suit treated by Court partly as summary suit for possession under s. 9 and partly as a suit based on title—Rights of parties to have question of title tried and decided—Practice.* Plaintiff sued to eject defendants from certain land, claiming title to it by purchase, and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession, and set up title in themselves, and alleged that they had long been in possession. The District Judge found that plaintiff had failed to prove a title by purchase, but had shown that he had been disposed otherwise than by due course of law, by defendants, within six months prior to the institution of the suit. He considered that s. 9 of the Specific Relief Act applied, and declared plaintiff entitled to possession, but dismissed the suit in so far as it claimed to have plaintiff's title established. *Held*, that, inasmuch as the suit had not been brought under the special provisions of the Specific Relief Act, but was based on plaintiff's superior title, a claim to title being also set up in defence, the issue concerning title should have been tried. The suit ought to have been treated partly as a suit under s. 9 and partly as based on plaintiff's title. *Ram Harak Rai* v. *Seodihal Joti, I. L. R. 15 All. 384*, not followed. RAMSAMI CHETTI *v.* PARAMAN CHETTI (1901) . . **I. L. R. 25 Mad. 448**

TITLE—*contd.*

2. MISCELLANEOUS CASES.—*contd.*

9. ——— **Occupancy rights**—*Limitation Act (XV of 1877), Sch. II, Art. 139—Claim for more than twelve years by tenants from year to year of permanent occupancy rights, to knowledge of landlord—Determination of lease.* A person who has lawfully come into possession of land as tenant from year to year for a term of years, or as mortgagee, cannot, by setting up, during the continuance of such relation, any title adverse to that of the landlord or mortgagor, as the case may be, inconsistent with the real legal relation between them—and that however notoriously and to the knowledge of the other party—acquire, by the operation of the law of limitation, title as owner, or any other title inconsistent with that under which he was let into possession. In the case of a mortgage, the title of the mortgagor will be extinguished only at the expiration of the period prescribed for the redemption of the mortgage, and, in the case of a lease, the landlord's title can be extinguished only at the expiration of the period prescribed by Art. 139 of Sch. II to the Limitation Act, and under that article such period will commence to run only when the tenancy is determined. SESHAMMA SHETTATI *v.* CHICKAYA HEGADE (1902)
I. L. R. 25 Mad. 507

10. ——— **Tiled hut**—*Presidency Small Cause Courts Act (XV of 1882), ss. 9, 19, 28—Attachment—Calcutta Small Cause Court, jurisdiction of—Injunction—Civil Procedure Code (Act XIV of 1882), ss. 278 to 283.* The Calcutta Small Cause Court has jurisdiction to try the question of title in tiled-hut cases, and in executing a decree of another Court transferred to it has the same power as it possesses in regard to its own decrees. All questions arising in execution of a decree under s. 28 of the Presidency Small Cause Courts Act can be decided by the Small Cause Court. *Deno Nath Batabyal* v. *Nuffer Chunder Nundy, I. L. R. 26 Calc. 778*, and *Deno Nath Batabyal* v. *Audhor Chunder Sett, 4 C. W. N. 470*, referred to. GUNAPUTTY ROY AGARWALLA *v.* THAKURDYE THAKURANI (1907)
I. L. R. 34 Calc. 823

11. ——— **Gift made orally**—*Evidence of title—Gift made orally by proprietor of Betia Raj to his daughter at her marriage—Condition attached to gift—Subsequent deed with recitals confirming gift—Suit by successor in title of donor against husband of donee for possession of subject of gift—*

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TITLE—*concld.*

2. MISCELLANEOUS CASES—*concld.*

Donee's power of alienation to prevent gift devolving on husband. The question in this case was whether the appellant or the respondent was entitled by inheritance to a village the subject of a gift said to have been orally made by a predecessor in title of the respondent to his daughter on her marriage to the appellant in 1868, for possession of which the respondent sued. Her case was that the gift was subject to the condition that on the death of the donee without issue (which event had occurred) the village should revert to the donor and his heirs: and she relied on an *ekrarnama* executed by the donor in 1883, when the donee was separated from the appellant and was an inmate of her father's house, by which deed the alleged condition of the gift was recited and confirmed. The defence set up by the appellant was that the village had been given to him at the marriage for the benefit of himself and his wife, or, in the alternative, that if it was given to his wife, he took it as her heir. The Subordinate Judge found on the evidence that the appellant and respondent both failed to prove any condition attached to the gift, but that, inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir. *Held*, by the Judicial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs. SHAM SHIVENDAR SAHI *v.* JANKI KOER (1908)
I. L. R. 36 Calc. 311

TITLE-DEEDS.

See EXECUTION OF DECREE—MODE OF EXECUTION—POSSESSION.
I. L. R. 11 Bom. 485

See VENDOR AND PURCHASER—TITLE.
I. L. R. 15 Bom. 657

——— **delivery of, for specific purpose**

See ATTORNEY AND CLIENT.
15 B. L. R. Ap. 15

——— **deposit of—**

See DEPOSIT OF TITLE-DEEDS.

See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR . . . **6 B. L. R. 701**
I. L. R. 19 All. 76
L. R. 23 I. A. 106

See MORTGAGOR AND MORTGAGEE.
I. L. R. 33 Bom. 1

See NEGOTIABLE INSTRUMENTS ACT, s. 13.
I. L. R. 17 Mad. 85

——— **possession of—**

See ARBITRATION—AWARDS—CONSTRUCTION AND EFFECT OF.
I. L. R. 29 Calc. 793

TITLE-DEEDS—*concld.*

——— **possession of**—*contd.*

See EVIDENCE—CIVIL CASES—MODE OF DEALING WITH EVIDENCE.
2 W. R. P. C. 1
8 Moo. I. A. 467

See REGISTRATION ACT, 1877, s. 50.
I. L. R. 18 Bom. 444

——— **production of—**

See INSPECTION OF DOCUMENTS.
5 Bom. O. C. 152
I. L. R. 10 Calc. 808

See ONUS OF PROOF—DECLARATION OF TITLE **6 B. L. R. 144**

See TITLE—EVIDENCE AND PROOF OF TITLE—GENERALLY
6 B. L. R. 144
19 W. R. 162

——— **refusal to produce—**

See RIGHT OF WAY.
I. L. R. 15 All. 270

——— **suit to recover—**

See JURISDICTION—SUITS FOR LAND—GENERAL CASES.
I. L. R. 4 Calc. 322

See LIMITATION ACT, 1877, SCH. II, ART. 49 . **I. L. R. 15 Mad. 157**

TITLES OF HONOUR.

See PLAINT—FORM AND CONTENTS OF PLAINT—DEFENDANTS.
12 B. L. R. 443; 445 note

TODA GIRAS ALLOWANCE ACT (BOM. ACT VII OF 1887).

——— **s. 5**—*Toda Giras allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation of—How far can the allowance be attached and sold.* The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance which the latter was entitled to receive periodically from the Mamlatdar's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda giras* allowance computed at its valuation for twenty years, could be attached and sold in execution of the decree. *Held*, reversing the order, that it is clear from the language of s. 5 of the Toda Giras Allowance Act (Bombay Act VII of 1887) that it is not the life interest of the judgment-debtor in a *toda giras* allowance, but something short of it that is allowed by the Act to be attached. The words "money likely to become due" in s. 5 of the Act must be restricted to the case where, for instance, during the lifetime of the judgment-debtor, a sum of money

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TODA GIRAS ALLOWANCE ACT (BOM. ACT VII OF 1887)——*concld.*

——— s. 5—*concld.*

is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date; and to other cases of a similar character. Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises. AMARSANG *v.* JETHALAL (1909) . . **I. L. R. 33 Bom. 258**

TODA GIRAS HAQ.

See DUTIES.
2 Bom. 253 : 2nd Ed. 239
7 Bom. A. C. 50

See LIMITATION ACT, 1877, SCH. II, ART. 144—IMMOVEABLE PROPERTY.
13 B. L. R. 254
L. R. 1 I. A. 34

See PENSIONS ACT, 1871, SS. 3 AND 4.
I. L. R. 1 Bom. 203
I. L. R. 4 Bom. 443
I. L. R. 5 Bom. 408
L. R. 8 I. A. 77

See PENSIONS ACT, 1871, S. 11.
I. L. R. 4 Bom. 432

TODDY.

See BOMBAY ABKARI ACT, 1878, SS. 3, 14, AND 24 . . **I. L. R. 6 Bom. 398**
I. L. R. 9 Bom. 462
I. L. R. 18 Bom. 428

See BOMBAY REVENUE JURISDICTION ACT, 1876 . . **I. L. R. 9 Bom. 462**

TOLLS.

See SETTLEMENT—CONSTRUCTION.
I. L. R. 17 Calc. 458

——— lease of—

See BOMBAY TOLLS ACT, S. 7.
I. L. R. 20 Bom. 668

——— non-liability to—

See MADRAS LOCAL BOARDS ACTS, S. 87.
I. L. R. 20 Mad. 16

——— recovery of dues under lease of—

See MADRAS DISTRICT MUNICIPALITIES ACT, S. 269 . **I. L. R. 26 Mad. 475**

——— suit for, paid in excess—

See BENGAL ACT IX OF 1871, S. 27.
I. L. R. 15 Calc. 259

1. **——— Lessee of tolls**—*Act VIII of 1851.* A lessee of tolls was *held* not to be a person employed in the management and collection of tolls within the meaning of Act VIII of 1851. *In the matter of* BANKA BIHARI GHOSE
2 B. L. R. A. Cr. 17 ; 11 W. R. 26

TOLLS—*concld.*

2. **——— Illegal collection of tolls——*Act VIII of 1851, s. 6—Public road.*** To justify a conviction under s. 6, Act VIII of 1851, for illegal collection of a toll on a public road, it was necessary that the road should be a public road within the meaning of s. 2 of the act. *In re* NARENDRA-NARAIN SINGH . . . **6 W. R. Cr. 48**

3. **——— Illegal demand of toll——*Act VIII of 1851. s. 6—Summary offience.*** Charge of an illegal demand of toll under Act VIII of 1851, s. 6, ought not to be dealt with summarily under Ch. XVIII of the Criminal Procedure Code, 1872. The power of levying tolls under Act VIII of 1851 is vested in the Lieutenant-Governor of Bengal, and is restricted to levying tolls only at the toll-bar : the establishment of a toll must be by some distinct resolution of the Government, notified in some way or other by the Government. The word "extortionately" in s. 6 of Act VIII of 1851 is not used in the same sense as it is used in the Penal Code, but as meaning an unlawful demand of toll acompanied by pressure, the pressure in this case being the exercise of the powers indicated in s. 3 of the Act by seizing the complainant's horses and carts and detaining them until the toll was paid. UTTOM CHUNDER GANGOOLY *v.* ISSUR CHUNDER MOOKERJEE
22 W. R. Cr. 76

4. **——— Dispute concerning the right to collect market-tolls and not the possession of the market land——*Possession under ekrarnama as agent of co-sharer for collection of tolls and division of profits—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145.*** S. 145 of the Criminal Procedure Code does not apply to a dispute relating to the rights of co-shares to collect tolls in proportion to their respective shares in a *hat* and not to the possession of the *hat* itself. Where one of two co-sharers was entitled under an *ekrarnama* to collect the tolls of the whole market and to divide the profits with the other co-sharers at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently :—*Held*, that the Magistrate had no jurisdiction to take proceedings under s. 145 in such a case. A Magistrate cannot under the section determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits of land. *Nritta Gopal Singh* v. *Chandi Charan Singh, 10 C. W. N. 1088,* followed. *Sri Mohan Thakur* v. *Narsing Mohan Thakur, I. L. R. 27 Calc. 259,* distinguished. *Tarujan Bibee* v. *Asamuddi Bepari, 4 C. W. N. 426,* referred to. AKALOO CHANDRA DAS *v.* MOHESH LAL (1909)
I. L. R. 36 Calc. 986

TOPOGRAPHICAL SURVEY MAP.

——— Evidence Act (I of 1872), s. 36—Topographical Survey map—Admissibility in evidence—Value as evidence—Presumption that entries are correct—Boundary dispute—Jungle land—Duty of Court to settle

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TOPOGRAPHICAL SURVEY MAP— *concld.*

boundary, when evidence insufficient—Second appeal —Civil Procedure Code (Act XIV of 1882), s. 584 —Error of law. When the question was in which of two adjoining villages—the boundary line between which admittedly corresponded with the boundary line between two pergunnahs —the land in dispute was included :—*Held*, that a Topographical Survey map of 1869, in which the boundary line between the two pergunnahs was given, was admissible in evidence under s. 36 of the Evidence Act. When pergunnah boundaries are found entered in such map the presumption is that they were so entered in pursuance of instructions received. S. 36 of the Evidence Act does not require that the authority under which a map is prepared must be authority given by Statute. Assuming that Topographical Survey maps were not prepared for revenue purposes they are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made. *Jagadindra Nath Roy* v. *Secretary of State for India, 7 C. W. N. 193 ; I. L. R. 30 Calc. 291,* referred to. In cases of boundary disputes, the fact that no satisfactory evidence as to possession is obtainable does not relieve the Court of the duty of settling the boundary line on the evidence before him. *Lukhi Narain Jagadav* v. *Jadu Nath Deo, I. L. R. 21 Calc. 504* followed. *Held*, on second appeal, that in the absence of better evidence the lower Appellate Court erred in law in not accepting a Topographical Survey map as evidence of possession at the time the map was made. GAJHOO DAMOR SINGH *v.* KOTWOR JAGATPAL SINGH (1906) . . . . . **11 C. W. N. 230**

TORT.

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES — TORTS.

See DAMAGES—SUITS FOR DAMAGES—TORTS.

See ENCROACHMENT. **I. L. R. 17 Mad. 368**

See LIMITATION **I. L. R. 36 Calc. 141**

See MINOR—CUSTODY OF MINORS. **I. L. R. 25 Bom. 574**

See MINOR—LIABILITY FOR TORTS. **3 N. W. 191**

See SCIENTER . **I. L. R. 36 Calc. 1021**

See SUIT . **I. L. R. 31 Calc. 839**

——— **action framed in—**

See MINOR—LIABILITY OF MINOR ON, AND RIGHT TO ENFORCE, CONTRACTS. **I. L. R. 24 Calc. 265**

TORT—*contd.*

——— **action framed in**—*contd.*

See RIGHT OF SUIT—SURVIVAL OF RIGHT. **I. L. R. 13 Bom. 677**

See WRONGFUL DISTRAINT. **I. L. R. 25 Calc. 285**

1. ——— **Tort, committed by Government Official**—*Government, liability of—Principal and agent—Act XVIII of 1850 —Second appeal—Suit of Small Cause Court nature—Small Cause Courts Act (IX of 1887), Sch. II, Excs. 2 and 3—Civil Procedure Code (Act XIV of 1882), s. 586.* A suit brought to recover moneys alleged to have been wrongly made over by a Magistrate purporting to act under the provisions of s. 517 of the Criminal Procedure Code, does not fall within the second or the third exception to the second schedule of the Provincial Small Cause Courts Act. When the amount claimed fell short of R500, a second appeal was barred under s. 586 of the Civil Procedure Code. In cases of torts committed by Government officials, the person to be sued is the person, who has actually done the alleged wrongful act, and he may or may not have a statutory or other defence. Where the act complained of was done by a Government official occupying such a position that for all practical purposes the Government had no control over him and the Government did not cause or authorise or adopt such act and gained no profit from it, the Government cannot be made liable. *Hari Bhanji* v. *The Secretary of State for India, I. L. R. 4 Mad. 344 ; Nabin Chunder Dey* v. *The Secretary of State for India, I. L. R. 1 Calc. 11,* referred to. MOTI LAL GHOSE *v.* SECRETARY OF STATE FOR INDIA (1905) . **9 C. W. N. 495**

2. ——— **Wrongful acts of servants, liability for**—*Tort—Master and servant—Malicious prosecution—Damages for—Implied authority in the servants—Acting in Master's interest—Zemindar and Naib.* The defendant No. 1, who was a peon under defendant No. 2, the Naib of defendant No. 3 prosecuted the plaintiff in the Criminal Court, but the plaintiff was found not guilty and acquitted. In a suit subsequently brought by the plaintiff against the defendants Nos. 1, 2, 3 to recover damages for malicious prosecution, it was found that the prosecution of the plaintiff was started by the defendant No. 1 under the orders of the defendant No. 2 in the interest of and for the benefit of defendant No. 3 and that all the expenses in the prosecution of the criminal case were borne by the estate of the defendant No. 3 :—*Held*, that the defendant No. 3 is answerable for the wrongful acts of his servants, defendants Nos. 1 and 2, and is liable to pay damages to the plaintiff, it being clear that there was an implied authority in the Naib, defendant No. 2, under whose orders the defendant No. 1 was acting, in starting the prosecution against the plaintiff, and the object of the servant's action was to advance their master's cause. SARAT CHANDRA ROY CHAUDHURY *v.* DAWLAT SINGH (1905) . . **10 C. W. N. 723**

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TORT—*contd.*

3. ——— **House-search by Magistrate**—*Tort—Trespass—Statutory jurisdiction—Arms Act (XI of 1878), s. 25—Arms, search for—Grounds of belief, recording of—Code of Criminal Procedure (V of 1898), ss. 94, 105 and 165—Magistrate as "Court"—Judicial Officers' Protection Act (XVIII of 1850), s. 1—Acts, judicial or executive—Malice—Bonâ fides—Damages, substantial, exemplary or nominal.* Unless a Magistrate can justify his acts as having been done under the authority of law, he is liable in an action of trespass for acts done by him to the persons or property of others. If a Magistrate seeks to justify his acts under the provisions of a Statute, he must bring himself strictly within the words thereof. When a Magistrate holds a search of a house without first recording the grounds of his belief that the owner thereof has in his possession any arms, etc., for an unlawful purpose and that such owner cannot be left in possession of such arms, etc., without danger to public peace in the way provided for in s. 25 of the Indian Arms Act (XI of 1878) he cannot justify the search under that Act. If there are no proceedings pending before him, a Magistrate cannot be said to be acting as a "Court" within the meaning of s. 94 of the Code of Criminal Procedure (Act V of 1898), and cannot, therefore, direct a search to be made in his presence pursuant to s. 105 of that Code. S. 165 of the Code of Criminal Procedure (Act V of 1898) does not authorise a search for the purpose of discovering arms generally. A Magistrate, when he is conducting a search for the discovery of arms, cannot be held to be "acting judicially" within the meaning of the Judicial Officers' Protection Act (XVIII of 1850). The *bonâ fides* of a Magistrate in conducting a search does not release him from the obligations the law casts upon him: while, having regard to his *bonâ fides* his conduct may not be such that the damages to be awarded for trespass should be exemplary, yet they ought to be substantial and not purely nominal. BRAJENDRA KISORE ROY CHAUDHURY *v.* CLARKE (1908) **12 C. W. N. 973 : I. L. R. 36 Calc. 433**

[But see the judgment of the Privy Council, on appeal, in CLARKE *v.* BRAJENDRA KISHORE ROY CHOWDHURY. . . **I. L. R. 39 Calc. 953**]

4. ——— **Injury by dogs at a public recreation-ground**—*Tort—Dogs likely to bite without provocation—Liability of Owner of Dogs—Scienter.* The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground. The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely:—*Held*, that the defendant was liable in damages to the plaintiff. *Barnes* v. *Lucile, Ltd., 23 T. L. R. 389*, distinguished. PRAKASH KUMAR MUKERJI *v.* HARVEY (1909)
I. L. R. 36 Calc. 1021
13 C. W. N. 1123

TORT—*concld.*

5. ——— **Malicious prosecution—Amount of damages**—*Second Appeal.* In a suit for damages for malicious prosecution the question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon such a question. *Bane Madhab Chatterjee* v. *Bhola Nath Banerjee, 10 W. R. 164*, and *Jageswar Sarma* v. *Dina Ram Surma, 3 C. L. J. 340*, referred to. DHUMAN *v.* SYED ABDULLAH KHAN (1909)
I. L. R. 31 All. 333

6. ——— **Trespass on person**—*Tort—Trespass—Police officer—Master and servant—Loss of service.* If a police officer, in order to arrest suspected persons, enters into a building, his action would be *primâ facie* justifiable. In order to maintain an action for trespass to the person of a servant, it must be shown that the plaintiff was, by reason of defendant's conduct, deprived of the benefit of the servant's service. BRAJENDRA KISSORE ROY CHOWDHURI *v.* M. A. LUFFEMAN (1909) . . . . **13 C. W. N. 485**

TORT-FEASORS.

See CONTRIBUTION, SUIT FOR—JOINT WRONG-DOERS.

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES.
I. L. R. 14 Bom. 408

TORTURE.

See ABETMENT—TORTURE.
7 W. R. Cr. 3
21 W. R. Cr. 11

See POLICE OFFICER . **7 W. R. Cr. 3**

TOTAL LOSS.

See INSURANCE—MARINE INSURANCE.
6 B. L. R. 218 : 7 B. L. R. 347
3 Bom. A. C. 1
Bourke O. C. 17. 228

TOUT.

See LEGAL PRACTITIONERS' ACT, 1879. s. 36 . . . . **6 C. W. N. 289**
I. L. R. 26 Mad. 596
12 C. W. N. 842, 843 note

TOWAGE, LIEN FOR

See BOTTOMRY BOND . **6 B. L. R. 323**

TOWAGE CONTRACT.

See ACTION IN REM.
I. L. 10 Calc. 865

TOWING, RULES FOR.

See STEAM TUGS . . **1 Hyde 29**
2 W. R. P. C. 51 : 8 Moo. I. A. 1033

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TOWN-DUTIES, BOMBAY.

——— **Act XIX of 1844**—*Suit to levy a tax on cotton and cotton seeds purchased in, and exported from, Broach—Cess illegal—Agency—Trust.* The plaintiff, manager and part proprietor of a Vallabhacharya temple at Broach, sued the defendant to establish the right of the temple to levy a cess on cotton and cotton seed purchased in Broach and exported from it. The defendant denied the plaintiff's right and contended (*inter alia*) that, even if the right existed until 1844, it was then abolished by Act XIX of that year, which "enacted that from the first day of October 1844 all town duties, kusubviras mohtarphas, baluti taxes, and cesses of every kind on trades and professions, under whatsoever name, levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished." *Held*, that Act XIX of 1844 applied to the cess claimed by the plaintiff. The expression "cesses of every kind" included the cess on cotton and cotton seeds, and absolutely put an end to the right, if any existed, of the Government or of any private individual of levying the same. *Held*, also, that the suit could not be regarded as a suit for money had and received by the defendant to the plaintiff's use, or as one to recover money received by the defendant as trustee or agent. GOSVAMI SHRI PURUSHOTAMJI MAHARAJ *v.* ROBB **I. L. R. 8 Bom. 398**

TRADE.

——— **contract in restraint of—**

See CONTRACT ACT (IX OF 1872), S. 27.

TRADE-DESCRIPTION.

See COLLECTOR OF CUSTOMS, POWER OF. **I. L. R. 34 Calc. 511**

TRADE LIBEL.

See LIBEL . **I. L. R. 36 Calc. 907**

TRADE MARK.

See APPEAL . **10 C. W. N. 7**
See CAUSE OF ACTION. **10 C. W. N. 107**
See CRIMINAL PROCEDURE CODE, SS. 233, 239 . . **I. L. R. 29 Bom. 449**
See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS. **I. L. R. 10 Bom. 617**
See INJUNCTION—SPECIAL CASES—TRADE MARK . . . . **Cor. 150**
3 B. L. R. Ap. 4
I. L. R. 17 Bom. 584
8 C. W. N. 151
See PENAL CODE, SS. 478, 480. **I. L. R. 29 Mad. 569**

1. ——— **Injunction to restrain use of trade-marks**—*Combination of figures.* The plaintiffs, from 1872, imported and sold an article described as 7½ lb grey shirtings, and marked as follows: "In the centre of each piece of cloth a stamp in blue colour of a turtle in a star, with the words 'trade mark;' underneath in a semi-circular form, is the name 'Fleming, Galbraith & Co., Manchester,' and under this the number 39 within a star, and at the bottom of each piece the number 2008." In 1877 the plaintiffs discovered that the defendants were importing from the same manufacturers, and selling cloth of a similar quality marked as follows: "A stamp in blue colour of a rose in a square; underneath are the words 'Ralli and Mavrojani' arranged in a semi-circular form, and under this the number 39 in a star, and at the bottom the number 2008." On the facts of the case the lower Court (MACKPHERSON, *J.*) granted an *interim* injunction to restrain the defendants from so marking their cloth, on the ground that it was a colourable imitation of the plaintiffs' mark and calculated to mislead the public; and on appeal the Court (GARTH, *C.J.*, and MARKBY, *J.*) upheld that decision so far as to continue the injunction. *Held per* GARTH, *C.J.*, that if the imitation of the plaintiffs' marks generally, or the use of the number 2008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation. Under the circumstances, the use of their marks by the defendants would be calculated to deceive the public into the belief that they were purchasing goods imported by the plaintiffs. *Per* MARKBY, *J.*—The number 2008 was not part of the plaintiffs' trade mark proper, nor on the evidence was it so associated with the plaintiffs' name as to indicate to the public that the goods bearing that number came only from the plaintiffs' firm as importers; on the evidence it was merely a quality mark and therefore not calculated to mislead the public into the belief that they were purchasing the plaintiffs' goods, while in fact they were purchasing those imported by the defendants. *Semble*: There may be a right to exclusive use of a trade mark by traders who are importers only. RALLI *v.* FLEMING **I. L. R. 3 Calc. 417 : 2 C. L. R. 93**

2. ——— **Right to use of trade mark**—*Rival traders—Similarity of name.* No trader importing goods can lawfully adopt a trade mark which it calculated to cause his goods to bear in the market the same name as those of a rival trader. TAYLOR *v.* VIRASAMI . **I. L. R. 6 Mad, 108**

3. ——— **Restraining use of trade mark**—*Evidence of fraud.* The ground upon which a person is restrained from using another's trade mark is that he is gaining an advantage by the use of a particular trade mark which is the property of another. It is not necessary to prove intentional fraud, or to show that persons have been actually deceived. It is sufficient if the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. EWING *v.* GRANT, SMITH & Co. . **2 Hyde 185**
BALFOUR & Co. *v.* KILBURN & Co. **1 Hyde 270**

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TRADE MARK—*contd.*

4. ——— **Possession and use of trade mark**—*User in foreign market—Abandonment—Estoppel by conduct.* Such possession and use of a trade mark in one market as to constitute a right in it establishes in the owner thereof an exclusive right to that trade mark in other markets, although the owner may not have used it in such markets. To constitute a mark, a trade mark, it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. Where the plaintiffs by their conduct let the defendant to believe that they claimed no right to a certain trade mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market:—*Held*, that the plaintiffs were estopped from denying the defendant's right to use the trade mark in the Indian market. LAVERGNE *v.* HOOPER . **I. L. R. 8 Mad. 149**

5. ——— **Right of exclusive user**—*Infringement—Combination of numerals as a trade mark—Injunction.* The question of the right to the exclusive user of a trade mark or trade number is largely, if not entirely, a question of fact, and the question whether it exists in any given case must depend upon whether the evidence in that case is sufficient to show such an association or connection between the mark or the number and the firm which uses it as to indicate the ordinary purchasers in the market that the goods are the goods of that particular firm. To show that a particular trade number has acquired a reputation in the market, and that purchasers buy the goods by that number and not from an examination of the nature or quality of the cloth is not sufficient to establish the right of exclusive user of that number. There must be such an association between the number and the firm's name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm. The right of exclusive user of a name or a number as a trade mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of that name or number deceives or is reasonably likely to deceive the public that it can be interfered with or prevented. There must be a reasonable probability of purchasers being deceived; it is not enough to show a mere possibility of deception. BARLOW *v.* GOBINDRAM . **I. L. R. 24 Calc. 364**
1 C. W. N. 281

6. ——— **Offence of using false or counterfeit trade mark**—*Penal Code (Act XLV of 1840), ss. 482, 486—Prosecution after one year from first discovery of offence—Limitation—Merchandise Marks Act (IV of 1889), s. 15.* A complainant having, in 1893, discovered that goods were being sold marked with what was alleged to be a counterfeit trade mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trade mark and to render an account of sales. The right to proceed further was reserved, but no action was then taken. In 1898, upon its being ascertained that the same trade mark was being used, a prosecution was commenced. *Held*, that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under s. 15 of the Indian Merchandise Marks Act, 1889; and that the complainant must enforce his remedy by civil process. RUPPELL *v.* PONNUSAMI TEVAN . . **I. L. R. 22 Mad. 488**

7. ——— **Selling books with counterfeit property mark**—*Penal Code (Act XLV of 1860), s. 486—Goods—Indian Merchandise Marks Act (IV of 1889).* Books are the subject of patre, and are goods within the meaning of s. VI 2, (4), of the Indian Merchandise Marks Act (I of 1889); therefore, when a person sells books with a counterfeit property mark, he commits at offence under s. 486 of the Indian Penal Code. KANAI DAS BAIRAGI *v.* RADHA SHYAM BASACK
I. L. R. 26 Calc. 232
3 C. W. N. 97

8. ——— **User of and property in trade mark**—*Proof of trade mark—Importation and sale of articles with particular marks impressed upon them—Succession by one Bank to business of another—Merchandise Marks Act (IV of 1889), s. 3—Penal Code (Act XLV of 1860), ss. 485 and 486.* A mark to be a trade mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person. The mere fact that a Bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a Bank that had ceased to exist and where there was no proof of any transfer or assignment of the mark, or that the new Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good-will of that Bank was *held* not to be sufficient to establish that the mark was the trade mark of the new Bank. ANOOKOOL CHUNDER NUNDY *v.* QUEEN-EMPRESS.
I. L. R. 27 Calc. 776

ANOOKOOL CHUNDER NUNDY *v.* EMPRESS.
4 C. W. N. 423

9. ——— **Importer**—*Rights of importer of goods bearing manufacturer's or producer's trade mark—Contract by importer for exclusive supply of goods—False statement in trade mark—Deception—Evidence—Admissibility of judgment of Foreign Court—Evidence Act (I of 1872), s. 3, cl. 4, and s. 42—Parties—Joinder of parties—Civil Procedure Code (Act XIV of 1882), ss. 27, 31, 32 and 34—Practice.* The plaintiff, an importer and seller of watches, sued to restrain the defendants from importing into and selling in Bombay or other parts of India watches, similar in appearance to a certain class of watches imported and sold by

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TRADE MARK—*contd.*

the plaintiff, and having a trade mark so similar to the trade mark on the watches imported by plaintiff that it was calculated to deceive purchasers into the belief that such watches were watches imported and sold by the plaintiff. It was proved that the trade mark on the watches so imported by the plaintiff was not the trade mark of the plaintiff, but that of the manufacturer in Switzerland and that the plaintiff was merely an importer and seller of the watches under a contract for exclusive supply in India. *Held*, that the plaintiff was not entitled to an injunction. An importer can only protect a trade mark representing his own reputation and the advantage accruing therefrom, but not the trade mark of another, a manufacturer or producer. It was necessary for the plaintiff to show that the value of the trade which he carried on was due to the reputation acquired by and attaching to the trade mark as a guarantee of importation by him, and not merely as a guarantee of manufacture by somebody else, and that therefore the imitation of that trade mark was an infringement of an exclusive right of his own, entitling him to ask for protection. This the plaintiff has failed to do. It was contended by the defendants that in no case was the plaintiff entitled to relief, inasmuch as by using the words " Roskopf Patent " in the trade mark for which he claimed protection he was guilty of deception, the fact being that there was no patent in existence for the watches which bore this trade mark. A certified copy of the judgment of a Swiss Court against one Ferdinand Schmidt on this point was tendered in evidence. *Held*, that the issue as to the use of the word ' Patent ' could not be decided in this case if the trade mark in question was not this plaintiff's as the Court could not in this suit decide whether Messrs. Schmidt and Company were or were not precluded from using the word ' Patent ' on Roskopf watches manufactured by them. No decision on the point could have effect in a case to which Messrs. Schmidt had not been made a party. *Held*, also, that the judgment tendered was not admissible in evidence. An application was made on behalf of the plaintiff to add the manufacturer as co-plaintiff in the suit. *Held*, that the application should be refused. The plaintiff's case was wholly different from that of the manufacturer. The plaintiff's case was that the defendants had infringed his trade mark as importer, the exclusive right to which in India had been established. The manufacturer's claim would raise questions as to his rights to adopt and protect it in the country of its origin, and consequently in all possible markets in which it might be introduced. Ss. 27, 31 and 32 of the Civil Procedure Code (XIV of 1882) did not apply. HEINIGER *v.* DROZ (1900) . . **I. L. R. 25 Bom. 433**

10. ——— Prior use in Scotland——*Prior user by owner in Scotland—Effect on right to exclusive user in British India by a person other than the owner—Infringement.* Plaintiff claimed to have been for many years the sole importer into Bombay and Madras of umbrellas bearing

TRADE MARK—*contd.*

a certain trade mark. Defendant had recently commenced importing and selling in Madras umbrellas which, plaintiff contended, bore a trade mark so similar as to be calculated to deceive purchaser so as to induce them to buy defendant's umbrellas under the belief that they were buying plaintiff's. He asked for an injunction and damages. Defendant denied that plaintiff had been the sole importer of umbrellas bearing the trade mark in question ; or that he was the owner or entitled to the exclusive use of that trade mark ; or that umbrellas bearing that trade mark had come to be known as umbrellas imported and sold by plaintiff alone. It was contended that the trade mark belonged to, and had, since 1884, been used by, a Glasgow firm, who manufactured the umbrellas, and supplied them to defendant through another. Defendant denied the alleged similarity of the trade mark, or that purchasers were calculated to be deceived as alleged, and contended that plaintiff could not lawfully use or claim it. For the purposes of the case it was assumed that the trade mark in question had been used by the Glasgow firm before it was used by plaintiff in India ; and that it had never been used by the Glasgow firm in India before plaintiff so used it. On its being contended that, inasmuch as the trade mark had originally belonged to the Glasgow firm, it could not be carefully used or claimed by plaintiff, notwitstanding that the Glasgow firm had never used it in or imported umbrellas bearing it into India. *Held*, that the contention could not be supported, and that the prior use in Scotland did not justify the Scotch firm and the defendant in claiming that plaintiff's user of the trade mark was illegal or otherwise than an exclusive user. EBRAHIM CURRIM *v.* ESSA ABBA SAIT (1900) . **I. L. R. 24 Mad. 163**

11. ——— Title of a book—*Trade description—Unauthorised publication—Indian Penal Code (Act XLV of 1860), ss. 478, 482—Merchandise Marks Act (IV of 1889), ss. 4, 6.* The complainant, as a descendant of one Shri Chandu, had for many years prepared calendars bearing the name of " Shri Chandu Panchang " at Jodhpur and had sent each year a copy of such calendar to publishers in different parts of India, and from the copy so furnished these publishers issued and published calendars bearing the name " Shri Chandu Panching," thus denoting them as calendars prepared in Jodhpur by the descendants of Chandu. The defendant, a publisher in Bombay, prepared a calendar and put the name " Shri Chandu Panchang " on the outside, although the calendar was not prepared by the descendants of Shri Chandu. The complainant thereupon filed an information against the defendant, under s. 482 of the Indian Penal Code (Act XLV of 1860) and s. 6 of the Merchandise Marks Act (IV of 1889). *Held*, (i) that the defendant had committed no offence under s. 482 of the Indian Penal Code (Act XLV of 1860), for the title " Shri Chandu Panchang" did not come within the definition of " trade mark " given in s. 478 of the Code ; and (ii) that

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TRADE MARK—*contd.*

the defendant's act did not fall under s. 6 of the Merchandise Marks Act (IV of 1889), as it was not alleged that the defendant's calendars differed as to text from the complainant's or were compiled on different principles; the allegation was simply that they were unauthorized. RADHA KRISHNA JOSHI *v.* KISSONLAL SHRIDHAR (1901)
I. L. R. 26 Bom. 289

12. ——— Selling goods marked with a counterfeit mark—*Ss. 482, 446 of the Penal Code, as amended by the Merchandise Marks Act (Act IV of 1889 as amended by Act IX of 1891, ss. 6 and 7—Applying a false trade description to goods. Held,* that a person may to some extent appropriate to his own use a name suggested by his trade, without infringing the law relating to trade marks or trade descriptions. *Held,* also, that the appellants, who sold fish-hooks in boxes similar to the respondents with a design of one fish with its head and tail turned up, cannot be held to have infringed the trade mark of the respondents, who also sold fish-hooks with the design of two fish crossed with their heads and tails turned up. *Held,* where the public has chosen a name for its own use such as "*mach murka*" (fish mark), that fact cannot be held to prevent other persons from applying a mark to fish-hooks, which may be generally known by the same term. EMPEROR *v.* BAKAULLAH MALLIK (1904) **I. L. R. 31 Calc. 411**

13. ——— False or counterfeit trade mark, use of—*Penal Code (Act XLV of 1860), ss. 482, 486—Merchandise Marks Act (IV of 1889), s. 6.* *K,* a merchant of Calcutta, ordered certain goods from Europe, but refused to take delivery of the consignment on its arrival in Calcutta. The goods were thereupon sold in the market with the labels of the firm of *K* attached thereto, and were purchased by *M,* a dealer in piece goods. *M* sold the goods without removing the labels of *K,* and was convicted under s. 486 of the Penal Code for selling the goods with a counterfeit trade mark. *Held,* that no offence was committed by *M,* either under s. 482 or s. 486 of the Penal Code. MOTILAL PREMSUK *v.* KANHAI LAL DASS (1905)
I. L. R. 32 Calc. 969

14. ——— Trade name—*Secondary signification—Name indicating manufacturer—True description of article—Tendency to deceive—Injunction.* The words "Camel Hair Belting" had acquired a special or secondary signification in the Indian market, meaning that the belting so called was of the plaintiffs' exclusive manufacture; the defendants began to sell belting made of camel hair, designating it as camel hair belting without clearly distinguishing it from the belting of the plaintiffs so as to be likely to mislead purchasers, into the belief that it was the plaintiffs' belting, endeavouring thus to pass off their goods as the plaintiffs':—*Held,* that the plaintiffs were entitled to an injunction restraining the defendants from using the words "Camel Hair" as descriptive

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of, or in connection with, the belting made, sold or offered for sale by them and not manufactured by the plaintiffs without clearly distinguishing such belting from the plaintiffs' belting. *Reddaway* v. *Banham, [1896] A. C. 189,* followed. JOHN SMIDT *v.* F. REDDAWAY & Co. (1905)
I. L. R. 32 Calc. 401
s. c. 9 C. W. N. 281

15. ——— User, bonâ fide dispute as to right of—*Criminal proceedings, propriety of—Penal Code (Act XLV of 1860) s. 486.* In a prosecution for counterfeiting a trade mark, if the Magistrate is of opinion there is a *bonâ fide* dispute between the parties as to the right of user of such mark, he should not deal with the matter criminally, but leave it to the complainant establish the right claimed in a Civil Court. *Emperor* v. *Bakaullah Malik, I. L. R. 31 Calc. 411* referred to. DOWLAT RAM v. EMPEROR (1905)
I. L. R. 32 Calc. 43

16. ——— *Using a false trade mark or selling goods with a counterfeit trade mark—Indian Penal Code (Act XLV of 1860), ss. 482 and 486—Bonâ fide disputes as to the right to use a trade mark—Jurisdiction of Criminal Court.* Where the accused had in close proximity to the shop of the complainant, opened a shop from which he was selling rose-water in bottles which were similar to those which contained rose-water sold by the complainant and the accused had applied labels to his bottles which were similar to those used by the complainant, but on closer examination great differences in the labels were discernible:—*Held,* that the accused was not guilty under ss. 482 and 486, Indian Penal Code, of using a false trade mark or of selling goods to which a counterfeit trade mark was applied. When a *bonâ fide* dispute exists between the parties as to the right to use a trade mark, action should be taken before a Civil and not before a Criminal Court. *Dowlat Ram* v. *The King-Emperor, I. L. R. 32 Calc. 431,* referred to and approved. SURJA PROSAD *v.* MAHABIR PROSAD (1907)
11 C. W. N. 887

17. ——— Sellers' designs——Rights of manufacture—*Partnership—Dissolution—Partner continuing the business—Right to sue in respect of trade mark.* In the year 1892 *M* designed a label for goods ordered by his firm C. J. & Co. from J.F. A. & Co., the London manufaturers. The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up-country as 'Jori Mal.' By *M's* request the name of C. J. & Co. was printed on the border of the label in Persian and Gujarati characters. In 1897 *M's* partner having retired from the firm, *M,* the fourth plaintiff, continued the business of C. J. & Co. with the other plaintiffs under the name, style and firm of V. & Co. V. & Co. then ordered goods bearing the label from B. W. A. & Co. in London instructing them to place on the border of the label the name of their firm V. & Co., in English, Persian and Gujarati characters.

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TRADE MARK—*contd.*

In 1898, B. W. A. & Co. having become insolvent, the plaintiffs imported goods, without the label from B. & Co., the defendants, who had taken up the business of B. W. A. & Co. In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label. In 1900, the defendants, having purchased from B. W. A. & Co. their rights under the label, proceeded to place it on goods manufactured for and sold by them, leaving the border of the label blank or inserting on the border their own name, or, by special request, the names of the constituents, by whom the goods were ordered. It was not expressly agreed that B. W. A. &. Co. should not supply goods under the label to constituents other than the plaintiffs. The lower Court held, *inter alia*, (i) that the plaintiffs had lost their right to the exclusive user of the label as against the defendants, and (ii) that the plaintiffs were not entitled to the rights, if any, of the firm of C. J. & Co. to the label. On appeal by the plaintiffs :— *Held*, that the plaintiffs have failed to establish an exclusive right to the label. In the absence of contract, a seller of goods has no exclusive right to a mark, which merely denotes goods, which he sells, even though he may have designed the mark himself. Such a mark may be a mere quality mark indicating the reputation of the goods, irrespective of the reputation of the seller. Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public. To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the person denoted, and no other person can, without their authority, make such representation. It is a question of evidence in each case, whether there is false representation or not. *Held*, also, a trade mark, belonging to a firm, would in the absence of express provisions to the contrary as part of the partnership assets, be available for any partner of that firm, carrying on that business. *Hirsch* v. *Jonas*, *L. R. 3 Ch. D. 584*, followed. *Damodar Ruttonsey* v. *Hormusjee Adarjee* (unreported), distinguished. VADILAL *v.* BURDITT & Co. (1905) . . . **I. L. R. 30 Bom. 61**

18. ———— **Slander of title, suit for**—*Infringement of trade mark—Colourable imitation—Malice—Similarities calculated to deceive incautious, ignorant or unwary purchasers.* *A* made a representation to the Collector of Customs that the trade mark on certain goods imported by *B* was a colourable imitation of the trade mark on goods manufactured by *C* and imported by *A*. Thereupon the Customs authorities held an inquiry and detained the goods. *B* brought an action for damages against *A* for slander of title. *Held*, that in order to enable *B* to succeed he must substantiate (i) that the statement to the Collector of Customs was untrue in fact, (ii) that the statement was made maliciously, *i.e.*, without reasonable and probable cause ; (iii) that he suffered special damage thereby. *Held*, further, that no action for slander of title lay against *A*, inasmuch as the mark on the goods imported by *B* was a colourable imitation of that on *C's* goods. A person has a right to use any marks he pleases so long as they are not calculated to mislead the public, and do not infringe anybody's trade mark. In order to arrive at a conclusion as to whether a trade mark is a colourable imitation of another or not the Court may look at the two marks in question with its own powers of forming an opinion, accompanied by the evidence given in the case. It has to consider whether the mark is calculated to deceive incautious, ignorant or unwary purchasers. *Re Christiansen's Trade mark, 3 R. P. C. 54, Johnston* v. *Orr Ewing, L. R. 7 A. C. 219, Singer Manufacturing Company* v. *Loog, L. R. 8 A. C. 15*, followed. NEMI CHAND *v. C.* W. WALLACE (1907) . **I. L. R. 34 Calc. 495**

19. ———— *Mark indicating manufacturer—Infringement, calculated to deceive—Passing off goods—Injunction—Admissibility of evidence of intent to deceive.* The general principle applicable to " passing off " is that nobody has the right to represent his goods as the goods of somebody else. *Reddaway* v. *Banham*, [*1896*] *A. C. 199.* followed. In an action for an injunction to restrain the use of a trade mark, if the defendant's goods on the face of them and having regard to the surrounding circumstances are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts. *Saxlehner* v. *Apollinaris Co.*, [*1897*] *1 Ch. 893*, followed. Where a trade mark has come to be recognised in the mark as denoting goods prepared by the plaintiff, and where the defendants have deliberately adopted a trade mark identical with that of the plaintiff :— *Held*, that such adoption is calculated to deceive and that an injunction should be granted. *London General Omnibus Co.* v. *Lavell*, [*1901*] *1 Ch. 135*, and *Bourne* v. *Swan and Edgar, Ld*, [*1903*] *1 Ch. 211*, referred to. MUNNA LAL SEROWJEE *v.* JAWALA PRASAD (1908) . **I. L. R. 35 Calc. 311**

20. ———— **Title of assignee of trade mark without business**—*Trade mark—Breach—Right of manufacturer to sue—Pleadings—Statement by plaintiff not admitted by defendant—Proof.* It is trite law that an assignment of trade mark, without the business, confers no effective right. An action for breach of trade mark does not lie at the instance of the manufacturer who supplies articles when another firm carries on the actual business with the articles supplied. The manufacturer may be interested in the success

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of the firm which *de facto* carries on the business, but this cannot put him in the shoes of the latter in vindicating the latter's right against wrong-doers. ULLMAN & Co. *v.* CESAR LEUBA (1908) 13 C. W. N. 82

TRADE NAME.

See TRADE MARK. I. L. R. 32 Calc. 401

TRADER.

See INSOLVENCY ACT, s. 7. I. L. R. 7 Bom. 411; I. L. R. 13 Calc. 68

See INSOLVENCY ACT, s. 9. I. L. R. 5 Calc. 605; I. L. R. 20 Calc. 771; I. L. R. 23 Calc. 26; L. R. 22 I. A. 162

See INSOLVENCY ACT, s. 60. 2 Hyde 1 177; 7 Bom. O. C. 22; I. L. R. 5 Bom. 1; I. L. R. 21 Calc. 1018

See MADRAS DISTRICT MUNICIPALITIES ACT, 1884, s. 53. I. L. R. 17 Mad. 100

TRADESMAN'S ACCOUNT.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—GENERALLY. I. L. R. 2 Bom. 570

TRAFFIC SUPERINTENDENT OF RAILWAY.

See RAILWAYS ACT, 1890, s. 77. I. L. R. 24 Calc. 306; I. L. R. 22 Mad. 137

TRAMWAYS.

See BOMBAY TRAMWAYS ACT (I OF 1874), s. 24 . . I. L. R. 22 Bom. 739

TRANSACTION.

——— one transaction, meaning of—

See CRIMINAL PROCEDURE CODE, ss. 233, 235 . . 13 C. W. N. 1062; 1089

See CRIMINAL PROCEDURE CODE, ss. 233, 239. . . . 13 C. W. N. 1113

TRANSFER.

See TRANSFER OF CIVIL CASES.

See TRANSFER OF CRIMINAL CASES.

See APPEAL . I. L. R. 33 Calc. 580

See BENGAL TENANCY ACT, s. 11. 10 C. W. N. 272

See CHAUKIKIDARI CHAKRAN ACT, s. 48. I. L. R. 33 Calc. 390

See CIVIL COURTS ACT, s. 8. 10 C. W. N. 841

See CIVIL PROCEDURE CODE, 1882, s. 25 . 10 C. W. N. 12; 240

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See CIVIL PROCEDURE CODE, 1882, s. 244 . . . 9 C. W. N. 134

See CRIMINAL PROCEDURE CODE, ss. 526, 528 . . . 9 C. W. N. 810; I. L. R. 32 Calc. 783; I. L. R. 33 Calc. 1183; I. L. R. 28 All. 331; 421

See HINDU LAW—MAINTENANCE. 10 C. W. N. 1074

See JURISDICTION. I. L. R. 36 Calc. 869

See LANDLORD AND TENANT. I. L. R. 33 Calc. 531

See LIMITATION ACT (XV OF 1877), s. 22. . I. L. R. 35 Calc. 1065

See OCCUPANCY HOLDING. 13 C. W. N. 833

See STAMP ACT (II OF 1899), s. 2 (*5*) (*b*). I. L. R. 33 Bom. 426

——— by landlord—

See LANDLORD AND TENANT—TRANSFER BY LANDLORD.

——— by tenant—

See LANDLORD AND TENANT—TRANSFER BY TENANT.

——— fraudulent transfer—

See TRANSFER OF PROPERTY ACT, s. 53. I. L. R. 31 All. 170

——— instrument of—

See STAMP ACT, 1869, SCH. II, ART. 38. I. L. R. 2 Calc. 399

——— of decree, for execution—

See CIVIL PROCEDURE CODE, 1882, s. 232. I. L. R. 29 Calc. 235

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION.

——— of lease—

See FERRY . I. L. R. 26 Mad. 156

——— of malikana rights—

See MALIKANA . 7 C. W. N. 846

——— of non-transferable holding—

See LANDLORD AND TENANT. 9 C. W. N. 843; 895; 972; 13 C. W. N. 220; 242

——— of occupancy holding—

See CIVIL PROCEDURE CODE, 1882, s. 311. 13 C. W. N. 652

——— of occupancy right—

See POSSESSION—SUITS FOR POSSESSION. 7 C. W. N. 607

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT.

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TRANSFER—*contd.*

——— **registration of**

See BENGAL RENT ACT, 1869, s. 26.

See BENGAL RENT ACT, 1869, s. 46.

See LANDLORD AND TENANT—ACKNOWLEDGMENT OF TENANCY BY RECEIPT OF RENT.

See LANDLORD AND TENANT—TRANSFER BY TENANT.

See SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE **13 B. L. R. 146**

See SALE FOR ARREARS OF RENT—EFFECT OF SALE . . . **9 W. R. 161**
7 W. R. 409
Marsh. 212
1 W. R. 225

1. ——— **Transfer by unregistered document**—*Delivery of possession—Transfer of Property Act (IV of 1882), s. 54.* A certain plot of land being transferred by the Road Cess Department to the Public Works Irrigation Department for a sum less than one hundred rupees without any registered instrument, the Secretary of State for India in Council instituted a suit against the defendants for recovery of possession of the said lands. Upon an objection taken that the plaintiff acquired no title to the property as the transfer, upon which he relied, was in contravention of the provisions of s. 54 of the Transfer of Property Act: *Held*, that inasmuch as the transfer was not made by a registered instrument, and as also the plaintiff had been in occupation from before the date of the transfer and there was not any delivery of possession within the meaning of the provisions of s. 54 of the Transfer of Property Act, the plaintiff acquired no title by the said transfer. *Ganga Narain Gope* v. *Kali Churn Goala, I. L. R. 22 Calc. 179,* distinguished. SIBENDRAPADA BANERJEE *v.* SECRETARY OF STATE FOR INDIA (1907) . **I. L. R. 34 Calc. 207**

2. ——— **Occupancy holding**—*Transferability, question of, if arises as between claimants not landlord or original tenants.* In cases between rival claimants of holdings neither of whom is either the landlord or the original tenant the question of transferability does not arise and the one who would have the best title if the holding were transferable is entitled to succeed. *Ambica Nath* v. *Aditya Nath, 6 C. W. N. 624, Ayenuddin* v. *Srish Chandra, 11 C. W. N. 76,* followed. *Bhiram Ali* v. *Gopi Kantha, I. L. R. 24 Calc. 355, Durga Churn* v. *Kali Prosonna, 3 C. W. N. 586, Sita Nath* v. *Atmaram, 4 C. W. N. 571,* distinguished. SAMIRUDDIN MUNSHI *v.* BENGA SHEIKH (1909) **13 C. W. N. 630**

3. ——— **Transferability of non-transferable holding**—*Holding created before the Transfer of Property Act (IV of 1882)—Transferability—Usage, proof of—Landlord consenting upon receipt of nazarana.* Instances of sales of holdings which the landlord recognises only upon

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receiving *nazarana* cannot go to prove the existence of a usage of transferability. The usage to be proved is usage of sale without the landlord's consent. Observation in *Maharaja Radha Kishore Manikya* v. *Ananda Pria, 8 C. W. N. 235,* not approved. KAILASH CHANDRA PAL *v.* HARI MOHAN DAS (1909) . . . . **13 C. W. N. 541**

TRANSFER OF CIVIL CASES.

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1. GENERAL CASES . . .	12476
2. LETTERS PATENT, HIGH COURT, CL. 13	12486
3. GROUND FOR TRANSFER . . .	12490

1. GENERAL CASES.

1. ——— **Power to transfer**—*Mad. Reg. IV of 1816, s. 26—Village Munsif—Jurisdiction.* In a suit under Regulation IV of 1816, the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif. *Held*, that this transfer was illegal. *Per* HUTCHINS, *J.—Semble:* In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif. LAKSHMAKKA *v.* BALI . **I. L. R. 8 Mad. 500**

2. ——— *Transfer to Munsif of Small Cause Court suit.* A suit within the cognizance of the Small Cause Court cannot be lawfully transferred for trial to a Munsif's Court. JOOBRAJ CHOWKEEDAR *v.* WHELAN **13 W. R. 399**

3. ——— *Case remanded for local inquiry.* A case remanded to a District Judge for the purpose of a local inquiry cannot be transferred to a Subordinate Judge for disposal. CHOWDRY HAMEDOOLLAH *v.* MUTEEOONISSA BIBEE **15 W. R. 574**

4. ——— *Power of Judge to transfer case under Act XVI of 1868.* A Judge had no authority under Act XVI of 1868 to order a Subordinate Judge to try proceedings in execution of a decree which were a portion of the original civil suit tried by himself. AFTABOODDEEN AHMED *v.* MOHINEE MOHUN DOSS . . **15 W. R. 48**

5. ——— *Bengal Civil Courts Act (VI of 1871), s. 19.* Though a Subordinate Judge may very properly, if he find the subject-matter of a suit to be of the value of less than R1,000, transfer it for trial to a Munsif, yet a Subordinate Judge is empowered under s. 19, Act VI of 1871, to try causes of any value. SUFEEOOLLAH SIRCAR *v.* BEGUM BIBEE **25 W. R. 219**

6. ——— *Civil Procedure Code, 1859, s. 6—Withdrawal of suits from subordinate Courts—Remand by Higher Court—Fresh suit.* The power given by s. 6 of Act VIII of 1859 to a Zillah Judge for the withdrawal of suits from subordinate Courts should only be exercised

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TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

upon a cause shown, and ordinarily not without opportunity given to the parties to the suit to be heard upon the question. The terms of s. 6 were inapplicable to suits which the subordinate Court had received by order of remand from a Court to which the District Court was itself subordinate. A suit sent by the High Court to a subordinate Court under a remand to the High Court by Her Majesty's Order in Council, and in which, under the Council's remand order, the plaint has been amended, a new statement filed, and new issues framed, is substantially a new suit. MAHOMED ZAHOOR ALI KHAN *v.* RUTTA KUNWOOR
2 N. W. 481

7. ——— *Civil Procedure Code, 1882, s. 25—Suit transferred to his own file by District Judge—Appeal to High Court—Remand to District Judge under s. 562 of the Civil Procedure Code—Power of Judge to transfer.* By order of a District Judge under s. 25 of the Code of Civil Procedure a suit was transferred from the Court of the Subordinate Judge to his own Court. The District Judge decided the suit, and from his dercee there was an appeal to the High Court. The High Court remanded the suit under s. 592 of the Code to the Court of the District Judge. The latter transferred the suit so remanded for trial to the Subordinate Judge. *Held,* that the District Judge had then no power to transfer the suit, but was bound to try it himself. *Semble:* That s. 25 of the Code of Civil Procedure has no application to a case remanded under s. 562 of the Code. SITA RAM *v.* NAUNI DULAIYA . **I. L. R. 21 All. 230**

8. ——— *Civil Procedure Code, 1859, s. 6—Transfer of part-heard case to be completed in another Court.* S. 6 of Act VIII of 1859 did not authorize the taking a case in progress of trial off the file of a Subordinate Judge in order that it might be completed by the Judge himself of some other Court. It is clear that such transfer must take place on the institution of the suit. RAM NATH *v.* GOWHUR . **2 N. W. 230**

DUMREE SAHOO *v.* JUGDHAREE . **13 W. R. 398**

ABDOOL HYE *v.* MACRAE . . **23 W. R. 1**

9. ——— *Civil Procedure Code, 1859, s. 6—Transfer after evidence has been taken. Quœre:* Whether a case could be transferred from one Court to another, under s. 6 after the evidence had been taken in the former Court. ASMEDH KOONWAR *v.* TAYLER. KHORSHED ALI *v.* TAYLER . . . . . **W. R. 1864 15**

10. ——— *Civil Procedure Code, 1819, s. 6—Suit brought whilst Court is closed for vacation.* The Court of the Principal Sudder Ameen of Thanna being closed during vacation, a plaint which, under s. 6 of the Civil Procedure Code, ought to have been instituted in that Court, was, by the order of the District Judge, referred for trial to the Assistant Judge, entered in the register of suits in the Judge's Court, and tried by the Assistant Judge. *Held,* reversing the decree of the District Court in appeal, that it was not lawful for the Judge to refer the suit, without its having first been instituted in the Principal Sudder Ameen's Court. MOTILAL RAMDAS *v.* JAMNADAS JAVERDAS
2 Bom. 42 : 2nd Ed. 40

11. ——— *Civil Procedure Code, 1859, s. 6—District Court—Power to receive plaint when lowest Court closed.* Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court, in which he ought to have presented it, being then temporarily closed, it was *held* that the District Court could not be considered a Court of first instance, competent to receive the plaint. The decision in *In re Ganesh Sadashiv, 5 Bom. A. C. 117,* overruled; and *Motilal Ramdas* v. *Jamnadas Javerdas, 2 Bom. A. C. 42,* followed. RAMAYA ELAPA *v.* MUHAMADBHAI
10 Bom. 495

12. ——— *Civil Procedure Code, 1859, ss. 5 and 6—Jurisdiction. Held,* that, though both suits were properly cognizable by the Court at Cawnpore, yet the Sudder Court's order, which it was competent to pass under s. 6, Act VIII of 1859, gave jurisdiction to the Principal Suddar Ameen of another district, whose decision was not liable to be set aside for want of jurisdiction, in reference to the provisions of s. 5 of that enactment. RAM BUX *v.* GIRDHAREE LALL
1 Agra 178

13. ——— *Evidence recorded by one officer and decision given by another.* A suit for enhancement was filed under Act X of 1859, in the Court of a Deputy Collector. The issues were framed and the evidence recorded by an Assistant Collector, apparently not invested with the powers of a Deputy Collector, who wrote a report recommending the mode in which the suit should be disposed of. It was then disposed of by another Deputy Collector, who was probably acting at the time as Collector. *Held,* that there was no power to transfer the case, and that the procedure by which the suit was heard by one officer and decided by another was illegal. HURDYAL OOPADHYA *v.* MAHOMED NAEEM
1 N. W. Part II p. 9 ; Ed. 1873, 79

14. ——— *Civil Procedure Code, 1859, ss. 5 and 6.* Where a District Court had jurisdiction under s. 5, Act VIII of 1859, to try a suit, and defendant made no application to the Judge or communication to the plaintiff, with a view to its being tried in a different district, the case was *held* to be not one for the exercise of any special power by the High Court for that purpose. KRISTO DASS KOONDOO *v.* ISSUR CHUNDER CHOWDHRY . . . . **11 W. R. 189**

15. ——— *Civil Procedure Code, 1859, s. 6—Notification giving jurisdiction as Small Cause Court—Power to transfer pending cases.* Where, on 3rd March 1870, the Govern-

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TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

ment issued a notification under ss. 4 and 5, Madras Act IV of 1863, investing the Additional Principal Sudder Ameen of Mangalore with exclusive jurisdiction to try Small Cause suits for sums under R500 within the jurisdiction of the District Munsif :—*Held*, that the Munsif had no power after the notification to transfer to the Principal Sudder Ameen an application pending before himself at the date of the notification under s. 6 of the Civil Procedure Code, 1859, the notification not being retrospective in its operation. NARAYANA MALYA *v.* GOVIND SHETTY . . **6 Mad. 18**

16. _____ *Civil Procedure Code, 1859, s. 13—Power of Sudder Courts.*—S. 13, Act VIII of 1859, enacted that, where a suit was brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit was brought should apply to the Sudder Court to which he was subject for authority to proceed, and the Sudder Court to which the application was made, with the concurrence of the other Sudder Court within whose jurisdiction the property was partly situated, might give authority to proceed. But no power was expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quœre :* Whether Sudder Courts acting in concurrence had power to make such a transfer. SKINNER *alias* NAWAB MIRZA *v.* ORDE **I. L. R. 2 All. 241**

17. _____ *Civil Procedure Code, 1859, s. 13—Family domains of the Maharaja of Benares. Held*, following S. A. No. 969 of 1877, decided the 14th December 1877, that the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property was situated within the limits of the family domains of the Maharaja of Benares, those domains not constituting a district within the meaning of that section. RAGHU NATH DASS *v.* KAKKAN MAL . . **I. L. R. 3 All. 568**

18. _____ *Civil Procedure Code, 1877, s. 24—Place of suing—Grounds of transfer.* S. 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction. The defendants in a suit instituted at Mainpuri, who resided and carried on business at Surat, applied under s. 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held*, that, there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Mainpuri. TULA RAM *v.* HARJIWAN DASS . . . . **I. L. R. 5 All. 60**

TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

19. _____ *Civil Procedure Code, 1877, s. 25—Power of High Court.* The High Court cannot make an order of transfer of a case under s. 25 of the Code of Civil Procedure unless the Court from which the transfer is sought to be made has jurisdiction to try it. PEARY LALL MOZUMDAR *v.* KOMAL KISHORE DASSIA **I. L. R. 6 Calc. 30**

20. _____ *Civil Procedure Code, 1802, s. 25—Jurisdiction.* An order for the transfer of a suit from one Court to another under s. 25 of the Code of Civil Procedure cannot be made unless the suit has been brought in a Court having jurisdiction. The judgment in *Peary Lall Mozoomdar* v. *Komal Kishore Dassia, I. L. R. 6 Calc. 30*, entirely approved. LEDGARD *v.* BULL . . . . **I. L. R. 9 All. 191**
L. R. 13 I. A. 134

21. _____ *Civil Procedure Code, 1877, s. 25—Transfer from Court in which a suit has been wrongly instituted.* A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25 of the Civil Procedure Code, and tried it. *Held*, in the High Court, that, inasmuch as the parties has assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit. PETMAN *v.* BULL **I. L. R. 5 All. 371**

But *held* by the Privy Council (reversing this decision) that under s. 25 of the Civil Procedure Code the superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it. *Peary Lall Mozoomdar* v. *Komal Kishore Dassia, I. L. R. 6 Calc. 30*, approved. A suit having been instituted in the Court of the Subordinate Judge, who was incompetent to try it, the case was transferred by consent of parties to the Court of the District Judge for convenience of trial. *Held*, that such transference was incompetent and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the defendant's written statement and subsequently insisted upon. LEDGARD *v.* BULL . . . . **I. L. R. 9 All. 191**
L. R. 13 I. A. 134

22. _____ *High Court, jurisdiction of—District Judge, jurisdiction of—Appeal—Appeal withdrawn from the District Court—Civil Procedure Code (Act XIV of 1882), s. 25.* An appeal, the subject-matter of which was over R5,000 in value, was wrongly presented and

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TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

filed in the District Judge's Court, and was subsequently upon application by the appellant withdrawn by the High Court under s. 25 of the Civil Procedure Code and registered as an appeal to that Court. The order of withdrawal left it open to the respondent to raise objection on the score of want of jurisdiction of the District Court at the time of hearing of the appeal. *Held*, that, when an appeal is transferred under s. 25 of the Civil Procedure Code, it must be heard subject to all the objections which could be taken before the Court from which it has been transferred. The High Court therefore had no jurisdiction to hear the appeal. *Peary Lall Mozoomdar* v. *Komal Kishore Dassia, I. L. R. 6 Calc. 30;* and *Ledgard* v. *Bull, I. L. R. 9 All. 393 : L. R. 13 I. A., 134,* referred to. RAM NARAIN JOSHY *v.* PARMESWAR NARAIN MAHTA . . . . **I. L. R. 25 Calc. 39**

23. ——— *Winding-up Company—Transfer of winding-up from District Court to High Court—Companies Act VI of 1882, s. 219—Civil Procedure Code, ss. 25, 647—Stat. 24 & 25 Vict., c. 104, s. 15—Letters Patent, High Court, N.-W. P., s. 9.* There is nothing in the Indian Companies Act (VI of 1882) or the High Courts Act (24 & 25 Vict., c. 104) or the Letters Patent which prevents the High Court from calling for the record of the proceedings in the winding-up of a Company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25 of the Civil Procedure Code. Where, in the proceeding in the winding-up of a Company under Act VI of 1882, an order was passed admitting the proof of a particular creditor of the Company before any liquidator had been appointed :—*Held*, that this was an irregularity which by itself would justify the High Court in sending for the record. Where the District Judge conducting the proceedings in the winding-up of a Company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to reconsider if the matter again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the District Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with winding-up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other :—*Held*, that, under these circumstances the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding-up proceedings to its own file. *In the matter of the* WEST HOPETOWN TEA COMPANY . **I. L. R. 9 All. 180**

24. ——— *Civil Procedure Code, 1882, s. 25—District Court, power of, as to suit pending in its own Court—Ultra vires.* S. 25 of the Civil Procedure Code (Act XIV of 1882) only enables a District Court to transfer a suit pending in a Court subordinate to itself, and not to transfer a suit which is pending in its own Court. Accordingly, where a District Judge made an order to retransfer to the original Court certain suits pending in his Court which had been previously transferred to his Court from a Subordinate Court. —*Held*, that the order of retransfer was *ultra vires* and should be discharged. SAKHARAM *v.* GANGARAM . . . . **I. L. R. 13 Bom. 654**

25. ——— *Civil Procedure Code (Act XIV of 1882), s. 25—Transfer of execution proceedings—Insolvency proceedings—Opposing creditor's right to apply for transfer of insolvency proceedings.* The power of transfer given by s. 25 of the Code of Civil Procedure extends to execution proceedings as well as to suits. An application to be declared an insolvent under the Civil Procedure Code is a proceeding in execution, and as such can be made the subject of an order under s. 25 of the Code. A creditor who has received notice of an insolvency petition, and whose name is entered on the record of the execution proceedings as an opposing creditor, is a "party" within the meaning of s. 25 of the Code of Civil Procedure, and may apply for a transfer of the proceedings under the section. NASSARVANJI *v.* KHARSEDJI DHUNJISHAH . **I. L. R. 22 Bom. 778**

26. ——— *Ganjam and Vizagapatam Agency Courts Act (XXIV of 1839)—Validity of Agency Rule No. 22 passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court—High Court's Charter Act (24 & 25 Vict., c. 104), s. 15.* An order was made by a single Judge by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge, which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the High Court of such an Agent to a District Court. *Held*, that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam; and that Agency Rule No. 22 made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule. MAHARAJAH OF JEYPORE *v.* PAPAYYAMMA. **I. L. R. 23 Mad. 329.**

27. ——— *Civil Procedure Code, 1882, s. 331—Claim below ordinary pecuniary limit.* By virtue of s. 647 of the Code of Civil Procedure, a superior Court may, for sufficient cause, transfer a claim, registered under s. 331, to a subordinate Court for trial. SITHALAKSHMI *v.* VYTHILINGA . . **I. L. R. 8 Mad. 548**

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TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

28. ——— *Reasons for transfer—Amending issues—Procedure on transfer.* The mere transfer of a suit for the convenience of the public, or for the acceleration of business, from one subordinate Court to another, does not affect the authority of the Judge of the District Court to transfer it to his own file, or to another Court, or to retransfer it, if he see sufficient cause for so doing ; nor would the circumstance that a case had been up on appeal to the High Court on a preliminary point, and been remanded for a trial on the merits, limit the authority of the District Court Judge to bring it upon his own file, or to transfer it to the file of a Court other than that in which it was instituted. The omission of the Judge to assign his reason for transferring the case does not vitiate his proceeding. When a Judge transfers a case to his own file, he is at liberty to amend the issues first laid down and to raise additional issues, and to go into the whole case, except upon any question upon which there has been a judicial finding. TARUCKNATH MOOKERJEE *v.* GOUREE CHURN MOOKERJEE **3 W. R 147**

29. ——— **Procedure on transfer—** *Evidence of witnesses.* Where a suit which was filed originally before a Principal Sudder Ameen, who had fixed the issues and recorded the evidence of witnesses, is transferred by a Judge to his own file, the Judge, his Court being a Court of original jurisdiction, ought to have the witnesses before him and take heir evidence *de novo.* UNNOPOORNA *v.* HURBULLUB SINGH . **8 W. R. 465**

30. ——— *Civil Procedure Code, 1882, s. 25—Court to which suit is transferred not taking fresh evidence.* Where the trial of a suit was commenced by a Subordinate Judge and then transferred by the District Judge to his own file under s. 25 of the Civil Procedure Code, and the latter did not retake the evidence, but dealt with the case as it came to him from the Subordinate Judge and dismissed the suit :—*Held,* that the District Judge had not tried the case within the meaning of s. 25 of the Code. BANDHU NAIK *v.* LAKHI KUAR . . **I. L. R. 7 All. 342**

31. ——— *Case referred to arbitration—Power of Judge to decide after transfer.* A case having been withdrawn by the Judge, for trial in his own Court, from the Principal Sudder Ameen's Court, where it had already been referred to arbitration :—*Held,* that the Judge was quite competent to decide the case himself, without necessarily being bound also to refer it to arbitration. ABOO MAHOMED *v.* KISHEN MOHUN SURMA . . . **6 W. R. 290**

32. ——— *Suit pending in Court of Subordinate Judge with Small Cause Court powers—Trasfer to Munsif's Court—Civil Procedure Code, s. 25—Munsif, jurisdiction of—Subordinate Judge, jurisdiction of—Provincial*

TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

Small Cause Courts Act (IX of 1887), s. 35. The plaintiff filed his suit as a Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers. During the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers. In consequence of this, the District Judge made an order, under s. 25 of the Code of Civil Procedure, transferring all cases above the value of R50 then pending before the Subordinate Judge in his capacity as a Small Cause Court to the Munsif to be tried as Munsif's Court cases. The Munsif had Small Cause Court powers up to R50. The plaintiff's suit was for R69. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed. *Held,* that, granted that the suit was a Small Cause Court suit (which was not decided), whether s. 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (IX of 1887) was applicable, it would remain throughout a Small Couse Court suit and be subject to the incidents of such a suit. MANGAL SEN *v.* RUP CHAND **I. L. R. 13 All. 324**

33. ——— *Civil Procedure Code, 1882, s. 25—"Court of Small Causes," meaning of the expression—A Court invested with Small Cause Court powers.* The expression "a Court of Small Causes" in the last clause of s. 25 of the Code of Civil Procedure (Act XIV of 1882) means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes. *Mangal Sen* v. *Rup Chand, I. L. R. 13 All. 324,* dissented from. RAMCHANDRA *v.* GANESH **I. L. R. 23 Bom. 382**

34. ——— *Transfer of suit by order of High Court—Duty of Court to which transfer is made.* When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for a trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge. FATIMA BIBI *v.* ABDUL MAJID . . **I. L. R. 14 All. 531**

35. ——— *Civil Procedure Code, 1882, s. 25—Application to High Court after rejection of a similar application by the District Judge.* Where an application to a District Judge to transfer a suit pending in the Court of the Subordinate Judge to his own file had been granted, the High Court declined to entertain an application for transfer of the same suit from the Court of the District Judge. *Farid Ahmed* v. *Dulari Bibi, I. L. R. 6 All. 233,* referred to. MUHAMMAD SAFDAR HUSEN *v.* PURAN CHAND **I. L. R. 20 All. 395**

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TRANSFER OF CIVIL CASES—*contd.*

1. GENERAL CASES—*contd.*

36. ———— *Civil Procedure Code (Act XIV of 1882), s. 25—Transfer of suit from the Court of a Small Causes at Calcutta to the Court of the District Judge at Dacca—Jurisdiction of the High Court.* The High Court, in the exercise of its appellate jurisdiction, has the power to transfer a suit from the Court of Small Causes at Calcutta to any other Court having equal or superior jurisdiction. KADAMBINI BAIJI *v.* MADAN MOHUN BASACK . . . **3 C. W. N. 247**

37. ———— **Application for transfer—***Transfer of several separate suits—Separate applications.* Where it is desired to have a number of suits transferred, a separate application should be made in each case for transfer. KISHOREE LALL *v.* LUCHMUN DOSS . . **2 N. W. 147**

38. ———— **Part-heard case—***Civil Procedure Code (Act XIV of 1882), ss. 25, 191 (2)—Suit commenced in a District Court—Issues settled by District Judge—Case transferred to Sub-Court by High Court—Decision by Sub-Judge— Appeal to and decision of District Judge—Validity of decision in appeal and of transfer by High Court.* A suit was instituted in a District Court, and issues were settled by the District Judge. The suit was then transferred by the High Court to the Court of the Subordinate Judge who decided the case; an appeal was then preferred to and was heard by the District Court, though the Judge who heard the appeal was not the Judge who had settled the issues. On a second appeal being preferred to the High Court: *Held,* (i) that the District Court had jurisdiction to hear the appeal, s. 17 of the Madras Civil Courts Act (III of 1873) having no application; and (ii) that the High Court had jurisdiction under ss. 25 and 191 (2) of the Code of Civil Procedure to make the transfer to the Subordinate Judge, though the case was in part heard. PALANISAMI COWNDAN *v.* THONDAMA COWNDAN (1902) **I. L. R. 26 Mad. 595**

39. ———— **Re-transfer—***Civil Procedure Code, s. 25—Transfer—Re-transfer by District Judge to his own file of a case once transferred by him to the file of the Subordinate Judge.* Where a District Judge had once exercised the powers conferred by s. 25 of the Code of Civil Procedure and transferred a case to his own file from the file of the Subordinate Judge, he cannot afterwards re-transfer such case to the Subordinate Judge. *Sukharam* v. *Gangaram, I. L. R. 13 Bom. 654,* followed. *Sita Ram* v. *Nauni Dulaiya, I. L. R. 21 All. 230,* referred to. AMIR BEGAM *v.* PRAHLAD DAS (1902) . . . **I. L. R. 24 All. 304**

40. ———— *Civil Procedure Code, 1882, ss. 25, 403 et seq.—Transfer—Application for leave to sue in formâ pauperis filed in Court of Subordinate Judge—Application transferred by District Judge to his own file—District Judge not thereafter competent to send the suit back to the Subordinate Judge for trial.* A pauper plaintiff presented to a Subordinate Judge an application for leave to sue as a pauper. This application was, by means of an order under s. 25 of the Code of Civil Procedure, taken on to the file of the District Judge, and heard and granted by him. *Held,* that the District Judge had no power subsequently to transfer the pauper suit thus initiated back to the file of the Subordinate Judge. *Amir Begam* v. *Prahlad Das, I. L. R. 24 All. 304,* referred to. NANDAN PRASAD *v.* KENNEY (1902) **I. L. R. 24 All. 356**

41. ———— *Act XX of 1887 (Bengal, N.-W. P. and Assam Civil Courts Act), ss. 11 and 17—Civil Procedure Code, s. 25—Transfer—Jurisdiction—Construction of Statutes.* *Held,* that the words "in the event of the death, resignation or removal of a Subordinate Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held," occurring in s. 11, cl. (*1*), of Act XII of 1887, include the abolition by order of Government of a special Court temporarily constituted by Government to exercise jurisdiction in a particular district and that therefore where such Court, being the Court of a Subordinate Judge, had ceased to exist, and the District Judge had taken upon his own file a suit which had been pending before the said Court, it was competent to the District Judge, under s. 11, cl. (*3*), of the Act above-mentioned, to re-transfer such suit to the Court of the permanent Subordinate Judge in his district, from which Court the suit had already been transferred by him to the Court of the temporary Subordinate Judge. *Amir Begam* v. *Prahlad Das, I. L. R. 24 All. 304,* and *Sakhram* v. *Gangaram, I. L. R. 13 Bom. 654,* distinguished. GAPPU LAL *v.* MATHURA DAS (1902) . **I. L. R. 25 All. 183**

2. LETTERS PATENT, HIGH COURT, CL. 13.

1. ———— **Transfer to High Court—***Jurisdiction of High Court, Calcutta—Sessions Court, Allahabad.* The High Court at Calcutta had no jurisdiction over the Court of the Sessions Judge at Allahabad, such Court not being subject to the superintendence of the High Court under the 13th section of the Charter. GREAT EASTERN HOTEL COMPANY *v.* SECRETARY OF STATE FOR INDIA **1 Ind. Jur. N. S. 219**

2. ———— *Ground for transfer—Prejudice to interests of party.* A suit will not be removed from a Zillah Court in which it was instituted, to the ordinary original jurisdiction of the High Court, unless it be clearly shown that the interests of the party petitioning for such removal will be prejudiced by a non-removal. BORRADAILE *v.* GREGORY . . **Bourke Ex. O. C. 1**

3. ———— *Power to transfer—Grounds for transfer—Inconvenience—Expense.* The 13th Section of the Letters Patent, 1865, of the High Court at Fort William gives the Court power to order a suit to be transferred for trial only where the transfer is agreed on by the

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TRANSFER OF CIVIL CASES—*contd.*

2. LETTERS PATENT, HIGH COURT, CL. 13 —*contd.*

parties, or for the purposes of justice; and in the absence of agreement it must be made out that there will be inconvenience amounting to this, that if the case be tried in the Court in which it was originally laid, the trial will be unsatisfactory. The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred. OJOODERAM KHAN *v.* NOBINMONEY DOSSEE . **1 Ind. Jur. N. S. 396**

4. ——— *Ground for transfer—Nature of questions for disposal—Conduct of Judge.* On an application under the Letters Patent, 1865, cl. 13, for the removal of a suit :— *Held*, that, having regard to the whole circumstances connected with the case from the beginning, the questions to be disposed of, and the conduct of the Judge before whom the proceedings were, it was proper and necessary for the purposes of justice that the suit should be removed. THAKOOR KAPILNAUTH SAHAI DEO *v.* GOVERNMENT **10 B. L. R. 168**

5. ——— *Ground for transfer—Nature of questions for disposal—Local prejudice.* The Court refused to transfer a case from the Mofussil where there were, among other alleged reasons, suggestions that the plaintiff's case might be prejudiced by being tried in the mofussil, and that difficult and intricate questions of law would arise in the case, the Court not being satisfied by the evidence that such reasons existed. COURJON *v.* COURJON . . . **9 B. L. R. 10**

6. ——— *Ground for transfer—Consent of parties—Expense.* A suit for an account and for other relief relating to immoveable property situated without the local limits of the ordinary original civil jurisdiction of the High Court, was instituted against several defendants in the Court of the Subordinate Judge of the district within which the property was situated. Upon a petition by one of the defendants, consented to by most of the other defendants and by the plaintiff, the High Court ordered the suit to be removed from the Court in which it had been instituted, to be tried and determined by the High Court as a Court of extraordinary original jurisdiction on the grounds that the parties and the witnesses resided in Calcutta, that it would be cheaper to try the suit in Calcutta, and that all parties appearing on the motion desired a transfer. PAYN *v.* ADMINISTRATOR GENERAL OF BENGAL **I. L. R. 6 Calc. 766 : 6 C. L. R. 221**

7. ——— *Ground for transfer—Difficult questions of English law in case.* The Court will order a suit to be removed from the mofussil, and tried in the High Court, when difficult points of English law arise, and when generally it appears to be an unfit case to be tried in the mofussil. DOUCETT *v.* WISE . **1 Ind. Jur. N. S. 94**

TRANSFER OF CIVIL CASES—*contd.*

2. LETTERS PATENT, HIGH COURT, CL. 13 —*contd.*

8. ——— *Ground for transfer—Questions of English law—Parties—British subjects and residents of Calcutta.* Where a case was originally tried by a Zillah Judge, and on appeal to the High Court on its appellate side the Judges of that Court remanded it to the Court below for a fresh trial, intimating that it was a proper case to be transferred under cl. 13 of the Letters Patent constituting the High Court; and where it appeared that questions of English law were involved in the case, that the witnesses and parties were chiefly British subjects, and the plaintiff an officer of the High Court and resident in Calcutta, the Court ordered the case to be transferred for trial to the High Court, original jurisdiction. DOUCETT *v.* WISE . . **1 Ind. Jur. N. S. 227**

9. ——— *Ground for transfer—Sale in execution of decree—Order winding up company.* On 25th October 1870, a petition for the winding up of the *B T E* Company of Assam was presented to the Court of Chancery in England by one of the shareholders of the Company, and a provisional liquidator was appointed. On 5th November, at an extraordinary meeting of the Company, it was resolved that the Company should be wound up, and liquidators were appointed. On 12th November the petition for winding up came on for hearing, and an order was made that the voluntary winding up should continue, subject to the supervision of the Court. On 18th November, by deed under the hands and seals of the liquidators, *M* was appointed their attorney in India. On 27th October certain immoveable properties in Assam belonging to the Company were attached in execution of decrees in certain suits in the Court of the Munsifs of Debroghur. On 9th December the properties were put up for sale, and purchased at prices which, it was alleged, were considerably under their value. Applications were made in the Munsif's Court at Debroghur by the purchasers for confirmation of the sales, which applications were opposed by *M* and pending the Munsif's decision an application was made to the Deputy Commissioner of Luckimpore for an order to stay all proceedings in the decree suits on the ground of the order for winding up the Company of 12th November, which application was refused on 15th February 1871. On 16th February 1871 the Munsif made an order confirming the sales. *M* thereupon petitioned the High Court for the removal of the suits from Assam to the High Court, to be tried in its extraordinary original civil jurisdiction, on the ground that no appeal would lie against the order of 15th February refusing to stay the proceedings in the suits; and that, if an appeal should be preferred to the Deputy Commissioner from the order of the Munsif confirming the sales, his decision would be final The application was opposed on behalf of the purchasers. *Held*, that the Munsif, not having had notice of the winding-up order of 12th November, had power to

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TRANSFER OF CIVIL CASES—*contd.*

2. LETTERS PATENT, HIGH COURT, CL. 13 —*contd.*

sell the property on 9th December, and the sale having actually taken place, and there being nothing to show that there was any irregularity in the proceedings, the High Court would have no power, if the cases were brought down, to set aside the sale. This therefore was not a proper case for the exercise of the power which the High Court possesses under cl. 13 of the Letters Patent. *In the matter of decree-suits in the* COURT OF MUNSIF OF DEBROGHUR . . **7 B. L. R. 305**

10. ——— *Law governing case.* Where a suit was originally instituted in the Hooghly Court, and *H S*, who was a defendant, and not subject to the jurisdiction of that Court, joined in an application to have the case tried by the High Court in the exercise of its extraordinary original civil jurisdiction, which application was granted :— *Held per* PHEAR, *J.*, that the suit must be treated as if the plaint had been originally filed in the High Court, the proceedings in the Hooghly Court being without jurisdiction, and the cause of action having arisen wholly within the jurisdiction of the High Court. *Held*, on appeal by PEACOCK, *C.J.*, and MACPHERSON, *J.*, that the defendant *H S*, by joining in the application to have the suit removed to the High Court, admitted the jurisdiction of that Court to try the suit in the exercise of its extraordinary original civil jurisdiction, and could not afterwards dispute the jurisdiction. The law, therefore, to be administered by the High Court must be the same law and equity which ought to have been applied if the suit had been tried in the Court at Hooghly. *Per* MACPHERSON, *J.* —The law which would have been applicable to the case if it had been tried at Hooghly is practically the same as the English law, whatever may be the nationality of the parties. GROSE *v.* AMIRTAMAYI DASI **4 B. L. R. O. C. 1 : 12 W. R. O. C. 13**

11. ——— *Letters Patent High Court, 1865, cl. 13—Grounds for transfer—Practice.* In a suit for immoveable property instituted in the Dinagepur Court the defendant applied for its transfer to the High Court under cl. 13 of the Letters Patent, the grounds upon which the transfer was asked for being that questions of difficulty arose in the suit, that the defendant's witnesses lived in Calcutta ; that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expense ; that an agreement upon which the suit was brought was executed in Calcutta ; that the plaintiff resided and carried on business in Calcutta ; and that all the persons who knew of the transactions in suit were residents of Calcutta or its neighbourhood. *Held*, that, under the circumstances, the case was a proper one to be transferred to the High Court. HARENDRA LALL ROY *v.* SARVAMANGALA DABEE **I. L. R. 24 Calc. 183**

SURVOMONGOLA DEBI *v.* HARENDRA LALL ROY **1 C. W. N. 109.**

TRANSFER OF CIVIL CASES—*contd.*

2 LETTERS PATENT, HIGH COURT, CL. 13 —*concld.*

12. ——— *Application for transfer—Before whom application should be made.* An application to the High Court to remove a case from a District Court, and to try it as a Court of extraordinary original jurisdiction, under s. 13 of the Charter, should be made to a Judge sitting on the original side of the Court. DOUCETT *v.* WISE . . . . . **4 W. R. Mis. 7**

13. ——— **Suit in Civil Court of Resident at Aden**—*Aden Courts Act (II of 1864)—Transfer of suit to the High Court—Power of High Court—Jurisdiction.* The Civil Court of the Resident at Aden as constituted by Act II of 1864, is subject to the superintendence of the High Court at Bombay, within the meaning of cl. 13 of the Letters Patent, dated the 28th December 1865 ; and the High Court has power to remove a suit from the Court of the Resident and to try and determine the same. ABDUL KARIM FATEH MAHOMED *v.* MUNICIPAL OFFICER, ADEN (1903) **I. L. R. 27 Bom. 575**

14. ——— *Civil Cases—Power of High Court to remove suit from Court of Political Resident at Aden—Letters Patent of High Court, 1865, cl. 13, —Superintendence of High Court—Charter Act (24 and 25 Vict., c. 104), s. 15—Aden Court's Act (II of 1864).* The Civil Court of the Political Resident at Aden as constitued by the Aden Court's Act (II of 1864), is subject to the superintendence of the High Court at Bombay within the meaning of cl. 13 of the amended Letters Patent, 1865 ; and that High Court has power to remove a suit from that Court to itself for trial and determination. MUNICIPAL OFFICER, ADEN, *v.* ISMAIL HAJEE (1905) . **I. L. R. 30 Bom. 246 s.c. L. R. 33 I. A. 30**

3. GROUND FOR TRANSFER.

1. ——— **Expense, convenience, on other good reason**—*Civil Procedure Code (Act XIV of 1882), s. 23—Practice.* S. 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed. Parties desirous of obtaining the transfer of a case from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence ; they should further state what are the issues and the evidence required, and then satisfy the Court that, either on the ground of expense or convenience, or otherwise, the place of trial ought to be changed. KHATIJA BIBI *v.* TARUK CHUNDER DUTT **I. L. R. 9 Calc. 980 : 13 C. L. R. 182**

2. ——— **Portion of property in another jurisdiction**—*Civil Procedure Code, 1877, s. 23—Procedure.* The fact that a portion of property, the whole of which is sued for in the Court of the Munsif of A, is of less value than the

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TRANSFER OF CIVIL CASES—*concld.*

3. GROUND FOR TRANSFER—*concld.*

remaining portion which is within the jurisdiction of the Munsif of B, is no sufficient ground for an application under the Code of Civil Procedure, s. 23, for a transfer to the latter Court. A party applying under s. 23, Act X of 1877, must first of all give notice to the other party or side; the application should then be received by the Munsif and transmitted to the High Court through the District Court. PURRUNJOTE *v.* DEON PANDEY
2 C. L. R. 352

3. ——— **Suit for partition of property partly in Calcutta and partly in mofussil.** In a partition suit instituted in the second Subordinate Judge's Court of the 24-Pergunnahs, the parties being residents of Calcutta, when the property sought to be partitioned consisted of (*a*) moveable property situate in Calcutta; (*b*) moveable property, $\frac{4}{5}$ths of which was in Calcutta, the rest being in the immediate vicinity, and when it appeared that, if tried in Alipore, an Ameen would have to partition the Calcutta property, and that the suit could be more expeditiously and cheaply tried in the High Court. *Held*, that the case was a proper one to be transferred to the High Court to be tried on the original side, and an order was made accordingly. JOTENDRO NAUTH MITTER *v.* RAJ KRISTO MITTER
I. L. R. 16 Calc. 771

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See CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 110 **I. L. R. 30 All. 47**

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See MAGISTRATE, JURISDICTION OF—POWERS OF MAGISTRATES.
4 C. W. N. 821
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See MAGISTRATE, JURISDICTION OF—SPECIAL ACTS—CATTLE TRESPASS ACT, 1871 . **I. L. R. 23 Calc. 300; 442**

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I. L. R. 14 Mad. 399
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——— **grounds of—**

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I. L. R. 28 Calc. 709

——— **power of, by Magistrates—**

See CATTLE TRESPASS ACT, S. 20, SCH. II.
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——— **right of accused to—**

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I. L. R. 29 Calc. 392

——— **when proceedings taken in absence of accused—**

See ACCUSED PERSON . **5 C. W. N. 110**

1. GENERAL CASES.

1. ——— **Power to transfer**—*Criminal Procedure Code, 1882, s. 178—Reference to High Court—Burma Courts Act (XVII of 1875), s. 80.* The Local Government has no power, under s. 178 of the Code of Criminal Procedure, to transfer trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon; but the Local Government has the power to transfer a case from the district of Rangoon to the Sessions Division of Pegu. QUEEN-EMPRESS *v.* NGA THA MOUNG
I. L. R. 10 Calc. 643

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TRANSFER OF CRIMINAL CASES— *contd.*

1. GENERAL CASES—*contd.*

2. ——— *Criminal Procedure Code, 1882, s. 526—District Magistrate and Civil and Sessions Judge (quâ Magistrate) of Bangalore subordinate to High Court.* The District Magistrate and Civil and Sessions Judge of the Civil and Military Station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of s. 526 of the Code of Criminal Procedure. The High Court therefore has power to transfer a case from the Courts of those Judges to any other Criminal Court. Under the circumstances disclosed, the High Court transferred this case. SCOTT *v.* RICKETTS **I. L. R. 9 Mad. 356**

3. ——— *Power of High Court, Bombay—Criminal Procedure Code, 1882, s. 526—Act III of 1884, s. 11—Cantonment Magistrate, Secunderabad.* The High Court of Bombay, having been vested, by notification of the Governor-General of India in Council, No. 178 of 23rd September 1874 with original and appellate criminal jurisdiction over European British subjects, being Christians, resident, amongst other places, at Secunderabad, outside the Presidency of Bombay, and within the territories of His Highness the Nizam of Hyderabad, the Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of s. 526 of the Code of Criminal Procedure (Act X of 1882), as amended by Act III of 1884, s. 11 ; and the High Court possesses, by virtue of the appellate jurisdiction so vested in it, the power of transferring a criminal case pending in the Cantonment Magistrate's Court either to itself or to any criminal Court of equal or superior jurisdiction. The High Court, by an order under s. 526 of the Criminal Procedure Code (Act X of 1882), transferred the present case of defamation from the Court of the Cantonment Magistrate at Secunderabad to the High Court for trial, on the ground that no machinery for a trial by jury existed at Secunderabad. QUEEN-EMPRESS *v.* EDWARDS . . . **I. L. R. 9 Bom. 333**

4. ——— **Aden Act (II of 1864)—** *Power of High Court, Bombay—Transfer of case from Court of Political Resident at Aden—Criminal Procedure Code, 1882, s. 526.* A prisoner charged with having committed murder at Perim was committed by the Magistrate there on the 26th August 1885 for trial before the Political Resident at Aden, by whom he was convicted and sentenced to death on the 14th September 1885. On the 26th January 1886 the High Court of Bombay reversed the conviction and sentence, on the ground that the Court of the Resident had no jurisdiction over the Island of Perim, and that the Resident, not having been appointed a Judge of a Court of Session for that island, was not competent to try the prisoner. The High Court ordered a re-trial before a competent Court. On the 10th February

TRANSFER OF CRIMINAL CASES— *contd.*

1. GENERAL CASES—*contd.*

1886 the Government of Bombay issued the notification (No. 823) above set forth. On the 11th March 1886 an application was made to the High Court of Bombay for the transfer of the case to another Court of Session or to the High Court for trial. *Held*, that Perim is a Sessions Division, and that, after the establishment, under the Code of Criminal Procedure, of a Court of Session for the Perim Sessions Division and the appointment of the Resident at Aden as Sessions Judge of that Court, the accused stood properly committed to a Court of Session. The High Court therefore could transfer the case from that Court, under s. 526 of the Code, to any other Court of equal or superior jurisdiction, or to the High Court of Bombay. *Per* BIRDWOOD, *J.*—The High Court cannot, under s. 526 of the Criminal Procedure Code (Act X of 1882), any more than under s. 25 of the Civil Procedure Code (Act XIV of 1882), direct the transfer of a case, which is not properly before a subordinate Court of competent jurisdiction, to receive and try it. *Peary Lall Mozoomdar* v. *Komul Kishore Dossia, I. L. R. 6 Calc. 30*, followed. *Queen-Empress* v. *Thaku, I. L. R. 8 Bom. 312*, distinguished. *Per* JARDINE, *J.*—After the High Court had annulled the proceedings in the Court of the Resident at Aden as without jurisdiction, the case could not be treated as still pending in his Court ; and as there was no Court of Session in existence at the time of the commitment, it necessarily followed that the case remained in the Magistrate's Court. But, whether the case was considered as pending in the Court of a Magistrate, or of a Resident, or of a Sessions Judge, the High Court had the power to transfer it, and that under the circumstances the case should be so transferred to the High Court for trial. QUEEN-EMPRESS *v.* MANGAL TEKCHAND.
I. L. R. 10 Bom. 274

5. ——— **European British subject**—*Jurisdiction of High Court to transfer—Grounds for transfer—Criminal Procedure Code (Act X of 1882), s. 526–Act XXXVII of 1855—Sonthal Pergunnahs.* The Court of a Magistrate in the Sonthal Pergunnahs is, as regards the trial of an European British subject, to the subordinate High Court, and the High Court has power, under s. 526 of the Criminal Procedure Code, to direct the transfer of a case in which such subject is concerned. The transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him, and will in consequence be prejudiced in the trial. *In the matter of the petition of* WILSON
I. L. R. 18 Calc. 247

6. ——— **Transfer to High Court—** *High Court's Criminal Procedure Act (X of 1875), s. 147 (Criminal Procedure Code, 1882, s. 526) and s. 115—"Case" referred to High Court—Reference to Police Magistrate. Semble:* That the "case"

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TRANSFER OF CRIMINAL CASES— *contd.*

1. GENERAL CASES—*contd.*

mentioned in s. 147 of the High Court's Criminal Procedure Act (X of 1875) must refer to some question in the nature of a criminal proceeding, and not to a matter of a *quasi*-civil character, such, as the reference to a Police Magistrate contemplated in s. 115. REG. *v.* RAMADAS SAMALDAS. *Ex parte* MADAVJI DHARRAMSI . **12 Bom. 217**

7. ——— *High Courts' Criminal Procedure Act, 1875, s. 147 (Criminal Procedure Code, 1882, s. 526)*—"*Other proceeding*"—*Commitment, application to quash—24 & 25 Vict. c. 104, ss. 13 and 15.* The words "or other proceeding" in s. 147 of Act X of 1875 did not include a commitment, and an application to have a commitment quashed could be entertained under the provisions of that section. *In the matter of the petition of* CHAROO CHUNDER MULLICK. CHAROO CHUNDER MULLICK *v.* EMPRESS **I. L. R. 9 Calc. 397**

8. ——— *Acquittal—Presidency Magistrates Act (IV of 1877), s. 181—Calcutta Municipal Act (Beng. Act IV of 1876), ss. 75, 79.* The powers of interference given to the High Court by s. 147 of the High Court's Criminal Procedure Act were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured. CORPORATION OF CALCUTTA *v.* BHEECUNRAM NAPIT *alias* BHEECUN NAPIT . **I. L. R. 2 Calc. 290**

9. ——— *High Courts' Criminal Procedure Act, 1875, s. 147 (Criminal Procedure Code, 1882, s. 526)—Notice to prosecutor—Penal Code, ss. 292 and 294—Specific charge—Procedure on transfer to High Court.* In an application for the transfer of a case under s. 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *primâ facie* cause shown, that the case be removed without notice to the Crown. *Semble:* A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X of 1875, may either try the case *de novo* or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained. QUEEN *v.* UPENDRONATH DOSS . . . . **I. L. R. 1 Calc. 356**

10. ——— *High Courts' Criminal Procedure Act, 1875, s. 147—Transfer of case before Magistrate—Power to issue Mandamus.*

TRANSFER OF CRIMINAL CASES— *contd.*

1. GENERAL CASES—*contd.*

A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and, without disbelieving it, decided it did not amount to the offence charged. *Held*, that, assuming that an error of law had been committed, the High Court had no power to issue a mandamus to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction and heard the case. *Held*, also, it was not a case which the Court could transfer under s. 147 of the High Court's Criminal Procedure Act. EMPRESS *v.* GASPER **I. L. R. 2 Calc. 278**

11. ——— *High Courts' Criminal Procedure Act, 1875, s. 147—Case transferred to High Court—Refund of fine on quashing conviction—Notes of evidence taken by Magistrate.* The High Court had no power, under s. 147, Act X of 1875, to order a fine to be refunded on quashing a conviction. The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial. QUEEN *v.* JEEBUN BUX **I. L. R. 1 Calc. 354**

12. ——— *High Courts' Criminal Procedure Act, 1875, s. 147—Costs—Police Magistrates—Notes of evidence.* In a case transferred to the High Court under s. 147, Act X of 1875, the Court had no power to give costs. *Semble:* The case may be transferred after final determination by the Magistrate. Notes of the proceedings before them should be taken in all cases by the judicial officers of all Criminal Courts subject to the Act. *In the matter of* LOUIS. *In the matter of* BENGAL ACT VI OF 1866 **15 B. L. R. Ap. 14**

13. ——— **Power of District Magistrate**—*Power to call for case—Procedure when, having called for it, he finds it out of his jurisdiction.* The Magistrate of the district has authority to call upon to his own Court any criminal case without limitation as to the stage of proceeding at which it may be called. If the Magistrate, having in the exercise of his authority withdrawn any case, finds that it did not come within the jurisdiction of his Magistracy, he would not merely be competent, but bound to refuse to proceed further with the case. VILAETEE KHANUM *v.* MEHER ALI . . . . **24 W. R. Cr. 4**

14. ——— *Held*, that, although the Magistrate of a district is competent to order the removal of any particular case from the file of a subordinate Court to his own, it is doubtful whether he can by general proceeding direct the transfer of cases which have no existence, and which are not pending before any of his subordinates. GOVERNMENT *v.* GIRDHAREE LALL **1 Agra Cr. 24**

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TRANSFER OF CRIMINAL CASES— *contd.*

1. GENERAL CASES—*contd.*

15. ——— *Criminal Procedure Code, 1882, ss. 526 and 192—Transfer of Criminal case by the High Court to the Court of a District Magistrate—Interpretation of order—Practice.* When a criminal case is transferred by an order of the High Court from a Court subordinate to a District Magistrate, to the Court of a District Magistrate if it is intended that the District Magistrate shall have power to transfer the case to a subordinate Court, that intention will be expressed in the order of the High Court. If no such intention is expressed, it will be understood that, in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court is expected to try the case itself; but, when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate it will be understood that, unless the contrary is directly expressed, the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply s. 192 of the Code of Criminal Procedure, and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it. QUEEN-EMPRESS *v.* MATA PRASAD . . . . **I. L. R. 19 All. 249**

16. ——— **Application for transfer—** *Criminal Procedure Code, 1872, s. 64—Power of Judge acting on English Committee.* An application for the transfer of a case under s. 64 of the Criminal Procedure Code, should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits or affirmation in the usual way. QUEEN *v.* ZUHIRUDDIN **I. L. R. 1 Calc. 219: 25 W. R. Cr. 27**

17. ——— **Notice of transfer—***Subordinate Magistrates—Criminal Procedure Code (Act X of 1872), s. 48—Notice to the parties before the transfer is made.* Before a Magistrate of a District can transfer a case from a Court subordinate to him to any other subordinate Court, notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made. *In the matter of the petition of* TEACOTTA SHEKDAR. TEACOTTA SHEKDAR *v.* AMEER MAJEE **I. L. R. 8 Calc. 393: 10 C. L. R. 239**

18. ——— *Criminal Procedure Code (Act X of 1882), s. 528—Notice to accused.* An order under s. 528 of the Criminal Procedure Code (Act X of 1882), transferring a case for inquiry or trial from one Magistrate to another ought not to be made without notice to the accused. QUEEN-EMPRESS *v.* SADASHIV NARAYAN JOSHI **I. L. R. 22 Bom. 549**

19. ——— **Transfer of partly heard case—***Hearing of evidence.* Where a case which has been partly heard by one officer is transferred to another officer for trial, the latter should hear all the evidence in the case before deciding it. KOPIL NATH SAHI *v.* KONEERAM . **14 W. R. Cr. 3**

QUEEN *v.* KULLIAN SINGH . **2 N. W. 468**

The High Court, however, declined to interfere in a case of this sort, as the prisoners did not appeal or raise any objection to the trial on this ground. KOPIL NATH SAHEE *v.* KONEERAM **14 W. R. Cr. 3**

20. ——— **Adjournment—***Application for adjournment of trial before hearing—Duty of Court to grant reasonable adjournment—Refusal to adjourn trial, effect of, on subsequent proceedings—Code of Criminal Procedure (Act V of 1898), s. 526, cl. (8).* The law does not require that an application for postponement under sub-s. (8) of s. 526 of the Code of Criminal Procedure, or an application to the High Court for transfer, should be made within any particular period before the date fixed for the hearing. It requires only that the party should notify to the Court before which the case is pending, before the commencement of the hearing, his intention to make an application for the transfer of the case. If such an intention is notified at however short a time before the commencement of the hearing, the Court before which the case is pending is bound to exercise its powers of postponement or adjournment without reference to any opportunity that the party might have had of making an application at some earlier time. The refusal to grant such an application for postponement is illegal, and none of the proceedings that follow can be supported. *Queen-Empress* v. *Gayitri Prosunno Ghosal, I. L. R. 15 Calc. 455,* followed. *Queen-Empress* v. *Virasami, I. L. R. 19 Mad. 375,* distinguished. SURAT LALL CHOWDHRY *v.* EMPEROR (1902) . . **I. L. R. 29 Calc. 211 s.c. 6 C. W. N. 251**

21. ——— *Criminal Procedure Code (Act V of 1898), ss. 344, 526—Magistrate, competency of, to proceed with the case up to the point at which the accused is called on for his defence.* Sub-s. (8) of s. 526, Criminal Procedure Code, does not make it obligatory to grant a special adjournment irrespective to whether the party has a reasonable time to make his application without such an adjournment; but makes it obligatory only if it is necessary to enable the petitioner under s. 526 to make his application before the accused is called on for his defence. Where, upon an application, made by an accused for adjournment under sub-s. (8) of s. 526, the Magistrate did not make any special order of adjournment for the sole purpose of enabling him to make the application for transfer:—*Held,* that the proceedings subsequent to the date of the refusal of the application were not bad, inasmuch as the applicant had sufficient opportunity for applying between the time when he notified his intention of so doing and the time he was called on

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TRANSFER OF CRIMINAL CASES— *contd.*

1. GENERAL CASES—*contd.*

for defence. S. 526, sub-s. (*8*), requires only that a reasonable time shall be afforded for the application for postponement being made and an order being obtained thereon before the accused is called on for his defence. It is, therefore, competent to the Magistrate, before granting an adjournment, to proceed with the case up to the point at which the accused would be called on for his defence. DHONE KRISTO SAMANTA *v.* KING-EMPEROR (1902) **6 C. W. N. 717**

22. ——— **"Criminal case."**—The provision of s. 526 of the Criminal Procedure Code (Act V of 1898) do not give any power to direct the transfer of any proceedings initiated under s. 145 of the Code. Such proceedings do not constitute a "criminal case" within the meaning of s. 526 of the Code. A criminal case means a case arising out of, and dealing with, some crime already committed. It does not include proceedings taken for the prevention of crime. *In re* PANDURANG GOVIND PUJARI (1900) **I. L. R. 25 Bom. 179**

23. ——— **Jurisdiction**—*Criminal Procedure Code* (*Act V of 1898*), *s. 528—Power of District or Sub-Divisional Magistrate to transfer a criminal case from the file of a Village Magistrate—Extent of power—Petty thefts triable under Mad. Reg. IV of 1821.* The jurisdiction which a District or Sub-Divisional Magistrate has, under s. 528 of the Code of Criminal Procedure, to transfer a criminal case from the file of a village Magistrate is limited to the cases (namely, those relating to petty thefts) which a village Magistrate is empowered by Mad. Reg. IV of 1821 to try and punish. SEVAKOLANDAI *v.* AMMAYAN (1902) **I. L. R. 26 Mad. 394**

24. ——— **Notice**—*Criminal Procedure Code* (*Act V of 1898*), *s. 528—Transfer of case at request of Magistrate.* An order for the transfer of a case, made at the request of the Magistrate, on whose file the case stands, and not on the application of a party, is an exception to the general rule that an order for transfer should not be made under s. 528 of the Code of Criminal Procedure without notice to the other side. QUEEN-EMPRESS *v.* KUPPUMUTHU PILLAI (1900) **I. L. R. 24 Mad. 317**

25. ——— *Criminal Procedure Code, s. 528—Transfer, application for—Notice to opposite party.* Although s. 528, Code of Criminal Procedure, does not expressly provide for the giving of notice to the opposite party, yet, on general principles, when an application for transfer is made by one party, notice should be given to the other party, before an order of transfer is made. *Teacottah Shekdar* v. *Ameer Majee, I. L. R. 8 Calc. 393*, referred to. AJODHEYA LAL *v.* PARYAG NARAIN (1902) . . **7 C. W. N. 114**

26. ——— **ecurity for keeping the peace**—*Criminal Procedure Code, ss. 107* (*2*), *192—Power of District Magistrate to transfer proceedings instituted by him against a person not within his district. Held*, that it was competent to a District Magistrate, who had initiated proceedings under s. 107 (*2*) of the Code of Criminal Procedure against a person not at the time within the limits of his jurisdiction to transfer such proceedings at a later stage to a Magistrate subordinate to himself, although such Magistrate was not competent to initiate such proceedings. KING-EMPEROR *v.* MUNNA (1901) **I. L. R. 24 All. 151**

27. ——— *Security to keep the peace—Jurisdiction of Magistrates—Criminal Procedure Code* (*Act V of 1898*), *ss. 107, 192—Proceedings, initiation of.* A District Magistrate instituting proceedings under s. 107 (*2*) of the Criminal Procedure Code has power to transfer the inquiry to any subordinate Magistrates, competent to inquire into the same. The object of s. 107 of the Criminal Procedure Code is to restrict the initiation only of proceedings against persons residing beyond the local limits of the jurisdiction of District Magistrates, and not to restrict their power to transfer such proceedings, after initiation, to a subordinate Magistrate. *Shama* v. *Lechhu Shekh, I. L. R. 23 Calc. 300*; *Raghu Singh* v. *Abdul Wahab, I. L. R. 23 Calc. 442*, distinguished. *Dinendro Nath Shanial, In re, I. L. R. 8 Calc. 851*; *Satish Chandra Panday* v. *Rajendro Narain Bagchi, I. L. R. 22 Calc. 898*, referred to. *King-Emperor* v. *Munna, I. L. R. 24 All. 151*, followed. The proceedings under s. 117 of the Code are intended to be precautionary and not punitive. SURJYA KANTA ROY CHOWDHRY *v.* EMPEROR (1904) **I. L. R. 31 Calc. 350**

28. ——— **Supplementary case—Disqualification of Sessions Judge to try**—*Adjournment of case—Criminal Procedure Code* (*Act V of 1898*), *s. 526, cl.* (*8*). The accused were committed for trial on the 12th December 1903. Trial was fixed for the 3rd February 1904 before the Sessions Judge. On the 3rd February the accused asked the Judge to refer the case to the High Court for transfer, on the ground that the Judge had previously convicted other accused persons on the same facts. This was refused. The accused thereupon applied under s. 526, cl. (*8*), of the Criminal Procedure Code, for an adjournment of the case, on the ground that the High Court would be moved for a transfer. This was also refused. The case proceeded, and, after the case for the prosecution was concluded, two witnesses were examined on behalf of one of the accused and the case was adjourned till the 16th February. Between the 23rd and 16th February no application was made to the High Court for a transfer. The case was concluded on the 16th February and the accused were convicted. *Held*, that the Sessions Judge was not disqualified from trying the case. That the accused had a reasonable time for applying to the High Court before they were required to enter upon their

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1. GENERAL CASES—*concld.*

defence on the 16th February and, as they abstained from doing so, the proceedings of the Sessions Judge were not void. JOHARUDDIN SARKAR *v.* EMPEROR (1904) . . . . **I. L. R. 31 Calc. 715**

29. ——— Succession of Magistrates—Transfer of case from one Magistrate to another—*De novo trial—Criminal Procedure Code (Act V of 1898), ss. 350 and 528—Practice.* Section 350 of the Criminal Procedure Code is not limited to cases in which Magistrates succeed each other in their offices, but applies also to all cases transferred from the file of one Magistrate to that of another under s. 528 of the Code. *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose, 12 C. W. N. 140,* commented on. *Purmessur Singh* v. *Sooroop Audikaree, 13 W. R. Cr. 40; Kopil Nath Sahi* v. *Koneeram, 14 W. R. Cr. 3,* referred to. *In re Raghoo Parirah, 19 W. R. Cr. 28; Damri Thakur* v. *Bhowani Sahoo, 1. L. R. 23 Calc. 194; Queen-Empress* v. *Bashir Khan, I. L. R. 14 All. 346,* distinguished. *Queen* v. *Hurnath Guho Thakurta, 24 W. R. Cr. 52; Queen-Empress* v. *Angnu, (1889), All. W. N. 130,* not followed. MOHESH CHANDRA SAHA *v.* EMPEROR (1908) . **I. L. R. 35 Calc. 457**

2. LETTERS PATENT, HIGH COURTS, 1865, CL. 29.

1. ——— Transfer to High Court—*Power to transfer—Criminal Procedure Code, 1872, s. 64.* S. 29 of the Letters Patent of 1865 empowers the High Court to transfer for trial before itself an appeal to a Court of Session from the sentence of a District Magistrate, and this power was not affected by s. 64 of the Code of Criminal Procedure, 1872, which authorized the High Court to transfer an appeal from one subordinate Court of criminal jurisdiction to another. SITAPATHI NAYUDU *v.* QUEEN . . **I. L. R. 6 Mad. 32**

2. ——— *Power to transfer —"Competency" to investigate case.* The construction of cl. 29 of the Letters Patent, 1865, is that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the investigation or trial of any criminal offence committed in Calcutta to a mofussil Court, which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the mofussil. "Competent to investigate it" does not include competency as regards local jurisdiction, but only competency with regard to the offender, the nature of the offence and the punishment. QUEEN *v.* NABADWIP GOSWAMI . . . . **1 B. L. R. O. Cr. 15 : 15 W. R. Cr. 71 note**

3. ——— *Power to transfer —Power of single Judge on original side of High Court.* On an application made for the transfer of a case from the Sessions Court at Patna for trial by the High Court at Calcutta, on the grounds mainly that all but one of the charges against the prisoners were for offences committed in Calcutta; that the selection of Patna as the place of trial was

TRANSFER OF CRIMINAL CASES— *contd.*

2. LETTERS PATENT, HIGH COURT, 1865, CL. 29—*concld.*

calculated to prejudice the prisoners; that the police at Patna were getting up the case against the prisoners by improper and illegal means; that by these means was created such a feeling of dread and insecurity among the witnesses and others in Patna as would prevent a fair trial from taking place there; that some of the witnesses for the defence, although willing to give evidence in Calcutta, refused to go to Patna to give evidence; and that many difficult points of law were likely to arise at the trial; but these allegations were denied by the affidavits filed in opposition to the application:—*Held* (MACPHERSON, *J.*, doubting), that the High Court had power under cl. 29 of the Letters Patent to transfer the case for trial by itself. The Court, however, refused the application, on the ground that a sufficient case had not been made out for the exercise of the power of the Court. *Per* PHEAR, *J.* A single Judge, sitting on the original side of the Court, has power to entertain an application for the removal of a criminal case from a Court in the mofussil to the High Court in the exercise of its extraordinary original criminal jurisdiction. QUEEN *v.* AMEER KHAN . . **7 B. L. R. 240 : 15 W. R. Cr. 69**

4. ——— *Criminal Procedure Code (Act V of 1898), ss. 145, 526—Jurisdiction of High Court to transfer a case pending disposal under s. 145.* A case under s. 145 of the Code of Criminal Procedure is a "criminal case," and the High Court has jurisdiction to transfer it, both under s. 526 of the Code of Criminal Procedure and cl. 29 of the Letters Patent. *Re Pandurang Govind Pujari, I. L. R. 25 Bom. 179,* not followed. ARUMUGA TEGUNDAN (1902) **I. L. R. 26 Mad. 188**

3. GROUND FOR TRANSFER.

1. ——— Nature of grounds for transfer—*Transfer from one Magistrate to another.* The High Court will not, except on very strong and very clear grounds, transfer a case from one Magistrate's Court to that of another Magistrate. *In the matter of the petition of* SHANKAR ABAJI HOSHING. REG. *v.* SHANKAR ABAJI HOSHING **6 Bom. Cr. 69**

2. ——— Probability of unfair trial —*Transfer from one Magistrate to another.* It is only when there is reason to suppose that the prisoner will not have a fair trial that the High Court will transfer a case from one magisterial officer to another. QUEEN *v.* KISTO CHUNDER GHOSE **2 W. R. Cr. 58**

3. ——— *Proof of grounds for transfer—Grounds necessary to obtain transfer when application is opposed by accused.* Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair

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TRANSFER OF CRIMINAL CASES—*contd.*

3. GROUND FOR TRANSFER—*contd.*

trial cannot be had in the District in which the case is ordinarily triable. *In the matter of the petition of the* LEGAL REMEMBRANCER. EMPRESS *v.* NOBO GOPAL BOSE **I. L. R. 6 Calc. 491**

4. ——— **Prosecution initiated by Magistrate**—*Conviction before same Magistrate—Transfer of appeal from Magistrate to Sessions Judge.* Where the Magistrate of the district had procured the initiation of a number of prosecutions against the same person, and one of them which had resulted in conviction came up before him in appeal, the High Court, considering that it was not altogether seemly that he should hear the appeal, ordered its transfer to the Sessions Judge. RAMZAN ALI *v.* DURPO KOMILLA **24 W. R. Cr. 58**

5. ——— **Judge forming premature opinion**—*Convenience—Relieving judicial officer of case he wishes not to try.* The High Court does not exercise its powers of transfer in a case of forgery or perjury solely on the ground that the Judge who is to try the case had formed an opinion that the document has been forged or the perjury committed. But when the transfer can be made without risk of any improper interference with the course of justice and without much inconvenience to the parties and witnesses, the transfer would be proper, not only as a fair concession to the accused person, but as a means of relieving the Judge from a position which he would himself desire to avoid. *In the matter of the petition of* ARUNACHALLA REDDI **5 Mad. 212**

6. ——— *Criminal Procedure Code (Act V of 1898), s. 526—Expression of opinion by Magistrate in counter-case on evidence adduced.* Where the complaint forming the subject of trial in a case before a Magistrate related to facts forming the substance of the defence in another case already tried by the same Magistrate :—*Held*, that the Magistrate having had to express his opinion on the evidence, which formed the evidence for the defence in that case, it was desirable to have the complaint tried by some other Magistrate. CHANDRAMANI SARMA *v.* KUNJA RENDI . . . . . **4 C. W. N. 824**

7. ——— **Reasonable apprehension in the mind of the accused**—*Criminal Procedure Code, 1882, s. 526—Real bias—Incidents calculated to create apprehension of bias.* In dealing with applications for transfer what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the accused, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable

TRANSFER OF CRIMINAL CASES—*contd.*

3. GROUND FOR TRANSFER—*contd.*

apprehension that he may not have a fair and impartial trial. DUPEYRON *v.* DRIVER **I. L. R. 23 Calc. 495**

FARZAND ALI *v.* HANUMAN PRASAD **I. L. R. 19 All. 64**

8. ——— **Probability of unfair trial**—*Complexity of case—Transfer from one Magistrate to another—Local investigation—Magistrate trying case, competency of, to be witness—Competent witness—Examination of Magistrate trying case as a witness.* Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity arising out of disputed boundaries to land, in which the accused were charged with rioting, trespass, mischief, and theft, and where, in the course of such investigation, he held a local inquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which, by reason of the way it was acquired, he could not properly or legally consider in arriving at an ultimate decision of the case (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercising judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record, and the Assistant Magistrate tender himself while trying the case as a witness to be cross-examined by either the prosecution or the defence :—*Held*, that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case, but that it must be transferred to some other Magistrate exercising first class powers for disposal. HARI KISHORE MITRA *v.* ABDUL BAKI MIAH **I. L. R. 21 Calc. 920**

9. ——— **Fairness and impartiality of the jury**—*Criminal Procedure Code, 1882, s. 526, cl. (e)—Expression of belief by the District Magistrate.* When two such officers, as the District Magistrate and the Sessions Judge, emphatically express their belief that it will be next to impossible to obtain a fair and impartial trial if the case be heard before a jury chosen from a particular district, the bare expression of such belief, quite apart from the foundations thereof, must shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular jury to try the case. An order for transfer in such cases is expedient for the ends of justice under s. 526, cl. (*e*), of the Criminal Procedure Code. The importance of securing the confidence of parties in the fairness and impartiality

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TRANSFER OF CRIMINAL CASES— *contd.*

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of the tribunal is next only to the importance of securing a fair and impartial tribunal. *Dupeyron* v. *Driver, I. L. R. 23 Calc. 495,* followed. The jury in a case triable by jury constitute a part and an important part of the tribunal. It is not quite reasonable to say where doubt is entertained as to the fairness and impartiality of the jury, that the trial should nevertheless go on before such a jury, because an erroneous verdict may, in the end, be set right by the High Court. *Empress* v. *Nobo Gopal Bose, I. L. R. 6 Calc. 491,* distinguished. LEGAL REMEMBRANCER *v.* BHAIRAB CHANDRA CHUCKERBUTTY **I. L. R. 25 Calc. 727**

In the matter of the petition of the DEPUTY LEGAL REMEMBRANCER. QUEEN-EMPRESS *v.* BHAIRAB CHUNDER CHAKURBUTTY . . **2 C. W. N. 65**

10. ——— Magistrate having bias against the accused—*Criminal Procedure Code, 1882, s. 526A.* Where a Magistrate in the course of an investigation under Ch. XIV of the Criminal Procedure Code, and also in the subsequent enquiry preliminary to commitment, acted in a manner indicating some bias against the accused :—*Held,* that the Magistrate should not proceed with the enquiry, and the case should be transferred from his file. RATNESSARI PERSHAD NARAIN SINGH *v.* EMPRESS . . . . **2 C. W. N. 498**

11. ——— Illegal procedure by Magistrate—*Magistrate antagonistic to accused—Power of High Court.* Where the procedure in the case of a person charged with an offence was found to be irregular and illegal, and the Magistrate was prejudiced and antagonistic to the prisoner, the High Court made an order (as in the *Bancoordh Case, 4 B. L. R. Ap. 1*), to transfer the proceedings to be tried by another officer appointed or deputed by the Government of Bengal to try the case. ABDOOL KADIR KHAN *v.* MAGISTRATE OF PURNEAH **11 B. L. R. Ap. 8 : 20 W. R. Cr. 23**

12. ——— Judicial officers interested in case—*Criminal Procedure Code, 1872, s. 64—Road-cess case—Transfer of appeal for trial.* Where it appeared that the only officers in the district of P otherwise competent to hear an appeal from a conviction for theft of property alleged to have belonged to the Road Cess Committee of the district were, by reason of their connection with that Committee, interested in the result of the appeal, the High Court directed that the petition of appeal, together with all papers connected therewith, should be forwarded to the Sessions Judge of the 24-Pergunnahs, to be dealt with as an appeal presented in his own Court. *In the matter of* DWARKA NATH BANERJEE . **6 C. L. R. 279**

13. ——— Magistrate expressing opinion unfavourable to accused—*Criminal Procedure Code, 1861, s. 36—Transfer by Magistrate.* Although s. 36 of the Code of Criminal Procedure did not require a Magistrate to state his reasons for

TRANSFER OF CRIMINAL CASES— *contd.*

3. GROUND FOR TRANSFER—*contd.*

transferring a criminal case from a Court subordinate to him to his own or to any other subordinate Court, the High Court set aside an order of a Magistrate transferring a case after the subordinate Magistrate, before whom it was, had taken the evidence for the prosecution, and had expressed an opinion unfavourable to the prosecution. QUEEN *v.* NOBOCOOMAR BANERJEE **14 W. R. Cr. 12**

14. ——— Manipulation of order-sheet by Magistrate—*Criminal Procedure Code (Act X of 1882), s. 526—Inquiry preliminary to commitment—Bias—Attaching document to record after receipt of order of High Court, staying proceeding—Transfer, grounds of.* It appeared that during the course of an inquiry preliminary to commitment some entries in the order-sheet were not made by the Magistrate, as required by the rules of the High Court, daily, and certain orders were not recorded either on the particular day or possibly even on the following day, and in one instance the Magistrate did not record the order with reference to the state of the proceedings then before him. In another instance a note had been subsequently interpolated in the order-sheet. It further appeared, that the Magistrate, after the receipt of the order of the High Court staying all further proceedings in the case, placed on the record a certain letter received from a medical officer. *Held,* that the Magistrate had acted with impropriety and showed some bias against the accused that further proceedings should not therefore be taken before the said Magistrate and the case should be transferred to another Magistrate. ANANT RAM *v.* MANSOOB ROY **2 C. W. N. 639**

15. ——— Jurisdiction—*Place of commission of offence—Transfer of preliminary investigation—Criminal Procedure Code, 1872, ss. 64 and 69.* The High Court, under ss. 64 and 69 of the Code of Criminal Procedure, directed the preliminary investigation in this case, in which the accused was charged with criminal breach of trust, to be held in Calcutta, the place where the offence charged was, if not wholly, at all events partly, committed. QUEEN *v.* MACDONALD **22 W. R. Cr. 6**

16. ——— View of the scene of the occurrence by a Magistrate trying a criminal case—*Local investigation—Criminal Procedure Code, s. 526.* It is not only not objectionable, but in many cases highly advisable, that a Magistrate trying a criminal case should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so, he should be careful not to allow any one on either side to say anything to him which might prejudice his mind one way or the other. The fact he has held such a local investigation does not amount to a ground for transferring the case to another Magistrate. *In the matter of the petition of* LALJI . **I. L. R. 19 All. 302**

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TRANSFER OF CRIMINAL CASES— *contd.*

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17. ——— **Bias**—*Reasonable apprehension in the mind of the accused of Magistrate being biassed—Suit by servant of estate under Court of Wards, the District Magistrate as Collector being Manager—Code of Criminal Procedure (Act V of 1898), s. 526.* Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, then, notwithstanding, that there may be no real bias in the matter, the fact of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer. *In the matter of the petition of J. Wilson, I. L. R. 18 Calc. 247,* and *Dupeyron* v. *Driver, I. L. R. 23 Calc. 495,* referred to. The mere fact that the Magistrate of the district is, in his capacity as Collector, concerned in the management of an estate held by the Court of Wards is no ground for asking for a transfer from the district of a case brought by a servant of the estate and pending before a Subordinate Magistrate in the District. BAKTU SINGH *v.* KALI PRASAD (1900) . . **I. L. R. 28 Calc. 297**

18. ——— *High Court, power of, to transfer case under s. 145 of the Code of Criminal Procedure—Bias, reasonable apprehension of—Witnesses, convenience to—Meaning of "case" and "criminal case"—Specific Relief Act (I of 1877), s. 9—Code of Criminal Procedure (Act V of 1898), ss. 4, 6, 107, 110, 145, 178, 192, 340, 342, 435, 437, 439, 526, 527, 528 and 556—Charter Act (24 & 25 Vict.), c. 104, s. 15—Letters Patent, s. 29. Held (per* GHOSE, *J.*), that an investigation in a case under s. 145 of the Criminal Procedure Code is an inquiry, within the meaning of cl. (*a*) of s. 526 of that Code. A Court of a Magistrate taking cognizance of a case under s. 145 is a Criminal Court, within the meaning of the Criminal Procedure Code. The expression "Criminal case," in s. 526, may be understood as simply distinguished from a civil case, being a case over which a Criminal Court has jurisdiction. It is doubtful whether, under s. 526, the Legislature meant to confer on the High Court the power of making a transfer in cases other than those in which a person is charged with an offence. The High Court may, however, under s. 15 of the Charter Act, direct the transfer of a case, under s. 145 of the Criminal Procedure Code, which a Magistrate has taken cognizance of. Next to the importance of deciding a case fairly and impartially is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done. If, therefore, by reason of the words or conduct of a Magistrate, or Judge, before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it would be expedient for the ends of justice to transfer the case from his file to that of some other officer competent to try it, though there may not be any actual bias. *Dupeyron* v. *Driver,* I. L. R. 23 Calc. 495, and *The Legal Remembrancer* v. *Bhairab Chandra Chuckerbutty, I. L. R. 25 Calc. 727,* referred to. *Held (per* TAYLOR, *J.*), that the phrases "case" and "criminal case," in the Criminal Procedure Code, are not co-extensive, and are not used indiscriminately or interchangeably. The phrase "criminal case," is intended to be used in a limited sense, and not to apply to every case cognizable by a Criminal Court. It is doubtful whether the High Court has power under s. 526 to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law. The power, however, exists under s. 29 of the Letters Patent, wherein the phrase "criminal case," appears to be used without the distinction which apparently exists in the Criminal Procedure Code in respect of cases tried by a Criminal Court as opposed to civil cases. LOLIT MOHAN MOITRA *v.* SURJA KANT ACHARJEE (1901) . . . **I. L. R. 28 Calc. 709; s.c. 5 C. W. N. 749**

19. ——— **Magistrate taking part during investigation by police**—*Criminal Procedure Code (Act V of 1898), ss. 526, 164, 342—Transfer of pending cases—Examination of accused by Magistrate, preliminary to trial, by way of cross-examination.* When a Magistrate was present at a search made by the police during an investigation, and in all probability he came to know of some facts in connection with the case, it is expedient that the case should be tried by some other Magistrate. During a police investigation, the examination of an accused by a Magistrate by way of cross-examination is improper. (TAYLOR, *J.*)—In the course of a police investigation a Magistrate is entitled to record, under s. 164, Code of Criminal Procedure, any voluntary statement made by an accused person, but he is not entitled to examine him in respect of the facts of the case. S. 342 of the Code only empowers a Court to examine an accused to explain evidence already recorded. GYA SINGH *v.* MOHAMED SOLIMAN (1901) . **5 C. W. N. 864**

20. ——— **Reasonable apprehension in the mind of the accused**—*Criminal Procedure Code (Act V of 1898), s. 526—Incidents and circumstances calculated to create apprehension.* A Magistrate is bound to postpone the hearing of a case for the purpose of enabling a party to apply to a Higher Court for a transfer and his refusal to do so renders the subsequent proceedings voidable, if not void. *Queen-Empress* v. *Gayitri Prosunno Ghosal, I. L. R. 15 Calc. 455, Surat Lall Chowdhry* v. *Emperor, I. L. R. 29 Calc. 211* and *Kishori Gir* v. *Ram Narayan Gir, 8 C. W. N. 77,* followed. If the words used by and the actions of a judicial officer, though susceptible of explanation and traceable to a superior sense of duty are calculated to create in the mind of the accused an apprehension that he may not have an impartial trial, the case should be transferred to some other Judge for

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TRANSFER OF CRIMINAL CASES— *contd.*

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trial. *Dhone Kristo* v. *King-Emperor, I. L. R. 31 Calc. 715*, and *Joharuddin* v. *Emperor, 8 C. W. N. 910*, referred to. Confidence in the administration of justice is an essential element in good government and a reasonable apprehension of failure of justice in the mind of the accused should be taken into consideration on an application for transfer. *Narain Chandra Banerjee* v. *The Howrah Municipality, 10 C. W. N. 441*, explained. *Held, per* HOLMWOOD, *J.* The case should be transferred in view of the technical objection that may be taken to the validity of the Magistrate's final decision, owing to his having refused time to apply for a transfer. THE VIEWS of BRETT, *J.* as expressed in *Narain Chundra Banerjee* v. *The Howrah Municipality, 10 C. W. N. 441*, concurred with. KALI CHARAN GHOSE *v.* EMPEROR (1906) . . **I. L. R. 33 Calc. 1183**

21. ——— *Criminal Procedure Code (Act V of 1898), s. 526—Rule nisi for transfer, issue of—Communication by vakil—Examining witnesses after communication—Reasonable apprehension that fair trial would not be had.* Where on an application being made by the accused to the trying Magistrate for time to enable him to move the High Court for transfer of the case pending against him, the Magistrate did not pass an order at once but examined 13 witnesses for the prosecution, and then passed an order allowing 14 days' time and whereafter the fact of the issue of a rule by the High Court on the application for transfer had been communicated by a telegram from a vakil of the High Court, the Magistrate instead of postponing the case at once examined four witnesses and then made an order for adjournment:—*Held*, that these proceedings on the part of the Magistrate were sufficient to justify the transfer of the case from his file. WAHED MOLLAH *v.* SHAIK BASARADDI (1906) . **11 C. W. N. 507**

22. ——— **Magistrate having prejudged accused in other case, sufficient ground for transfer**—*Criminal Procedure Code, s. 526—Transfer of criminal case*—Where the Magistrate has, in a counter case brought by the accused on the same facts, prejudged the guilt of the accused, the High Court will, in the interest of justice, transfer the case against the accused to some other Court. RANGASAMI GOUNDAN *v.* EMPEROR (1906) . . **I. L. R. 30 Mad. 233**

23. ——— *Opinion arrived at in another but similar case on other evidence—Bias—Criminal Procedure Code (Act V of 1898), s. 526.* The doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer is sound, but in applying it regard must be had to the circumstances of each case. The mere fact that in another case, on other evidence, the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer. *Asimaddi* v. *Govinda Baidya, 1 C. W. N. 426*, referred to. RAJANI KANTA DUTT *v.* EMPEROR (1909) **I. L. R. 36 Calc. 904**

TRANSFER OF CRIMINAL CASES— *concld.*

3. GROUND FOR TRANSFER—*concld.*

24. ——— **Omission to state grounds**—*Criminal Procedure Code (Act V of 1898), s. 528.* It is incumbent on the Court making a transfer under s. 528 to record its reasons therefor, but the omission to do so is not a ground for setting aside the order where it has not prejudiced the accused. PRAKAS CHUNDER DUTT *v.* EMPEROR (1907) **I. L. R. 34 Calc. 918**

TRANSFER OF NON-TRANSFERABLE HOLDING.

——— *Landlord and Tenant Act (Bengal Act VIII of 1869)—Occupancy raiyat unauthorised to transfer his holding—Usufructuary mortgage, if a transfer.* By creating an usufructuary mortgage an occupancy raiyat not authorised to transfer his holding makes himself liable to ejectment by the landlord. KRISHNA CHANDRA DATTA CHOWDHURY *v.* KHIRAN BAJANIA (1903) **10 C. W. N. 499**

TRANSFER OF PROPERTY.

See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES. **I. L. R. 30 Calc. 961**

See TRANSFER OF PROPERTY ACT.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER. **I. L. R. 2 Bom. 547** **I. L. R. 5 Bom. 554**

——— **while transferor is out of possession**—

See VENDOR AND PURCHASER—BILLS OF SALE . . **2 B. L. R. P. C. 111**

1. ——— **Ownership of cotton in press**—*Sale—Exchange—Trade usage, proof of—Contract Act ss. 49, 77, 92, 151—Transfer of Property Act, s. 118—Delivery of cotton to cotton press.* According to mercantile usage in the cotton trade in Tuticorin where a dealer delivers cotton to the owner of a cotton press not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality. The transaction is not a sale, but an agreement for exchange. Where therefore cotton thus delivered was accidentally destroyed by fire:—*Held*, that the loss fell on the owner of the press. VOLKART BROTHERS *v.* VETTIVELU NADAN . . . **I. L. R. 11 Mad. 459**

2. ——— **Erection of building for school on land**—*Gift of building for a school—Position of managers of school—Suit by managers for trover and trespass.* Where a party who, partly with his own funds and partly with R100 subscrib-

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TRANSFER OF PROPERTY—*contd.*

ed by the village, erected a building for a school never gave the property to the school, and never even acquiesced in the managers of the school entering upon it :—*Held*, that the managers entered upon it as trespassers, and that, although the proprietor acquiesced in their having taken possession, he did not thereby convey any property in the school to the subscribers, and was not bound to repay that portion of the money which he expended himself in building the house, or to do more than return that portion of the funds which were subscribed by the village. SREEHURRY ROY *v.* HILLS . . . . . **7 W. R. 476**

S.C. on reference on original trial. **6 W. R. Civ. Ref. 21**

3. ——— **Sale while vendor is out of possession**—*Right of purchaser to sue for possession.* It is the practice of the Courts in this country to give effect to sales of property made by persons out of possession, and to recognize the title of the purchaser to maintain a suit. RUNNOO PANDEY *v.* BUKSH ALI . . . **3 N. W. 2**

KUMUROODDEEN *v.* BHADOO . **11 W. R. 134**

AULOCK MONEE DOSSIA *v.* AULOCK MONEE DEBIA **25 W. R. 48**

PRANKRISHNA DEY *v.* BISWAMBHAR SEIN **2 B. L. R. A. C. 207** **11 W. R. 81**

4. ——— *Right of purchaser to sue for possession—Want of consideration.* Alleged purchasers whose vendors were not in possession, and who have paid nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. BISHONATH DEY ROY *v.* CHUNDER MOHUN DUTT BISWAS . . **23 W. R. 165**

See TARA SOONDOREE CHOWDHRAIN *v.* COLLECTOR OF MYMENSINGH **13 B. L. R. 495 : 20 W. R. 446**

5. ——— *Right of purchaser to sue for possession.* The current of High Court decisions on the question whether a purchaser from a party not in possession is competent to maintain a suit to recover the land is in favour of the right to bring a suit. BISSESSUR DOSS *v.* JOYKISHORE DOSS . . . **25 W. R. 223**

6. ——— *Wrongful dispossession of vendor—Right of vendee to sue for possession.* Where a conveyance of property was made by a person who had been in possession and enjoyment for years before she was wrongfully ousted, the conveyance was *held* to give a right to sue for immediate possession. BIKAN SINGH *v.* PARBUTTY KOOER **22 W. R. 99**

NITTYANUND GOSSAIN *v.* SHAMA CHURN CHATTERJEE . . . . . **23 W. R. 163**

See GUNGA HURRY NUNDEE *v.* RAGHUBRAM NUNDEE . **14 B. L. R. 307 : 23 W. R. 131**

TRANSFER OF PROPERTY—*contd.*

7. ——— *Right of assignee to sue for possession—Third parties—Requisite proof.* An assignee of property, of which the assignor was not in possession when the assignment was made, can only recover, even from the hands of third persons, upon showing that he would have a right to enforce specific performance of his contract against his assignor if the property were come back to the hands of the assignor. BOODHUN SINGH *v.* LUTEEFUN . . **22 W. R. 535**

8. ——— *Right of specific performance after purchase of right to sue.* Where a purchaser of a right to sue for possession brings a suit for specific performance and it is not shown that he has left undone anything necessary to entitle him to what he claims, it must be taken in special appeal that the plaintiff is entitled to insist on specific performance of his contract with his vendor. LALLA SABIL CHAND *v.* GOODUR KHAN **22 W. R. 187**

9. ——— *Suit by assignee for possession—Effect of bill of sale.* The assignees, *R*, *K*, and *G*, of certain property brought against the assignor, *L* and others, a suit to obtain possession of a portion of assigned property of which he, *L*, never had possession, and to obtain a declaration of right of ownership to the other portion already in the possession of one or more of themselves. *Held*, that as *L*, at the time when the assignments were made, was not in either actual or constructive possession, he was unable thereby to pass the property, and that the bill of sale was only evidence of a contract to be performed in future upon the happening of a contingency. RAM KHELAWUN SINGH *v.* OUDH KOOER. **21 W. R. 101**

And *see* BOODHUN *v.* BOODHUN SINGH **21 W. R. 156**

10. ——— *Suit by assignee for possession—Validity of transfer.* The plaintiffs sought to recover possession from the defendants of certain land, claiming under a kararnama executed to them by one Mutyawa. The defendants contended that Mutyawa had never been in possession of the land. The lower Appellate Court held that, as Mutyawa was not in possession at the time when the kararnama was executed, the plaintiffs' claim was not maintainable. On appeal to the High Court :—*Held*, reversing the decree of the lower Appellate Court, that the circumstance of Mutyawa's not having been in possession at the time the kararnama was executed did not prevent the plaintiffs from recovering possession from the defendants. *Kalidas* v. *Kanhaya Lali*, *I. L. R. 11 Calc. 121 : L. R. 11 I. A. 219*, referred to and followed. UGARCHAND MANAKCHAND *v.* MADAPA SOMANA . . **I. L. R. 9 Bom. 324**

11. ——— *Sale in execution of decree—Assignment by purchaser who has not obtained possession.* Upon a sale in execution of a decree the property in the thing sold passes to the purchaser ; and there is nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property

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TRANSFER OF PROPERTY—*contd.*

from the auction-purchaser, albeit it has not been reduced into possession by him. GOVIND RAGUNATH *v.* GOVIND JAGOJI . **I. L. R. 1 Bom. 500**

12. ——— Hypothecation of property without possession—*Incomplete title. Held,* that the hypothecation of property to which a judgment-debtor had not acquired absolute title was incomplete and insufficient to create a valid and perfect lien in favour of the mortgagee enforceable by law against the actual possessor. HERCHUND SINGH *v.* RAM SINGH . **1 Agra 286**

13. ——— Lease granted while lessor is out of possession. A valid lease cannot be granted by a person not in possession of the lands leased. TIERY *v.* KRISTO MOHUN BOSE. HOVENDEN *v.* AKBAR ALI . **L. R. 1 I. A. 76**

14. ——— *Rights of lessee —Suit for possession.* A transfer of property of which the transferor is not at the time of the transfer in possession is not *ipso facto* void. Where a patnidar, while out of possession of the patni estate, granted a dar-patni thereof :—*Held,* that the dar-patnidar's suit against third persons, who were in possession of the estate, to recover possession, would lie, it appearing that the plaintiff had paid an adequate consideration for the dar-patni, and that the dar-patni pottah was not evidence of a contract to be performed in future on the happening of a certain contingency, or that if it were so, that the plaintiff had done all he was bound to do to entitle him to specific performance of the agreement by the patnidar. LOKENATH GHOSE *v.* JUGOBUNDHOO ROY . . . **I. L. R. 1 Calc. 297**

15. ——— Impartible zamindari—Unregistered transfer—*Transfer of Property Act—Effect of recited transfer in a mortgage-deed—Notice to Revenue authorities of alleged transfer.* An impartible *zamindari* having been mortgaged, the *zamindar*, with other members of the joint family, including the defendant, his then presumptive heir, executed a deed-poll addressed to the mortgagee, which recited a transfer of the *zamindari* to the defendant, and referred the mortgagee, if paid off either by all the family or by the defendant, to surrender to the latter. In pursuance of this deed, *arzis* were addressed to the Collector and Deputy Collector of the district, and a statement was made by the *zamindar* to the Collector that a transfer had been effected which was followed by mutation of names in the defendant's favour. *Held,* (i) that the *arzi* and statement could not operate a transfer for which a registered deed was prescribed by the Transfer of Property Act ; (ii) that the mortgage-deed was, both in form and substance, a transaction between the family and the mortgagee for the purpose of strengthening his title, and not between the several members of the family ; and (iii) that it did not evidence a contract between the *zamindar* and the defendant which the latter could enforce. IMMUDIPATTAM THIRUGNANA *v.* PERIYA DORASAMI (1900) . . . . **I. L. R. 24 Mad. 377**
s.c. L. R. 28 I. A. 46 : 5 C. W. N. 217

TRANSFER OF PROPERTY—*concld.*

16. ——— Effect not given to intention to transfer—*Registered deed of sale—Deed retained by vendor—Possession by vendor and subsequent transfer by registered trust deed to temple—Suit for possession by original vendee—Failure of consideration—No property passed.* *S* executed and registered what purported to be a sale deed in favour of first defendant. *S* retained the deed and also continued in possession of the property. He subsequently transferred the property to a temple, and held possession as tenant to the temple, until his death. When *S* died, first defendant took possession of the property, whereupon plaintiffs, the Dharmakartas of the temple brought the present suit to recover possession of it. The finding was that the transfer by *S* to first defendant was intended to be effected only upon an event happening which did not in fact happen :—*Held,* that, as the event did not take place, effect was not given to the intention to transfer and no property passed to the first defendant. RAMALINGA MUDALI *v.* AYYADORAI NAINAR (1905)
I. L. R. 28 Mad. 125

TRANSFER OF PROPERTY ACT (IV OF 1882).

See LANDLORD AND TENANT—AGRICULTURAL TENANCY. **13 C. W. N. 949**

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
I. L. R. 28 Calc. 308

See LEASE—CONSTRUCTION.
I. L. R. 7 Bom. 256
I. L. R. 17 Calc. 826

See LIMITATION, ACT, 1877, SCH. II, ART. 132 . . **I. L. R. 10 Mad. 509**
I. L. R. 14 Calc. 730

See LIMITATION ACT, 1877, SCH. II, ART. 135 . . **I. L. R. 16 Calc. 693**
L. R. 16 I. A. 85

See MORTGAGE—FORECLOSURE—DEMAND AND NOTICE OF FORECLOSURE.
I. L. R. 8 All. 388
I. L. R. 1 Calc. 582

——— holding created before—

See TRANSFER . . **13 C. W. N. 541**

——— Application of Act—*Mortgages executed before Act came into force—"Property," meaning of—General Clauses Act (I of 1868), s. 2, cls. 5, 6. Held* by EDGE, *C.J.*, STRAIGHT, TYRRELL, and KNOX, *JJ.*, that the term "property" as used in Ch. IV of Act IV of 1882, means an actual physical object and does not include mere rights relating to physical objects. *Held,* by the Full Bench, that the Transfer of Property Act (IV of 1882), so far as the question of reliefs and procedure is concerned, applies to mortgages executed before the coming into force of the Act. *Ganga Sahai* v. *Kishen Sahai, I. L. R. 6 All. 262,* and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose, I. L. R. 12 Calc. 583,* referred to. *Per* MAHMOOD, *J.* (*contra*).—The term "property"

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

throughout Act IV of 1882 is used in its most generic sense, and will include the right known as an "equity of redemption." MATA DIN KASHODHAN *v.* KAZIM HUSAIN
I. L. R. 13 All. 432

1. ——— **s. 2**—*Mortgage executed before Act came into force—Assignment of after Act in operation.* The provisions of the Transfer of Property Act apply to the assignment of a mortgage made after that Act came into force although the mortgage may have been made before the commencement of that Act. LALA JUGDEO SUHAI *v.* BIRJ BEHARI LAL . . **I. L. R. 12 Calc. 505**

2. ——— *Mortgage—Foreclosure—Reg. XVII of 1806, s. 8—Provision as to the year of grace—Extension of time by mutual agreement.* The years of grace allowed by s. 8, Regulation XVII of 1806, is a matter o procedure which it was open to the parties of extend by mutual agreement without prejudice to the proceedings already had under the section, and upon the expiration of such extended period the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. The right so acquired by the mortgagee while the Regulation was in force is a right which falls within the meaning of cl. (c), s. 2, of the Transfer of Property Act. Proceedings under s. 8 had come to a close by the expiration of the stipulated period of extension while the Regulation was still in force, and the mortgagee brought his suit for possession in pursuance thereof after the passing of the Transfer of Property Act. *Held*, that the mortgagee was entitled to a decree such as he would have had if the Regulation had been still in force. BAIJ NATH PERSHAD NARAIN SINGH *v.* MOHESHWARI PERSHAD NARAIN SINGH . . **I. L. R. 14 Calc. 451**

3. ——— *Mortgage—Foreclosure—Suit for conditional sale—Reg. XVII of 1806—Procedure.* A suit was brought on the 24th January 1885 by a mortgagee upon a mortgage by conditional sale asking for a declaration that the mortgagor's right to redeem had been extinguished, and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April 1881, and the mortgage-money was repayable on the 13th May 1881. On the 9th July 1881 the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of ss. 7 and 8 of Regulation XVII of 1806. The year of grace expired on the 10th July 1882. It was contended by the mortgagor that, as the Transfer of Property Act came into force on the 1st July 1882, the proceedings taken by the mortgagee should be regulated by the procedure laid down in ss. 86 and 87 of that Act, and not by the procedure prescribed by Regulation XVII of 1806. *Held*, that the procedure laid down by the Transfer of Property Act could not be applied to the case. Although the year of grace had not expired when that Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired the right to bring a suit under the provisions of Regulation XVII of 1806 at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year, and such right and liability came withint he meaning of these terms as used in cl.. (c), s. 2, of the Transfer of Property Act. MOHABIR PERSHAD NARAIN SINGH *v.* GUNGADHUR PERSHAD NARAIN SINGH **I. L. R. 14 Calc. 599**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 2**—*contd.*

4. ——— *Mortgage—Suit for foreclosure—Conditional sale—Reg. XVII of 1806—General Clauses Consolidation Act (I of 1868), s. 6—"Proceedings."* In a suit for foreclosure under a deed of conditional sale where the due date of the deed expired and notice for foreclosure was served while Regulation XVII of 1806 was in force, but before the expiration of the year of grace that Regulation had been repealed by the Transfer of Property Act :—*Held*, following *Mohabir Pershad Narain Singh* v. *Gungadhur Pershad Narain Singh, I. L. R. 14 Calc. 599*, that proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by s. 6 of the General Clauses Consolidation Act (I of 1868). The "proceedings" referred to in that section are not necessarily judicial proceedings only, but ministerial proceedings, as, in the present case, the service of notice of foreclosure. UMESH CHUNDER DAS *v.* CHUNCHUN OJHA
I. L. R. 15 Calc. 357

5. ——— **and ss. 67, 86**—*Suit for foreclosure of mortgage—Beng. Reg. XVII of 1806, ss. 7, 8—Procedure—General Clauses Act (I of 1868), s. 6.* A mortgagee by conditional sale under an instrument executed while Regulation XVII of 1806 was in force and before the Transfer of Property Act, 1882, which repealed that Regulation, came into force, sued, after the repeal of that Regulation, for foreclosure of the mortgage, not having proceeded in accordance with the provisions of s. 8 of that Regulation. *Held* (STUART *C.J.*, dissenting), that the procedure of that section was not saved by cl. (c) of s. 2 of the Transfer of Property Act but the provisions of that Act were applicable to the suit. GANGA SAHAI *v.* KISHEN SAHAI . . . . **I. L. R. 6 All. 262**

6. ——— **and ss. 67 and 99**—*Attachment of property mortgaged prior to 1882.* In 1884 a mortgagee obtained a decree for arrears of interest due under a mortgage-deed of 1879, and in execution of the decree attached and applied for the sale of the land mortgaged :—*Held*, that by reason of s. 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by by a suit instituted under s. 67 of the said Act. KAVERI *v.* ANANTHAYYA . **I. L. R. 10 Mad. 129**

7. ——— **and ss. 67 and 99**—*Mortgage-decree—Execution of decree.* A decree-holder, who had obtained a decree in the year 1880 against his judgment-debtor, declaring his title in certain

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 2**—*contd.*

mortgaged properties and authorizing a sale, sought. after several previous applications keeping the decree alive, to execute his decree again on the 15th April 1885. The judgment-debtor objected, on the ground that no suit had been instituted or decree obtained under s. 67 of the Transfer of Property Act as directed by s. 99. *Held*, that s. 99 of that Act was not intended to apply to decrees already obtained declaring a lien and authorizing a sale but even assuming that it was so intended, s. 2 of the Act saved the right of the decree-holder to obtain a sale of the mortgaged properties. *Ganga Sahai* v. *Kishen Sahai, 1. L. R. 6 All. 262*, distinguished. DINENDRA NATH SANNYAL *v.* CHANDRA KISHORE MUNSHI . . . . **I. L. R. 12 Calc. 436**

8. ——— and **s. 86**—*Mortgage—Conditional sale—Suit for possession on foreclosure—Beng. Reg. XVII of 1806, ss. 7, 8.* The procedure laid down in the Transfer of Property Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by s. 2, cl. (*c*), of the Act. Where, therefore, under the provisions of Regulation XVII of 1806, notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed and the foreclosure proceedings taken before the Transfer of Property Act came into force, and after the expiry of the year of grace, the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution-sale and obtained possession before the commencement of the foreclosure proceedings, and the necessary notice had not been served upon him :—*Held*, that it was competent to the Court to apply the procedure prescribed by the Transfer of Property Act and grant the mortgagee a decree in the terms of s. 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai* v. *Kishen Sahai, I. L. R. 6 All. 622*, referred to. PERGASH KOER *v.* MAHABIR PERSHAD NARAIN SINGH **I. L. R. 11 Calc. 582**

9. ——— *Mortgage—Foreclosure, suit for—Mortgage by conditional sale—Beng. Reg. XVII of 1806—Procedure—Statute, construction of.* Where a suit is brought, after the date of the Transfer of Property Act, for the foreclosure of a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Regulation XVII, 1806, not being saved by s. 2, cl. (*c*), of Act IV of 1882. *Ganga Sahai* v. *Kishen Sahai, I. L. R. 6 All. 262*, approved. *Per* WILSON, *J.*—It is a general rule in construing Statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation. *Per* TREVELYAN, *J.*—There is a clear distinction between "relief" and the mode or procedure for obtaining such relief. The "relief" remains unaffected by a change of procedure. The "rights and liabilities" of a mortgagor and mortgagee, and the "relief" in respect of such rights and liabilities, are the same under Act IV of 1882 as they were before. A different procedure for enforcing such rights and obtaining such relief, has, however, been adopted by the Transfer of Property Act. BHOBO SUNDARI DEBI *v.* RAKAL CHUNDER BOSE . . . . **I. L. R. 12 Calc. 583**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 2**—*concld.*

——— **ss. 2 cl. (c), (d) ; 111 cl. (d).**

See MERGER . **I. L. R. 36 Calc. 802.**

——— **s. 2, cl. 36.**

See LANDLORD AND TENANT. **I. L. R. 33 Calc. 786**

——— **s. 3.**

See CONTRACT . **I. L. R. 33 Calc. 702.**

See DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS. **L. R. 29 I. A. 203**

See MORTGAGE . **10 C. W. N. 276**

See PARTIES—PARTIES TO SUITS—MORTGAGES, SUITS CONCERNING. **I. L. R. 21 Calc. 116.**

See REGISTRATION ACT, 1877, s. 50. **I. L. R. 16 All. 478**

1. ——— *Meaning of "notice."* The definition of the word "notice" in s. 3 of the Transfer of Property Act (IV of 1882) correctly codifies the law as to notice which existed prior to the passing of the Act. CHURAMAN *v.* BALLI . . . . **I. L. R. 9 All. 591**

2. ——— *Mortgage—Registration, if it amounts to notice—Constructive notice.* Case in which it was held that the mere registration of puisne mortgages did not amount to a constructive notice to the prior mortgagee, and he was not bound, before suing on his mortgage, to make a search in the registration office to ascertain who had subsequently acquired a right to redeem, and was not guilty of gross negligence or wilful abstention in not causing such a search. *Janki Pershad* v. *Kishen Dat, I. L. R. 16 All. 478*, dissented from. *Laksman* v. *Dasrat, I. L. R. 6 Bom. 168, Dundaya* v. *Chenbasapa, I. L. R. 9 Bom. 427, Chintaman* v. *Dareppa, I. L. R. 14 Bom. 506, Narayan* v. *Bapu, I. L. R. 17 Bom. 741, Churaman* v. *Balli, I. L. R. 9 All. 591*, disapproved. *Shan Maun Mull* v. *Madras Building Company, I. L. R. 15 Mad. 268, Damodara* v. *Soma Sundara, I. L. R. 12 Mad. 429, Madras Building Company* v. *Rowlandson, I. L. R. 13 Mad. 383, Inder Dawan Pershad* v. *Gobind Lall Chowdhry, I. L. R. 23 Calc. 790, Preo Nath Chattopadhya*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 3**—*concld.*

v. *Ashutosh Ghose, I. L. R., 27 Calc. 358,* and *Jadu Nath Ghosh* v. *Radha Raman Mukerjee, 5 C. W. N. lxxxiii, notes,* approved. Whether registration by itself amounts to notice in any case depends upon the facts and circumstances of that case—upon the degree of care and caution which an ordinary prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act. BUNWARI JHA *v.* RAMJEE THAKUR (1902) . **7 C. W. N. 11**

——— **ss. 3, 6** (*e*), **130.**

See ASSIGNMENT.
I. L. R. 36 Calc. 345

——— **s. 4.**

See REGISTRATION ACT, 1877, s. 17, CL. (*d*).
I. L. R. 17 Mad. 275

——— **ss. 4, 107**—*Registration Act, ss. 17* (*d*), *49—Proof of terms of oral lease by unregistered argeement in writing by tenant to occupy on certain conditions—Such evidence not excluded by s. 92 of the Evidence Act.* The effect of the closing words of s. 4 of the Transfer of Property Act is that s. 107 of that Act must be read along with s. 17 (*d*) of the Registration Act so as to add to the first sentence of s. (*d*) words to the following effect:—"and all instruments referred to in s. 107 of the Transfer of Property Act." An instrument which does not fall within s. 107 of the Transfer of Property Act is not compulsorily registrable because it falls within the definition of a lease in s. 3 of the Registration Act. A written undertaking by a tenant to occupy on certain conditions is not a document by which a lease can be made and is not an instrument referred to in s. 107, although it is a lease within the definition in s. 3 of the Registration Act. Such a document is not compulsorily registrable when s. 17 (*d*) of the Registration Act read by itself does not require it to be registered, and its admissibility in evidence to prove an oral lease is not precluded by anything in the Evidence Act or by s. 49 of the Registration Act. *Turof Sahib* v. *Esuf Sahib, I. L. R. 30 Mad. 322,* referred to. KAKI SUBBANADRI *v.* MUTHU RANGAYYA (1909) . . . . **I. L. R. 32 Mad. 532**

——— **ss. 4, 123.**

See GIFT . **I. L. R. 33 Calc. 584**

——— **s. 6.**

See HINDU LAW—REVERSIONARY RIGHT.
I. L. R. 29 Mad. 120

See ONUS OF PROOF—HINDU LAW—ALIENATION . **I. L. R. 17 All. 125**

See RIGHT OF SUIT—MESNE PROFITS.
2 C. W. N. 43

1. ——— *Property—Actionable claim—Transferable claim—Civil Procedure Code, s. 266—Execution of decree—Attachment.* Under the Transfer of Property Act, "property" includes an actionable claim. RUDRA PERKASH MISSER *v.* KRISHNA MOHAN GHATUCK
I. L. R. 14 Calc. 241

2. ——— *Reversionary right—Assignment of the interest of a Hindu reversioner.* The interest of a Hindu reversioner upon the death of a widow does not come within the terms of cl. (*a*), of s. 6 of the Transfer of Property Act (IV of 1882), and an assignment of such interest is allowed by law. BRAHMADEO NARAYAN *v.* HARJAN SINGH . . **I. L. R. 25 Calc. 778**

3. ——— *Mesne profits, right to recover—Transferability of—Actionable claim—Transfer of Property Act, s. 130.* A right to recover mesne profits which are in the nature of damages is not transferable. DURGA CHUNDRA ROY *v.* KOYLASH CHUNDER ROY . . **2 C. W. N. 43**

4. ——— *Hindu law—Transfer by a Hindu reversioner of his reversionary interest. Held,* that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. *Sham Sunder Lal* v. *Achhan Kunwar, L. R. 25 I. A. 183,* followed. JAGGAN NATH *v.* DIBBO (1908)
I. L. R. 31 All. 53

——— **s. 6** (*a*).

See COMPROMISE . **I. L. R. 31 Mad. 474**

See HINDU LAW—REVERSIONERS.
I. L. R. 29 Calc. 355

See MAHOMEDAN LAW.
I. L. R. 31 Bom. 165

1. ——— *Spes successionis—Non-transferable and non-releasable—Deeds executed by pardanashin lady—Burden of proof—Mahomedan law.* It was not intended by s. 6 (*a*) of the Transfer of Property Act to establish and perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity. SUMSUDDIN *v.* ABDUL HUSEIN (1906)
I. L. R. 31 Bom. 165

2. ——— *Hindu Law—Reversioner—Renunciation of reversionary right to a transfer of an expectancy and as such is void—Limitation Act (XV of 1877), Sch. II, Art. 127—Time does not run until sharer excluded.* *A*, a member of an undivided Hindu family was adopted by one *V*, a widow. His adoption was declared invalid in 1883. He consented to reside with *V*, and in 1886 orally renounced his right to a share in the property belonging to his natural family in consideration of his co-sharers who were also the reversioners of *V* renouncing the reversionary right in the properties held by *V* as the heiress of her husband. In a suit brought by *A* in 1901 for partition of the property in his natural family:—*Held,* that *A's* residing with *S* from 1883 to 1896 did not amount to an abandonment by *A* of his right to partition or to an exclu-

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 6 (a)—*contd.*

sion of *A* to his knowledge, from the enjoyment of his family property and that his right to partition was not barred by Article 127, Schedule II of the Limitation Act. *Held*, further, that the renunciation of their reversionary rights by the reversioners amounted to a transfer of an expectancy and was a nullity under s. 6 (*a*) of the Transfer of Property Act and that such renunciation cannot be a good consideration for a contract. DHOORJETI SUBBAYYA *v.* DHOORJETI VENKAYYA (1906) **I. L. R. 30 Mad. 201**

3. ——— *Transfer of bare expectancy by Mortgagor or by consent decree void.—Res judicata in execution proceedings—Order passed after notice no res judicata when notice silent as to prayers claimed—Receiver, continuation of, by Appellate Court—Amendment of execution petition, power of Court to allow.* *A*, the owner of an impartible and inalienable zamindari, which passed on the death of the owner for the time being who had only a life estate, to the senior male member of the family mortgaged it to *B* in 1892 without possession. Four male members of the family *C*, *D*, *E*, *F*, who were in the line of heirs joined *A* in executing the mortgage. Subsequently some usufructuary mortgages were executed to *B* and *B* was in possession of the zamindari. In 1894, Original Suit No. 43 of 1894 was brought by *B* against *A*, *C*, *D*, *E*, *F*, and others to recover the amount due under the mortgage of 1892. A consent decree was passed making defendants *A*, *C*, *D*, *E*, *F* liable for the amount and directing that in case the amount was not recovered in the lifetime of *A*, it should be recovered from the other defendants when they succeeded to the estate and the zamindari was made liable for the decree amount. *A* died in 1904. He was succeeded by one not a party to the suit and on the latter's death in 1905, *C* succeeded as zamindar. In 1899 and 1903 two applications for execution by sale of the *whole zamindari* were put in by *B* and were granted after notice served on *C*. The notices, however, only stated that application was made for execution of the decree, but the reliefs asked for were not stated. *A* applied again for execution in 1905. The prayer was for sale of the zamindari and for the appointment of a Receiver, but the prayer for sale was given up at the trial. *C* raised various objections which were over-ruled and the Sub-Judge appointed a Receiver to take charge of the zamindari and its appurtenances. *C* appealed :—*Held*, on appeal, that *C* in 1892 was not a dormant co-owner with *A* in the zamindari and that the mortgage by *C* of his right in the zamindari in 1892 was a transfer of a bare expectancy and was a nullity under s. 6 (*a*) of the Transfer of Property Act. The probihition in s. 6 (*a*) of the Transfer of Property Act is based on principles of public policy, and the Court cannot allow such transactions to be effected by a consent decree. *Lakshmanuswami Naidu* v. *Rengamma*, *I. L. R.* 26 *Mad. 31*, referred to. The principles of equity, on which English Courts grant relief in such cases when the property actually vests, cannot be given effect to in the face of express prohibition contained in s. 6 (*a*) of the Transfer of Property Act. An order passed in execution proceedings will be *res judicata* only when the notice gives sufficient intimation of the relief prayed for. *Narayana Pattar* v. *Gopalakrishna Pattar*, *I. L. R. 28 Mad. 355*, followed. *Held*, further, that as the Receiver was validly appointed on the ground that the property was the subject-matter of the suit, the Appellate Court had jurisdiction to maintain him as a means of realising the amount from the judgment-debtor personally and the property must be considered under attachment, though not attached under s. 274 of the Code of Civil Procedure. Amounts realised by an usufructuary mortgagee in possession after decree for sale cannot be applied in satisfaction of the decree amount unless certified under s. 258 of the Code of Civil Procedure. *Held*, also, that under the circumstances of the case the decree-holder may be considered to have applied for the enforcement of the decree against *C* personally and the order of the lower Court upheld on that ground. Amendment of petition by inserting a prayer for execution against *C* personally allowed. RAMASAMI NAIK *v.* RAMASAMI CHETTI (1906) . . . . **I. L. R. 30 Mad. 255**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 6 (a)—*concld.*

——— s. 6 (d)—

See MORTGAGE . **I. L. R. 29 All. 640**

——— ss. 6, 19, 21—*Succession Act* (*X of 1865*), *s. 107—Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property—Vested or contingent interest—Registration Act* (*III of 1877*), *ss. 17, 18, cl.* (*d*) *and* (*f*), *21, 24.* *Held*, that the right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of a "vested interest" in s. 19 of the Transfer of Property Act (IV of 1882), or of "a contingent interest" in s. 21 of the Act and s. 107 of the Indian Succession Act (X of 1865). So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (*a*) of s. 6 of the Transfer of Property Act (IV of 1882), the "chance of an heir-apparent succeeding to an estate" or "a mere possibility" of succession, which cannot be transferred. ABDOOL HOOSEIN *v.* GOOLAM HOOSEIN (1905) . . . **I. L. R. 30 Bom. 304**

——— s. 7.

See MINOR—LIABILITY OF MINOR ON, AND RIGHT TO ENFORCE, CONTRACTS. **I. L. R. 23 Bom. 146**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 8.

See DEED—CONSTRUCTION.
L. R. 30 I. A. 71

See MORTGAGE . 9 C. W. N. 710

See REGISTRATION ACT, s. 18.
I. L. R. 18 Mad. 454

See VENDOR AND PURCHASER—PURCHASERS, RIRHTS OF.
I. L. R. 22 Bom. 610

——— *Mortgage—Superior and subordinate rights existing in the same person—General words in mortgage-deed, effect of—Estoppel—Evidence Act (I of 1872), ss. 92, 115—Judgment nunc pro tunc.* Defendant No. 1 amongst other properties mortgaged a taluk, in which he had a superior zamindari right and in some villages of which he had a subordinate *sarbarakari* interest. The mortgage-deed did not in terms purport to pass the *sarbarakari* rights. But it is found that though the *sarbarakari* tenure was never allowed to be specially merged in the superior tenure, yet at the time the mortgage was created, it was not known that any *sarbarakari* interest existed in these villages, but both parties understood that the entire interest in the taluk without reservation of any *sarbarakari* rights passed under the mortgage. *Held* by PARGITER, *J.*—That it was not open to the mortgagor, on subsequently discovering that he had the *sarbarakari* rights in these villages, to say he had not mortgaged his entire interest in the villages, and that defendants Nos. 2 and 3, who were subsequent *bonâ fide* mortgagees for value of the *sarbarakari* interest, were in no better position. *Held* by WOODROFFE, *J.*—That according to the rule of construction embodied in s. 8 of the Transfer of Property Act, the general words used in the mortgage-deed were, in the absence of reservation of entire rights, sufficient to pass the entire interest of the mortgagor. Appellant having died before the judgment was delivered, but after the appeal had been heard, the judgment was entered *nunc pro tunc.* GOUR CHANDRA GAJAPATI NARAIN DEB *v.* MAKUNDA DEB (1905)
9 C. W. N. 710

——— ss. 8, 70—*Mortgage—Accession to mortgaged property. Held,* that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage. The Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in ss. 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed. MACLEOD *v.* KISSAN (1904)
I. L. R. 30 Bom. 250

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 10.

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.
I. L. R. 26 Mad. 157

See MARRIED WOMAN, PROPERTY OF.
I. L. R. 30 Mad. 378

1. ——— *Married Woman's Property Act (III of 1874), s. 8—Restraint on anticipation.* S. 10 of the Transfer of Property Act merely excepts from the general rule laid down in s. 8 of the Married Woman's Property Act, III of 1874, the particular case of a married woman, and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Woman's Property Act of 1874 and the decisions upon it untouched. HIPPOLITE *v.* STUART . I. L. R. 12 Calc. 522

2. ——— and s. 2—*Condition against alienation—Inheritance—Deed of compromise—Bengal Civil Courts Act, VI of 1871, s. 24.* In a suit for possession of certain shares in certain villages a compromise was effected between the plaintiffs and *B*, the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows: "The said *B* will hold possession as a proprietor, generation by generation without the power of transferring in any shape. The following shares recorded in *B's* name shall not be transferred or sold in auction in payment of any debt payable by the said *B*, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession." *B* obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of *B* attached the shares referred to in the deed in execution of a decree obtained against the heirs of *B* for money lent to *B* on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment. *Held,* by OLDFIELD, *J.*, that the deed of compromise passed an absolute estate to *B* and his heirs to which the law annexed a power of transfer, and that, in reference to s. 10 of the Transfer of Property Act, the stipulation against alienation on *B's* part, or against sale by auction in execution of decrees aginst him, was void. *Per* MAHMOOD, *J.*—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession of inheritance, to be governed by s. 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu law the rights of *B* in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that the Hindu law being silent on this subject, the principles of justice, equity, and good conscience

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 10**—*concld.*

must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restriction imposed by the deed of compromise upon *B's* powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognised; and that *B* must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts. *Tagore Case, 9 B. L. R. P. C. 377*, referred to. BHAIRO *v.* PARMESHRI DAYAL . . **I. L. R. 7 All. 516**

3. ——— **and s. 12**—*Transfers by act of parties—Assignments by operation of law.* Ss. 10 and 12 of the Transfer of the Property Act (IV of 1882) relate only to transfers by act of parties. *In the matter of the* WEST HOPETOWN TEA COMPANY **I. L. R. 12 All. 192**

——— **ss. 10, 11.**

See RIGHT OF SUIT—CONTRACTS AND AGREEMENTS . **I. L. R. 8 All. 452**

——— **ss. 10, 110 (g)**—*Perpetual lease—Covenant against alienation without covenant for re-entry—Construction of documents.* Where a perpetual lease of a village to the lessee and his heirs contained a covenant against alienation by the lessee, but no covenant giving the lessor a right of re-entry upon breach of the former covenant, it was *held* that the successors in title of the lessor could not recover the property the subject of the lease from the alienees of the successors in title of lessee. *Nil Madhab Sikdar* v. *Narattam Sikdar, I. L. R. 17 Calc. 826*, and *Parmeshri* v. *Vittappa Shanbaga, I. L. R. 26 Mad. 157*, followed. NETRAPAL SINGH *v.* KALYAN DAS (1906) **I. L. R. 28 All. 400**

——— **s. 14.**

See PERPETUITIES, RULE AGAINST. **I. L. R. 20 Bom. 511**

——— **ss. 14, 15 and 123**—*Trust validly created by registered instrument without delivery of possession—Ss. 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law—Hindu Law—Gift—Settlement on persons then in existence at close of a life in being valid—Trusts Act (II of 1882), s. 6.* *R* by registered deed of settlement settled property in trust and after making various provisions for the maintenance of himself and his wife and his grand-daughters *V* and *R* further provided that on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters, who attain 18 and the daughters of the grand-daughters, who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given R1,000, and a male child on attaining age was to be given his share of the property. The settlor did not give possession ot the properties to his trustees, but remained in possession till his death.

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 14**—*concld.*

In a suit by the reversioners of *R* to set aside the settlement as null and void:—*Held*, that a transfer of property and a valid declaration of trust were effected by the registered deed, though unaccompanied by physical delivery of possession and that nothing in s. 6 of the Trusts Act was in conflict with this view. *Held*, also, that the settlement by way of remainder in favour of the sons of *V* and *R* (such sons being in existence at the date of the settlement) was valid under the Hindu Law. A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good. *Sreemuthy Soorjumoney Dossee* v. *Denobundoo Mullick, 9 Moo. I. A. 134*, followed. A bequest to a class, some of whom could not take, is not void, but will ensure for the benefit of such of the class, who can take. The rule in *Leake* v. *Robinson, 2 Mer. 363*, does not apply to the wills of Hindus. *Bhagabati Barmanya* v. *Kali Charan Singh, I. L. R. 32 Calc. 992*, referred to and followed. *Ram Lal Sett* v. *Kanai Lal Sett, I. L. R. 12 Calc. 663*, referred to and followed. Ss. 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated and do not apply to Hindu wills. In determining the validity or otherwise of dispositions of property under ss. 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad, although, as events actually happened, it was not so postponed. RANGANADHA MUDALIAR *v.* BAGIRATHI AMMALL (1906) . **I. L. R. 29 Mad. 412**

——— **ss. 17, 89.**

See APPEAL . **I. L. R. 31 Calc. 373**

——— *Order for stay of sale—Mortgage decree—Civil Procedure Code (Act XIV of 1882), ss. 244, 291 and 588—Order absolute for sale—Court's power to adjourn sale of mortgaged property.* An appeal lies against an order for stay of sale of property directed to be sold in execution of a mortgage-decree, notwithstanding that the said order is in terms one under s. 291 of the Code of Civil Procedure. After an order absolute for sale had been made under s. 89 of the Transfer of Property Act, the Court has power to adjourn the sale of the mortgaged property with a view to give time to the mortgagor to raise money to pay off the decree. It could adjourn the sale to a future date in order to have a better sale in the event of want of bidders or for other similar reason. *Kedar Nath Raut* v. *Kali Churn Ram, I. L. R. 25 Calc. 703*, distinguished. *Taniram* v. *Gajanan, I. L. R. 24 Bom. 300*, dissented from. SHYAMKISHEN *v.* SUNDAR KOER (1904) . **I. L. R. 31 Calc. 373**

——— **s. 25**—*Lis pendens—Contentious suit—Suit for partition—Admission of share in plaint—Transfer after filing of plaint—Objection to share in written statement.* *A* instituted a suit

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 25—*concld.*

against *B* and other co-sharers, for partition, admitting that *B* had a share in the property. Afterwards *C* purchased the share, which *B* claimed to have held. Some of the defendants, who were co-sharers of the property under partition, then put in written statements, in which they denied that *B* had any share. A preliminary decree was passed by the Court specifying the shares of the several proprietors and declaring that *B* had no share at all. *B* did not enter appearance in these proceedings. After the decree declaring the shares of the proprietors had been passed, *C* applied to be made a party to that suit, but her application was rejected. *B* appealed against the preliminary decree, but his appeal was dismissed. Upon a suit by *C* for possession of the share purchased by her from *B*, the defence mainly was that the suit was barred by reason of s. 25 of the Transfer of Property Act :—*Held*, that the suit was not so barred. The suit did not become contentious, until the written statement was put in by the opposing defendants disputing any right, title or interest of *B* in the property under partition, as in the plaint in the partition suit it was admitted that he had a share in the property under partition ; and that, having regard to the fact that *C*, the transferee, was not allowed to become a party to that suit, she could not properly be regarded as prejudiced by the result. *Jogendra Chunder Ghose* v. *Ful Kumari Dassi*, *I. L. R. 27 Calc. 77*, distinguished. KRISHNA KAMINI DEBI *v.* DINO MONY CHOWDHURANI (1904) **I. L. R. 31 Calc. 658**

——— ss. 33, 52.

See SALE . . **9 C. W. N. 22**

——— s. 34.— *Hindu Law—Minor—Contract by father to sell ancestral property—Specific performance of such contract—Circumstances justifying sale—Debts of father—Burden of proof of justifying circumstances.* The principle laid down by s. 34 of the Transfer of Property Act (IV of 1882) has no application where the transaction is still incomplete, for it pre-supposes an actual transfer for consideration. JAMSETJI N. TATA *v.* KASHINATH JIVAN MANGLIA (1901) **I. L. R. 26 Bom. 326**

——— s. 35.

See GUARDIAN—DUTIES AND POWERS OF GUARDIANS . **I. L. R. 22 Mad. 289**

——— ss. 37, 109—*Misjoinder of parties and causes of action—No misjoinder where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors, and lessors who are tenants-in-common.* A suit is bad for misjoinder, where there is a joinder of two causes of action, in each of which all the defendants are not interested. Where, however, there is really only one cause of action against some defendants, and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder. *Saminada Pillay* v. *Subba Reddiar I. L. R. 1 Mad. 333*, distinguished. *Per* SIR S. SUBRAHMANIA AYYAR, *Acting C.J.*—A tenant-in-common may have ejectment to the extent of his interest, on proper notice to quit ; and the inclusion in such a suit of the other co-sharers, as defendants, is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made. *Per* SANKARAN NAIR, *J.*—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained ; as also the rights of lessors, who are tenants-in-common. Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it to continue, while according to the Indian cases it subsists, until all of them agree to put an end to it ; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them, if they continue to hold as joint tenants. This principle, however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties. The principles embodied in ss. 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable. When the lessor recognises the right of another in the premises demised, all the obligations of the lessee, as to payment of rent and surrender of possession, must, if such obligation be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties. SIMHADRI APPA RAO *v.* PRATTIPATI RAMAYYA (1905) . . . **I. L. R. 29 Mad. 29**

——— s. 39.

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIDOW.
I. L. R. 23 Bom. 342
I. L. R. 27 Calc. 194
I. L. R. 22 All. 326

——— ss. 39 and 100—*Maintenance—Charge—Decree on compromise creating a charge—Bonâ fide transferees for value without notice.* *B* instituted a suit to recover certain property from *M*, who was entitled to maintenance. The suit resulted in a decree incorporating a compromise. *M* sued *B* and certain transferees for value without notice to recover arrears of maintenance by the sale of certain property charged by the above decree with the payment of the maintenance. *Held*, (i) that s. 39 of the Transfer of Property Act had no application ; (ii) that, it being clear

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 39—*concld.*

upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of s. 100 of the Transfer of Property Act, the charge could be enforced against *bonâ fide* transferees for value without notice. *Harjas Rai* v. *Naurang, All. Weekly Notes, (1906) 82,* distinguished. MAINA *v.* BACHCHI (1906)

I. L. R. 28 All. 655

——— s. 40—*Trust Act (II of 1882), s. 91—Mortgagee with knowledge of facts which might have revealed the existence of an equitable right bound by such right.* Where a mortgagee, at the time of his mortgage, is aware of circumstances, which ought to have put him on enquiry, and such enquiry, if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights will, on the principles embodied in s. 40 of the Transfer of Property Act and s. 91 of the Trusts Act, be postponed to the rights of such third party. KAMESWARAMMA *v.* SITARAMANUJA CHARLU (1905) . . **I. L. R. 29 Mad. 177**

——— s. 41.

See GUARDIAN **I. L. R. 29 All. 292**

See N.-W. P. RENT ACT, s. 7.

I. L. R. 8 All. 409

1. ——— *Ostensible ownership—Purchase bonâ fide for value from ostensible owner—Laches—Decision based upon ground not specifically pleaded.* Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. Where the plaintiff had for many years left another person in possession of a house, and the defendant had become at auction sale the *bonâ fide* purchaser for value of the house under a decree against such person as ostensible owner, the Court found that s. 41 of the Transfer of Property Act applied, and dismissed the plaintiff's suit. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties. THAKURI *v.* KUNDAN

I. L. R. 17 All. 280

2. ——— *Transfer by ostensible owners—Inquiry by transferee as to title of transferors—Reasonable care.* A Government official, owning *zamindari* property in the district in which he was employed, caused that property to be recorded in the revenue-papers in the name of his young sons. The sons sold portions of the property and mortgaged others. The vendee and mortgagee satisfied himself that the property had been recorded for some years in the names of the sons, but there stopped, and made no further inquiries as to whether the property really belonged to the sons, who were the ostensible owners, or not. *Held,* that the transferor, though acting in good faith, had not taken reasonable care to ascertain that the transferor had power to make the transfer. PARTAP CHAND *v.* SAIYIDA BIBI (1901) . . **I. L. R. 23 All. 442**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 41—*concld.*

3. ——— *Mortgage by ostensible owner.* Where certain mortgagees took a mortgage from a person, who was in possession of the property mortgaged, was recorded as owner, and held the title-deeds of the property, it was *held* that there was nothing in the transaction to put the mortgagees on inquiry as to the real title to the property, but the principle of s. 41 of the Transfer of Property Act, 1882, applied, and a suit to restrain the mortgagees from selling the property in execution of a decree on their mortgage was rightly dismissed. *Ramcoomar Koondoo* v. *John and Maria Mc Queen, 11 B. L. R. 46,* followed. KHWAJA MUHAMMAD KHAN *v.* MUHAMMAD IBRAHIM (1904) . . **I. L. R. 26 All. 490**

4. ——— *Application for a personal decree against mortgagor—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 116. Held,* that the fact that there is no express personal convenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under s. 90 of the Transfer of Property Act (IV of 1882) against the mortgagor, if the requirements of the section are otherwise fulfilled a personal covenant to pay is implied in and is an essential part of every simple mortgage. *Sawaba Khandapa* v. *Abaji Jotirav, I. L. R. 11 Bom. 475,* not followed. *Unichaman* v. *Ahmed Kutti Kayi, I. L. R. 21 Mad. 242,* referred to. *Held,* also, that on an application under s. 90 of the Transfer of Property Act it is the date of filing the suit, which has to be looked to, in considering the question whether the balance is legally recoverable from the defendant. *Hamid-ud-din* v. *Kedar Nath, I. L. R. 20 All. 386,* followed. JANGI SINGH *v.* CHANDAR MAL (1908)

I. L. R. 30 All. 388

——— s. 43.

See EXECUTION OF DECREE—MODE OF EXECUTION—MORTGAGE.

I. L. R. 18 Mad. 492

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.

I. L. R. 26 Bom. 379

See SALE . . **9 C. W. N. 1019**

See VENDOR AND PURCHASER—MISCELLANEOUS CASES.

I. L. R. 14 Mad. 459

——— *Mortgagor acquiring the mortgaged property cannot use the mortgage right as a shield against subsequent mortgages executed by himself.* The doctrine that a person paying off mortgage or purchasing the mortgaged property in execution of a decree on the mortgage can set up such mortgage as a shield against puisne incumbrancers will not, on the principle embodied in s. 43

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 43—*concld.*

of the Transfer of Property Act, apply, when the person so paying or purchasing is the mortgagor himself. The effect of the payment or purchase in such cases so far as the mortgagor and those claiming under him are concerned will be simply to extinguish the mortgage, and the rights of subsequent incumbrancers will be determined as if such prior mortgage never existed. MANJAPPA ROI *v.* KRISHNAYYA (1905)
I. L. R. 29 Mad. 113

——— s. 44.

See HINDU LAW—PARTITION—RIGHT TO PARTITION—PURCHASER FROM CO-PARCENER . **I. L. R. 13 Mad. 275**

See PARTITION ACT (IV OF 1893), s. 4.
I. L. R. 30 All. 324

——— s. 45.

See SALE FOR ARREARS OF REVENUE—PURCHASERS, RIGHTS AND LIABILITIES OF . . . **4 C. W. N. 465**

——— s. 48.

See N.-W. P. RENT ACT, s. 7.
I. L. R. 8 All. 409

——— s. 50—*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.* On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same. *Held*, that the defendant was not chargeable with rent sued for. S. 50 of the Transfer of Property Act (IV of 1882) was applicable, inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary. KAVERIAMMA *v.* LINGAPPA. (1908)
I. L. R. 33 Bom. 96

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 51.

See DECREE—FORM OF DECREE—MORTGAGE . . **I. L. R. 8 All. 502**

See EJECTMENT, SUIT FOR.
I. L. R. 29 Calc. 871

1. ——— *Equitable principle embodied in s. 51 not opposed to Mahomedan Law—Mahomedan Law—De facto guardian, power of, over minor's property.* Under Mahomedan Law, a sale by the mother as *de facto* guardian of her minor son, of the property of such minor is not binding on him. The rule of equity embodied in s. 51 of the Transfer of Property Act is not opposed to any principle of Mahomedan Law and s. 2 does not preclude its application in cases decided under the Mahomedan Law. What constitutes good faith within the meaning of s. 51 is a question of fact and a person may act in good faith, though he acts under a mistake of Law. DURGOZI ROW *v.* FAKEER SAHIB (1906) . **I. L. R. 30 Mad. 197**

2. ——— *Improvements, right to claim compensation for, when allowable.* Good faith within s. 51 of the Transfer of Property Act is not necessarily precluded by facts showing negligence in investigating the title. Where, however, a purchaser knows or must be presumed to know that the vendor could sell only under certain circumstances, and he either knows that such circumstances do not exist or wilfully abstains from making any enquiries on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be entitled to claim compensation for improvements effected by him. NANJAPPA GOUNDEN *v.* PERUMA GOUNDEN (1909)
I. L. R. 32 Mad. 530

3. ——— A "belief" in good faith under s. 51 of the Transfer of Property Act (IV of 1882) means not only acting honestly and fairly but includes due enquiry. So, where a person consciously avoids making an enquiry, though he may be said to have a belief on the matter, it would not be a belief in good faith. The position of the Crown as landlord of all immoveable property in Calcutta ought not to prevent the application of s. 51 of the Transfer of Property Act (IV of 1882). *Jugmohan Das* v. *Pallonjee, I. L. R. 22 Bom. 1; Ismail Khan Mahomed* v. *Jaigun Bibee, 4 C. W. N. 210 : s.c. I. L. R. 27 Calc. 570,* referred to. ABHOY CHURN GHOSE *v.* ATTARMONI DASSEE (1908) . . . **13 C. W. N. 931**

——— s. 52.

See s. 88 . . **13 C. W. N. 1138**

See FOREIGN COURT, JUDGMENT OF.
I. L. R. 19 Mad. 257

See PRE-EMPTION . **I. L. R. 30 All. 467**

See LIS PENDENS.

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 52—*contd.*

1. ——— *Registered and unregistered documents—Transfer of property "pendente lite"—Act III of 1877 (Registration Act), s. 50.* *B* held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable, and was not registered. *N* purchased the same property *pendente lite* by a registered deed of sale. *Held*, that there was here no competition between a registered and an unregistered instrument to which s. 50 of the Registration Act could apply; and that *N's* purchase was, by s. 52 of the Transfer of Property Act, subject to the decree passed in *B's* favour. BHAGWAN DAS *v.* NATHU SINGH
I. L. R. 6 All. 444

2. ——— *Lis pendens—Contentious suit.* Where there are several defendants to a suit, the suit does not become "contentious" within the meaning of s. 52 of the Transfer of Property Act, 1882, only when all the defendants are served with summonses in the suit, nor can a suit be contentious as regards some of the defendants and not contentious as regards others. *Parsotam Saran v. Sanehi Lal, I. L. R. 21 All. 408*, discussed and doubted. CHATARBHUJ *v.* LACHMAN SINGH (1905) . **I. L. R. 28 All. 196**

3. ——— *Lis pendens—Suit for maintenance by widow praying it to be charged on immoveable property—Right to immoveable property in dispute in such suit.* A suit in which a widow claims to get her maintenance made a charge on immoveable property is one in which a right to such immoveable property is directly and specifically in question within the terms of s. 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitle to priority over the claim for maintenance, will be affected by the *lis pendens* created by the suit. *Bazayet Hossain* v. *Dooli Chand, I. L. R. 4 Calc. 402, 409*, referred to and followed. DOSE THIMMANNA BHUTTA *v.* KRISHNA TANTRI (1906) . . **I. L. R. 29 Mad. 508**

4. ——— *The doctrine of lis pendens, applies to cases, in which decrees are passed on compromise—"Contentious suit" or proceeding, meaning of.* The doctrine of *lis pendens* as embodied in s. 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding even when such suit or proceeding is subsequently compromised and a decree passed in pursuance of such compromise, provided such compromise is not tainted by fraud or collusion. The word "contentious" is used in s. 52 of the Transfer of Property Act in the sense in which it is used in Probate Practice and means the opposite of common form or voluntary business. ANNAMALAI CHETTIAR *v.* MALAYANDI APPAYA NAIK (1905)
I. L. R. 29 Mad. 426

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 52—*concld.*

5. ——— *Civil Procedure Code (Act XIV of 1882)—Contentious suit—Active prosecution—Non-service of the summons on the defendant—Transfer of property by the defendant—Lis pendens.* S. 52 of the Transfer of Property Act (IV of 1882) imposes two conditions—(*a*) the existence of a contentious suit and (*b*) that the transfer should be during its active prosecution in a Court of the kind described in the section. *Semble:* Every real suit (as distinguished from a collusive one) to which the Civil Procedure Code (Act XIV of 1882) applies, is *primâ facie* contentious. According to the Civil Procedure Code the essentials of a suit are—(i) opposing parties, (ii) a subject in dispute, (iii) a cause of action, and (iv) a demand of relief. If there is no inaction on the plaintiff's part, the suit would be contentious, notwithstanding the fact that the service of the summons could not be effected on the defendant. A suit cannot be said to be non-contentious merely because the decree therein is passed *ex parte*. *Annamalai Chettiar* v. *Malayandi Appaya Naik, I. L. R. 29 Mad. 426*, followed. *Upendra Chandra Singh* v. *Mohri Lal Marwari, I. L. R. 31 Calc. 745*, not followed. The defendant having transferred his property to another during the active prosecution of the suit but before the service of summons: —*Held*, that the doctrine of *lis pendens* applied. *Radhasyam Mohapattra* v. *Sibu Panda, I. L. R. 15 Calc. 647; Abhoy* v. *Annamalai, I. L. R. 12 Mad. 180; Parsotam Saran* v. *Sanehi Lal, I. L. R. 21 All. 408; Upendra Chandra Singh* v. *Mohri Lal Marwari, I. L. R. 31 Calc. 745*, not followed. *Jogendra Chunder Ghose* v. *Fulkumari Dassi, I. L. R. 27 Calc. 77*, and *Annamalai Chettiar* v. *Malayandi Appaya Naik, I. L. R. 29 Mad. 426*, approved. *Per* BEAMAN, *J.*—I am clearly of opinion that from the moment a suit of any sort whatever, except only collusive suits, is filed, it is potentially contentious. So-called friendly suits, I think, certainly are. For the purpose then of conditioning the rule of *lis pendens*, I would say that the filing of any but a collusive suit is enough. KRISHNAPPA *v.* SHIVAPPA (1907) . . . **I. L. R. 31 Bom. 393**

——— *Lis pendens exists until the final decree in appeal is passed.* The functions of an Appellate Court are not the same in India as in England and America. In India, the decree of the Appellate Court is, under the Code of Civil Procedure, the final decree in the case, and the proceedings in appeal must, for the purposes of s. 52 of the Transfer of Property Act, be treated as a continuation of the proceedings in the lower Court. A transfer of property, which is the subject-matter of contentious litigation, by a party thereto *after* the date of the decree of the lower Court and *before* an appeal is preferred against such decree, will be affected by the principle of *lis pendens* under s. 52 of the Transfer of Property Act. SETTAPPA GOUNDAN *v.* MUTHIA GOUNDAN (1908) . . . **I. L. R. 31 Mad. 268**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— ss. 52, 53.

See LIS PENDENS.
I. L. R. 32 Calc. 196

——— *Estate under administration—Purchase from legatee or heir, effect of—Transfer of immoveable property in fraud of creditor—Lis pendens—Pleadings—Suit on mortgage—Sale in execution of mortgage-decree—Purchase of equity of redemption by mortgagee before sale— Validity of sale.* When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition, which has been or may be made of the deceased's estate in due course of administration. An issue as to whether a transfer of immoveable property was fraudulent against a creditor within s. 53 of the Transfer of Property Act can be raised and decided only in a suit properly constituted for that purpose; and the present suit not having been so constituted either as to parties or otherwise, that question was not decided and decision given as in the case presented to the Court. *Malkarjun* v. *Narhari, 5 C. W. N. 10 : s. c. L. R. 27 I. A. 236,* referred to. In a suit purporting to be brought on a mortgage, only a money-decree was made. It was pointed out that so long as that decree remained unreversed, the suit could not be regarded as one in which a right to immoveable property was "directly and specifically in question," within s. 52 of the Transfer of Property Act. By the time mortgaged properties were brought to sale in execution of a decree obtained on the mortgage, the equity of redemption had been purchased by the mortgagee himself in the name of a *benamidar*, so that at the time of sale the mortgagee alone was represented on each side of the record. The mortgagee himself became a purchaser at that sale. *Held*, that the sale under such circumstances passed no title to the mortgagee. CHUTTERPUT SINGH *v.* MAHARAJ BAHADUR SINGH (1905) . 9 C. W. N. 225
s.c. I. L. R. 32 Calc. 108
L. R. 32 I. A. 1

——— s. 53.

See FRAUDULENT CONVEYANCE.
I. L. R. 34 Calc. 999

See FRAUDULENT TRANSFER.
I. L. R. 30 Mad. 6

See LIS PENDENS I. L. R. 13 All. 371
13 C. W. N. 226

See MAHOMEDAN LAW—GIFT.
I. L. R. 29 Bom. 428

See MORTGAGE-BOND.
I. L. R. 35 Calc. 1051

See PARTNERSHIP.
I. L. R. 31 Mad. 206

See REGISTRATION ACT, 1877, s. 50.
I. L. R. 8 All. 540

1. ——— ——— *Stats. 13 Eliz., c. 5, and 27 Eliz., c. 4—Voluntary transfers as against creditors or subsequent transferees for consideration—Notice—Registration—Duty of mortgagee in searching for prior incumbrances—Post-nuptial settlement with power of appointment to wife—Deed of appointment in favour of children—Secrecy as evidence of fraud—Subsequent mortgage by wife and trustee of settlement without mention of deed of appointment.* In 1870 the defendant *J* and her husband executed a post-nuptial settlement by which they assigned certain Municipal debentures to the defendant *E* (the brother of *J*) and one *G* "upon trust for *J* during her life and after her death as she should by deed or will appoint," and subsequently the trustees, in pursuance of a power given them by the settlement, sold the debentures and invested the proceeds in house property in Calcutta, such house and premises thereafter representing the trust property and being held by the trustees on the trusts of the settlement. On the 17th December 1878 *E* retired from the trust and made over his interest to the remaining trustee *G*, and on the same day *J* executed a deed of appointment in favour of her children representing to her solicitor that she did so to protect the property from her husband. The deed of appointment was witnessed by *E*, and was duly registered, but it was not mentioned in the deed which assigned the trust property to *G*, and no information of it was given to him, the deed remaining in *J's* custody and not being made over to *G*. In 1884 *G* retired from the trust, and *E* became sole trustee in his place. In March 1884 money was raised by *J* and *E* on mortgage of the trust property to *G*, but no mention of the deed of appointment was made in the mortgage-deed. *J's* husband died in October 1884, but neither then, nor on the occasion of another mortgage of the property in 1888, was any mention made of the deed of appointment, and there was nothing on the record of the case to show that the husband was ever in needy circumstances, or pressed his wife for money, or that he died leaving no property. In 1890 *E* and *J* mortgaged the house and premises to the plaintiffs, the mortgage-deed (which was duly registered) reciting the settlement of 1870, and that "*J* has not made any irrevocable appointment of the said trust premises under the power of appointment given to her in the settlement," but making no mention of the deed of appointment executed by her in 1878. A deed of further charge was also executed by *J* and *E* in 1891 in favour of the plaintiffs also without any mention of the deed of appointment: this was also duly registered. Before execution of the mortgage of 1890, the plaintiffs' solicitors did not search the register of deeds further back than 1884, because they were dealing with persons who must have known of the exercise of the power of appointment, and who had given a covenant that no such exercise had been made and because they then found that *G*, the former trustee had taken a similar security himself in 1884 and must have been satisfied that no such blot existed on the title. They had, moreover, a letter from

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 53—*contd.*

G's solicitors saying that they had searched the register up to 1884. *J* first set up the deed of appointment as a defence in the present suit, which was brought on the mortgages against *E* and *J* and their children, and in which the plaintiffs sought to recover the amount advanced with interest, and prayed that the deed might be declared void as against them. In this suit *E* did not appear. The principal grounds of defence were that the mortgage-deeds were not explained to *J*, that she was ill at the time and left all the transactions to her brother *E*, and that she did not know the contents of the deeds which she contended were therefore not binding on her; that the deed of appointment was made in consideration of her natural love and affection for her children; and that the plaintiffs had notice of it. On the facts the lower Court (SALE, *J.*) found that she had full and complete knowledge of the contents of the mortgage-deeds and was bound by them, and that there was gross fraud towards the plaintiffs on the part of *E* in suppressing the fact of the existence of the deed of appointment. *Held* by SALE, *J.*, that according to the law which existed in India prior to the passing of the Transfer of Property Act, the deed of appointment was a voluntary conveyance and fraudulent within the meaning of the Stat. 27 Eliz., c. 4, and void as against the plaintiffs as subsequent transferees for valuable consideration; the legal presumption of fraud which the Court was entitled to make on the cases decided on that Statute rendering the question of notice or no notice immaterial. *Judha* v. *Abdool Kureem, 22 W. R. 60; Doe d. Otley* v. *Manning, 9 East 59; Doe d. Newman* v. *Rushan, 17 Q. B., 724;* and *Godfrey* v. *Poolee, L. R. 18 Ap. Cas. 497,* referred to. S. 53 of the Transfer of Property Act has not altered the law in that respect. The deed of appointment came within the definition of "transfer of property" given in that Act, there being nothing in the Act to suggest that it was intended to confine its operation to transfers by contract. The words of s. 53, "may be presumed to have been made with such intent as aforesaid" (*i.e.*, with a fraudulent intent), should be construed in accordance with the cases decided under the Stat. 27 Eliz., c. 4. Even assuming that it was intended by s. 53 to exclude voluntary conveyances of which a subsequent transferee had notice from the presumption of fraud:—*Held*, on the facts, that the plaintiffs had no notice of the deed of appointment. The doctrine of notice, if applied, must be applied in accordance with, and subject to, the definition of notice given in the Act itself. There was no actual notice, and there was not such an "abstention from inquiry or search" on the part of the plaintiffs as to fix them with constructive notice. The words "wilful abstention from inquiry and search" mean such abstention as would show want of *bonâ fides* on the part of the plaintiffs in respect of this particular transaction. *Agra Bank* v. *Barry, L. R. 7 E. & I. 135,* referred to. *Held*, also, that the doctrine of registration amounting to notice, as laid down in the case of *Lakshmandas Sarupchand* v. *Dasrat, I. L. R. 6 Bom. 168,* had no application to the present case. Having regard to the terms of s. 53 of the Transfer of Property Act, that doctrine, if applicable, can only apply for the purpose, either of rebutting the presumption of fraud or of preventing the presumption of fraud from arising. If the true meaning of that section be that the Court is to presume fraud only in accordance with the facts of each particular case, the facts of the present case were amply sufficient to raise the presumption as regards the deed of appointment. That deed therefore was fraudulent as against the plaintiffs, and they were entitled to a declaration that it was void and inoperative as against them. *Held*, on appeal (by PETHERAM, *C.J.*, and NORRIS and O'KINEALY, *JJ.*), that, looking to the unusual way in which the transaction as to the deed of appointment was carried out, and the secrecy given to it, the result of which was to enable *E* and *J* to raise money on the trust property by inducing persons to believe that the whole title lay in themselves alone and on the other facts in the case, apart from the presumption which might be made under s. 53 of the Transfer of Property Act, where a transfer is made gratuitously for a grossly inadequate consideration, *viz.*, that it may be presumed to have been made to defraud or defeat creditors, the decree of the Court below was correct. JOSHUA *v.* ALLIANCE BANK OF SIMLA . **I. L. R. 22 Calc. 185**

2. ——— *Rights of a transferee in good faith and for consideration—Good faith, meaning of—Effect of transfer made with the object to delay or defeat a creditor, the transferee not being aware of such an intention.* Where a transferee for value is not aware of any intention on the part of the transferor to defeat or delay his creditors, but has knowledge only of an impending execution against the transferor, such knowledge of itself is not sufficient to vitiate the transfer, and does not make the transferee a transferee, otherwise than in good faith within the meaning of s. 53 of the Transfer of Property Act (IV of 1882). *Ramburun Singh* v. *Jankee Sahoo, 22 W. R. 473,* referred to. ISHAN CHUNDRA DAS SARKAR *v.* BISHU SIRDAR **I. L. R. 24 Calc. 825**
1 C. W. N. 665

3. ——— *Transfer in fraud of creditors—Good faith.* When it is said that a deed is not executed in good faith, what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself. RAMASAMIA PILLAI *v.* ADINARAYANA PILLAI **I. L. R. 20 Mad. 465**

4. ——— *Debtor and creditor—Intent to delay and defeat creditors—Stat. 13 Eliz., c. 5.* A mere preference by a debtor of one creditor to another, and *à fortiori* a mere *bonâ fide*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 53—*contd.*

security given to a creditor to the extent of his debt, is not within s. 53 of the Transfer of Property Act, 1882, as it is not within the English Statute of 13 Eliz., c. 5. But where a document given by way of security goes further and secures debts that are not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors. Where a party intends to reply upon a document as not within s. 53 of the Transfer of Property Act because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more. NARAYANA PATTAR *v.* VIRARAGHAVAN PATTAR,

I. L. R. 23 Mad. 184

5. ——— *Assignment in fraud of creditors—Interest taken under will.* *B* died in 1891, leaving a widow (defendant No. 1) and two sons *P* and D (defendants Nos. 4 and 5). By this will he gave his widow a life-interest in the rents and income of his property subject to the obligation of maintaining, educating, and bringing up the children. After his death the property, moveable and immoveable, was to be divided among his sons equally when *D* should attain the age of 25. He attained majority in October 1895. On the 13th June 1895 the plaintiffs obtained a decree for R3,976-10-10 against the widow and her son *P*. In execution of that decree they attached under an order, dated 2nd July 1895, the immoveable properties which had belonged to the testator's estate on the ground that both the widow and *P* had an interest in them. The defendants alleged (*inter alia*) that by an assignment dated the 20th February 1896 the widow had assigned and surrendered her life-interest to her son *D*, and that such interest was therefore not available to satisfy the plaintiff's decree against her. As to *P's* interest the defendants alleged that by a deed of settlement, dated the 9th February 1895, it was validly settled for the benefit of himself and his family, and that therefore he had no interest in him which could be attached under the order of the 2nd July 1895. That even independently of the attachment, her assignment to her own son *D* was invalid as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882). The object of that assignment was to protect the property from the creditors and it was designed to defeat the plaintiff's decree and it was therefore fraudulent and void as against the plaintiffs. That the deed of settlement by *P* of the 9th February 1895 was void as against the plaintiffs under s. 53 of the Transfer of Property Act (IV of 1882). That the plaintiffs were entitled to realize the shares and interest both of the widow and of *P* so far as might be necessary to satisfy their decree of 13th June 1895. NATHA KERRA *v.* DHUNBAIJI . . . I. L. R. 23 Bom. 1

6. ——— Fraudulent conveyance—*Sale by debtor in order to defeat an execution—Intent to defeat or delay creditors—13 Eliz., cap. 5, and 27 Eliz., cap. 4.* Bhagwant field a suit against

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 53—*contd.*

Ganpati, the manager of a Hindu undivided family, to recover a sum of money due to him, and on the same day obtained an order for attachment before judgment of certain property belonging to the defendant and his family. Before the attachment was actually effected, the property in question and other property was sold to Kedari (defendant No. 1). The deed of conveyance was executed on the day the suit was filed, and the order for attachment was made and notice of the order for attachment was given both to the vendor and the purchaser before the deed was registered, but before the attachment was actually effected. Subsequently the plaintiff obtained a money-decree in his suit, and then filed this suit against the vendor and purchaser, praying for a declaration that the conveyance was fraudulent and void, and that the property was liable to attachment in execution of his decree. The lower Courts dismissed the suit, holding that the sale to the vendee was valid, although made with the object of defeating the anticipated attachment of the plaintiff. On appeal to the High Court :—*Held* (confirming the decree), that cl. 2 of s. 53 of the Transfer of Property Act (IV of 1882) did not apply, as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration. *Held*, also, that, although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditory so as to render cl. 1 of s. 53 applicable. Such intent would probably be inferred if their was such an inadequacy of consideration as to bring the case within cl. 1 of s. 53. Cl. 3 of the section only comes into operation when the facts justify the application of cl. 1 or cl. 2. BHAGWANT APPAJI *v.* KEDARI KASHINATH (1900) . I. L. R. 25 Bom. 202

7. ——— *Suits by one creditor to set aside deed—Creditor not a judgment-creditor—Meaning of the word "creditor"—Statute 13 Eliz., c. 5.* Under s. 53 of the Transfer of Property Act (IV of 1882), a creditor may sue to set aside a deed executed by his debtor, by which he (the creditor) is defrauded, defeated or delayed, although he has not obtained a decree for the debt in respect of which he is a creditor. But such a creditor can only sue on behalf of himself and all other creditors. ISHVAR TIMAPPA HEGDE *v.* DEVAR VENKAPPA SHANBOG (1902)

I. L. R. 27 Bom. 146

8. ——— *Transfer to one creditor—Good faith.* One Byramji Kuverji died in June 1896, indebted to several creditors. Immediately after his death his sons mortgaged his property to Moti Gelaji, one of his creditors. On the 11th August 1897, another creditor, Jaitha Kupaji, obtained letters of administration to the estate of the deceased, and, as such administrator, sold the property to the son of mortgagee, the latter having died. Subsequently the plaintiffs obtained a money-decree against the estate and

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 53—*contd.*

sued to establish their right to attach the property, alleging that the sale was void under s. 53 of the Transfer of Property Act (IV of 1882). The lower Appellate Court held that the purchase was for value, and that there was no evidence of fraud, and it dismissed the suit. On second appeal :— *Held* (affirming the decree), that the sale was valid. The fact that it was a sale of the whole of the property of the deceased to one of his creditors made no difference. The only question was whether the transaction was in good faith and for proper consideration. The test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the grantor. On the findings of the lower Court it appeared that in this case it was intended that the grantee should have the property and keep it. NATHA KUPAJI *v.* MAGANCHAND MOTIJI (1903) **I. L. R. 27 Bom. 322**

9. ——— *Fraudulent transfer —Suit to set aside fraudulent conveyance—Frame of suit—Appeal.* A suit under s. 53 of the Transfer of Property Act to obtain a declaration that a conveyance is voidable at the instance of the creditors of the transferor must be brought by or on behalf of all the creditors, and the suit unless so framed would not be maintainable. *Burjorji Dorabji Patel* v. *Dhunbai, I. L. R. 16 Bom. 1 ; Ishvar Timappa Hegde* v. *Devare Venkappa, I.L.R. 27 Bom. 146 ; Chatterput Singh v. Maharaj Bahadur, I. L. R. 32 Calc. 198,* and *Reese River Silver Mining Co.* v. *Atwell, L. R. 7 Eq. 347,* referred to. But a suit cannot be dismissed on this ground, if the objection is taken for the first time in appeal. HAKIM LAL *v.* MOOSHAHAR SAHU (1907) **I. L. R. 34 Calc. 999**

10. ——— *Mortgage— Assignment of invalid mortgage—Right of assignee as against mortgagor and subsequent mortgagee for consideration—Maxim—Qui prior est tempore potior est jure.* On the 23rd of October 1897 one *MA* executed a mortgage of certain property in favour of *HA*, which was registered on the 29th of October 1897. This mortgage was found to be fictitious and without consideration and to have been made solely for the purpose of defeating the creditors of the mortgagors. On the 15th of August 1898 the mortgagee transferred his rights under this mortgage to his wife *B*, in part satisfaction of her dower debt. It was found that this was a *bonâ fide* transaction and that *B* obtained the transfer of the mortgage without any knowledge of its fraudulent character and was a transferee in good faith and for consideration. On the 29th of October 1897 the same property was again mortgaged to one *BP*, who accepted the mortgage in ignorance of the existence of the mortgage of the 23rd October 1897. This mortgage was registered on the 22nd of March 1898. *BP* afterwards brought a suit for sale on his mortgage impleading *B* as a defendant, as well as the mortgagor and the prior mortgagee. *Held*, that *B* was entitled

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 53—*concld.*

to nor elief as against *BP*, though as against the mortgagor she was entitled to be paid the amount of the consideration named in the deed of transfer in her favour out of the surplus sale proceeds (if any) of the mortgaged property. *Halifax Joint Stock Banking Company* v. *Gledhill, [1891] 1 Ch. D. 31,* distinguished. *Cockell* v. *Taylor, 15 Beav. 103 ; Ogilvie* v. *Jeaffreson, 2 Giff. 353 ; Parker* v. *Clarke, 30 Beav. 54 ; French* v. *Hope, L. J. 56 Ch. D. 363 ; Bickerton* v. *Walker, L. R. 13 Ch. D. 151,* and *Rice* v. *Rice, 2 Drew. 73,* referred to. BASTI BEGAM *v.* BANARSI PRASAD (1908) **I. L. R. 30 All. 297**

11. ——— *Mortgage—Part of consideration fictitious—Intention to defeat or delay creditors—False case, setting up of, at a later stage —Effect.* A mortgage purported to secure R8,500. But it was proved that R4,853 only of the consideration money had passed. It was, however, not shown that the transaction was intended *only* to defeat or delay the realisation of their dues by certain other creditors, though after the latter had attached the mortgaged properties the mortgagees instituted a suit for the recovery of the whole amount stated in the mortgage. *Held*, that in the circumstances a decree should be passed in favour of the mortgagee on the footing of the amount actually advanced, that part of the transaction being separable from the rest. The setting up at a later stage of a false case should not affect rights created by the transaction. *Ishan Chandra Das Sarkar* v. *Bishu Sardar, I. L. R. 24 Calc. 825 ; Narayana Pattar* v. *Viraraghavam Pattar, I. L. R. 23 Mad. 184,* relied on. RAJANI KUMAR DAS *v.* GOUR KISHORE SAHA (1908) **I. L. R. 35 Calc. 1051 12 C. W. N. 761**

12. ——— *Transfer with intent to defeat or delay creditors—Mahomedan law—Transfer by Mahomedan to one of his wives with intent to defeat claim of the other for dower.* A few days after the institution of a suit against him by his first wife for recovery of her dower, a Mahomedan, who had two wives, transferred the bulk of his property to his second wife in satisfaction of her claim for dower. *Held*, on suit by the first wife to have the transfer above-mentioned set aside, that such transfer was not necessarily unimpeachable, but that it was necessary to find, first, that the transfer was a real and not merely a colourable transaction ; and, secondly, that the second wife had not combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claim of the first wife. HAMID-UN-NISSA *v.* NAZIR-UN-NISSA (1909) . . **I. L. R. 31 All. 170**

——— s. 54.

See EASEMENTS ACT (V OF 1882), s. 4. **I. L. R. 31 All. 612**

See ESTOPPEL . **I. L. R. 36 Calc. 920**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 54—*contd.*

See MAHOMEDAN LAW—PRE-EMPTION—RIGHT OF PRE-EMPTION—GENERALLY. I. L. R. 16 All. 344

See MORTGAGE—REDEMPTION—RIGHT TO REDEEM . I. L. R. 24 Mad. 449

See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-URZ. I. L. R. 7 All. 482; 626

See REGISTRATION ACT, 1877, s. 17. I. L. R. 10 All. 20 I. L. R. 27 Calc. 468

See REGISTRATION ACT, 1877, s. 18. I. L. R. 18 Mad. 454

See REGISTRATION ACT, 1877, s. 48. I. L. R. 13 Mad. 324 I. L. R. 27 Calc. 468

See SALE CERTIFICATE. I. L. R. 35 Calc. 614

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.

See VENDOR AND PURCHASER—INVALID SALES . . I. L. R. 18 Mad. 61

1. ——— *Optional registration. Per* GARTH, *C.J.*—S. 54 of the Transfer of Property Act virtually abolishes optional registration. NARAIN CHUNNDER CHUKERBUTTY *v.* DATARAM ROY I. L. R. 8 Calc. 597 : 10 C. L. R. 241

2. ——— *Sale — Transfer of immoveable property without written conveyance in satisfaction of a decree—Title of transferee—Mahomedan law—Dower.* A Mahomedan widow obtained a decree for dower against her four sons. The decree was partly satisfied, and as regards the balance of the decretal money the parties entered into a parol agreement for the transfer of certain immoveable property by the judgment-debtors to the decree-holder. In pursuance of this agreement possession was transferred, but the agreement was never put into writing and no conveyance was executed. After the widow had been for some years in possession, a judgment-creditor of one of the sons attempted to take the property in question in execution of his decree and brought a suit for a declaration that the property was liable to attachment and sale in execution of his decree. *Held*, that although the transfer of the property in question was not a transfer made by a Court in satisfaction of a decree, yet under the circumstances of the case it could not be taken and sold as the property of the plaintiff's judgment-debtor. *Karalia Nanubhai Mahomedbhai* v. *Mansukhram Vakhatchand, I. L. R. 24 Bom. 400*, followed. *Hormasji Manekji Dadachanji* v. *Keshav Purshotam, I. L. R. 18 Bom. 13*, distinguished. RAM BAKHSH *v.* MUGHLANI KHANAM (1904) I. L. R. 26 All. 266

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 54—*contd.*

3. ——— *Enforceable contract of sale followed by delivery of possession to defendant, but not followed by registered sale-deed no defence to suit for possession—Construction of statute.* The provisions of s. 54 of the Transfer of Property Act are imperative, and Courts will not be justified in disregarding them on equitable grounds. Where the words of a statute are clear and unambiguous, effect must be given to them, although hardship may result in individual cases. A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover. *Ramasami Pattar* v. *Chinnan Asari, I. L. R. 24 Mad. 449*, approved. *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami, I. L. R. 24 Mad. 377*, considered. KURRI VEERAREDDI *v.* KURRI BAPIREDDI (1905) I. L. R. 29 Mad. 336

4. ——— *Transfer of property by the Road Cess Department to the Public Works Irrigation Department—Property valued at less than 100 rupees—Delivery of possession.* A certain plot of land being transferred by the Road Cess Department to the Public Works Irrigation Department for a sum less than one hundred rupees without any registered instrument, the Secretary of State for India in Council instituted a suit against the defendants for recovery of possession of the said lands. Upon an objection taken that the plaintiff acquired no title to the property, as the transfer, upon which he relied, was in contravention of the provisions of s. 54 of the Transfer of Property Act :—*Held*, that, inasmuch as the transfer was not made by a registered instrument, and as also the plaintiff had been in occupation from before date of the transfer and there was not any delivery of possession within the meaning of the provisions of s. 54 of the Transfer of Property Act, the plaintiff acquired no title by the said transfer. *Ganga Narain Gope* v. *Kali Charan Goala, I. L. R. 22 Calc. 179*, distinguished. SIBENDRAPADA BANERJEE *v.* SECRETARY OF STATE FOR INDIA (1907) . . I. L. R. 34 Calc. 207

5. ——— *Sale—Non-payment of consideration—Sale nevertheless complete.* In a sale of immoveable property non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser, and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. *Shib Lal* v. *Bhagwan Das, I. L. R. 11 All. 244 ; Umed Mal Motiram* v. *Davu bin Dhondiba, I. L. R. 2 Bom. 547 ;* and *Sagaji* v. *Namdev, I. L. R. 23 Bom. 525*, followed. BAIJNATH SINGH *v.* PALTU (1908) I. L. R. 30 All. 125

6. ——— *Kobala—Registration if dispenses with proof of passing of consi-*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 54—*contd.*

deration—Conveyance if may be challenged on ground of want of consideration by legal representative of vendor. The mere registration of a document which purports to be a transfer for consideration does not, apart from all questions as to whether consideration passed or not, convey title to the transferee. The Court has to see what was the intention of the vendor, if no consideration passed. *Mauladan* v. *Rughu Nandan Pershad Singh, I. L. R. 27 Calc. 7,* referred to. Where it appeared that it was the intention of the owner, whether consideration passed or not, to transfer the property to the defendant who was his concubine, and the plaintiff claimed the property by right of inheritance, the defendant was not bound to prove payment of consideration, and the *kobala* as it was prevailed against the claim of the plaintiff. *Lal Achalram* v. *Raja Kazim Hussain Khan, 9 C. W. N. 477; s. c. L. R. 32 I. A. 113; I. L. R. 27 All. 271,* applied. GOSTHO BEHARY GHOSH *v.* ROHINI GOWALINI (1908) . . . . **13 C. W. N. 692**

——— ss. 54, 56 (6) (*b*)—*Contract of sale—Deed of sale not registered—Rights and remedies of the contracting parties.* The plaintiff executed a conveyance of immoveable property of the value of upwards of R100, which was not registered according to law, received the purchase-money and delivered possession of the property to the vendee (defendant *I*). For a specific performance of this contract, the defendant *I* brought a suit which was dismissed. The plaintiff then sued to recover the possession of the property as its owner. *Held,* that the suit should be decreed in plaintiff's favour and that all that the defendant *I* was entitled to was the benefit which he could claim under s. 56 (*6*) (*b*) of the Transfer of Property Act (IV of 1882). *Karalia Nanubhai* v. *Mansukhram, I. L. R. 24 Bom. 400,* explained. LALCHAND *v.* LAKSHMAN (1904) . . **I. L. R. 28 Bom. 466**

——— ss. 54, 100—*Agreement to execute a mortgage over immoveable property—Charge—Deposit of title-deeds—Mortgage.* Plaintiffs sued defendants for money lent and also claimed to be entitled to charge the debt on immoveable properties belonging to the defendants. Defendants had executed a document in which they recited that they had deposited the title-deeds of immoveable properties with the plaintiffs, and undertook to execute a deed of mortgage over those properties in favour of the plaintiffs, whenever the latter should call upon them to do so. This deposit had been made outside of the town of Madras, and the document had not been registered :—*Held,* that plaintiffs were not entitled to a charge on the immoveable property, but only to a personal decree. A deposit of title-deeds creates a mortgage and not a mere charge, under the Transfer of Property Act, and inasmuch as s. 59, paragraph (*3*), necessarily implies that a deposit of title-deeds not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph, it follows that a grant of security by a mere deposit of title-deeds unaccompanied by writing, duly attested and registered, evidencing it, is invalid, if it takes place outside of those towns. KONCHADI SHANBHOGUE *v.* SHIVA RAO (1905) **I. L. R. 28 Mad. 54**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 54—*concld.*

——— s. 55.

See CIVIL PROCEDURE CODE, 1882, s. 111. **9 C. W. N. 178**

See LIEN . **I. L. R. 39 Mad. 524**

See LIMITATION ACT, 1877, SCH. II, ART. 116 . . **I. L. R. 21 Mad. 8**

See VENDOR AND PURCHASER—BREACH OF COVENANT. **I. L. R. 15 Mad. 56**
I. L. R. 25 Calc. 298
2 C. W. N. 222
I. L. R. 21 Mad. 8

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF. **I. L. R. 13 Mad. 158**

1. ——— *Meaning of words "material defects"—Defect in title.* The expression, "material defect in the property" in s. 55 of the Transfer of Property Act (IV of 1882), includes a defect in the title to an estate. ESSA SULLEMAN *v.* DAYABHAI PARMANANDAS **I. L. R. 20 Bom. 522**

2. ———*Limitation Act (XV of 1877), Sch. II, Arts. 132, 111—Art. 132 applies to suits to enforce the charge created by s. 55 of the Transfer of Property Act.* The statutory charge, which an unpaid vendor obtains under s. 55 of the Transfer of Property Act, is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor. *Webb* v. *Macpherson, I. L. R. 31 Calc. 57,* referred to and applied. The article of the Limitation Act applicable to a suit to enforce such charge is Art. 132 of Sch. II and not Art. 111. *Natesan Chetti* v. *Soundararaja Ayyangar, I. L. R. 21 Mad. 141,* overruled. *Avuthala* v. *Daumma, I. L. R. 24 Mad. 233,* overruled. *Subrahmania Ayyar* v. *Poovan, I. L. R. 27 Mad. 28,* overruled. RAMAKRISHNA AYYAR *v.* SUBRAHMANIA AYYAR (1905) **I. L. R. 29 Mad. 305**

——— ss. 55, 59.

See COVENANT, CONSTRUCTION OF. **I. L. R. 30 Mad. 284**

——— ss. 55 (2), 108 (b)—*Art. 116, Sch. II of the Limitation Act, will apply only when the transaction is one to which s. 55 (2) or s. 108 (b) of the Transfer of Property Act will apply and a covenant of title or quiet enjoyment can be implied—Limitation Act (XV of 1877), Sch. II, Arts. 62, 97, 116.* The first defendant, in September 1897, granted in consideration of an advance, a registered karar to *P*, the predecessor in title of the present plaintiff, on the

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 55—*contd.*

following terms: "Deed of consent or permission granted to . . . . . , by . . . . . in consideration of this amount, the trees standing . . . . . shall be cut down at your expense during a period of 6 years from this date, with the exception of teak and blackwood. For every cart load of timber so removed . . . you are to pay a kuttikanam of R2-4-0 and on those timber, the seal of the Etam shall be impressed without delay . . . . during the period of 6 years, the Etam shall not grant any permission to others to cut trees . . . . You have the right to cut down trees and none whatever to the land." The first defendant and the other defendants formed a Tarward and in a suit brought on behalf of the Tarward against *P* and the first defendant, it was declared that the karar was not binding on the Tarward and *P* was restrained from cutting timber. The present suit was instituted by *P* to recover personally from the first defendant and from the Tarward properties the amount advanced with interest as damages. *Held*, that the suit so far as the Tarward properties were concerned was *res judicata* by reason of the decision in the previous suit. *Held*, also, that the suit as against the first defendant was barred by limitation. The article applicable to the suit is either Art. 62 or Art. 97 of Sch. II of the Limitation Act. The document is not a sale or lease of immoveable property within the definition of those terms in the Transfer of Property Act and a covenant for title or for quiet enjoyment cannot be implied under s. 5 (*2*) or s. 108 (*b*) of the Act. Art. 116 of Sch. II of the Limitation Act does not apply to the case. The document did not create a mortgage or charge on immoveable property. It is no more than an exclusive license to cut trees. A document may create an interest in land and bring it within the provisions of the Registration Act. The covenant of title will not necessarily be implied in such cases unless it is one of the transactions in which the covenant can be implied under the Transfer of Property Act. *Seeni Chettiar v. Santhanathan Chettiar, I. L. R. 20 Mad. 58*, followed. MAMIKUTTI *v.* PUZAKKAL EDOM (1906) . **I. L. R. 29 Mad. 353**

——— s. 55 (4).

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILITIES OF.

L. R. 30 I. A. 238
I. L. R. 31 Calc. 57

——— s. 55 (4) (*b*).

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 111, 132.

I. L. R. 30 All. 172

See VENDOR'S LIEN.

I. L. R. 31 All. 443

——— ss. 55 (4) (b) cl. (6)—*Vendor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration-money in full—Mortgagee taken the mortgage without notice of unpaid purchase-money—Estoppel—Evidence Act (I of 1872), s. 115.* In a registered sale-deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration-money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property. *Held*, that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title-deeds. *Per Batchelor, J.*—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. TEHILRAM *v.* KAHSIBAI (1908)

I. L. R. 33 Bom. 53

——— s. 55 (5) (d)—*Requisites of a valid acknowledgment—Where no contract to the contrary liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability.* Under s. 55 (*5*) (*d*) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes. Where the adjustment of matters, which form part, but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such an adjustment itself. *Dinham* v. *Bradford, L. R. 5 Ch. App. 519*, referred to. Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the peshkush due to Government" and the deed contains no other words to show that the sub-division was a pre-requisite to the vendee's liability, the mere use of the words *as per sub-division* does not make it such and, where no sub-division is effected and the vendor pays the whole peshkush, the Court will ascertain, as between the vendor and vendee, the proportion payable by the latter and direct payment thereof. An acknowledgment of a conditional liability will not, under s. 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition, which is fulfilled. ARUNACHELLA ROW *v.* RANGIA APPA ROW (1906) . **I. L. R. 29 Mad. 519**

——— s. 56.

See CIVIL PROCEDURE CODE, 1882, S. 13.

8 C. W. N. 30

——— ss. 56, 67, 81, 88—*Marshalling—Purchaser of portion of mortgaged property has no right*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 56—*concld.*

to marshall. A *bonâ fide* purchaser, who purchases for value a portion of a mortgaged property without notice of such mortgage has no right, in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased by him must be sold only for the balance, if any, due. Under ss. 67 and 68 of the Transfer of Property Act, the mortgagee is entitled to an order that the mortgaged property or a sufficient part thereof should be sold on default of payment. The purchaser cannot claim such a right under s. 81 or s. 56 of the Transfer of Property Act, as the former applies only to second mortgagees and the latter confers such right only "as against the seller." *Krishna Ayyar* v. *Muthukumarasawmiya Pallai, I. L. R. 29 Mad. 217,* referred to and explained. It is competent to the Court under s. 88 of the Transfer of Property Act to order a *sufficient portion* of the mortgaged property to be sold; and, if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the Court may by its decree direct such unsold portion to be sold first; and if the decree directs the sale of the whole property, the Court in execution may first bring to sale the portion unsold and, if the sale-proceeds be sufficient, stop the sale of the portion sold by the mortgagor. KOMMINERI APPAYA *v.* MANGALA RANGAYYA (1907) . . **I. L. R. 31 Mad. 419**

——— ss. 56, 81, 82.

See RES JUDICATA.
I. L. R. 31 Calc. 95

——— s. 57.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.
I. L. R. 24 Mad. 412

——— s. 58.

See COSTS . **9 C. W. N. 372; 697**

See DECREE—CONSTRUCTION OF DECREE—MORTGAGE . **I. L. R. 19 Mad. 249**
L. R. 23 I. A. 32

See HÂT . **I. L. R. 36 Calc. 665**

See LIMITATION ACT, 1877, SCH. II, ART. 147 . . **I. L. R. 16 Mad. 64**

See LIMITATION ACT, 1877, SCH. II, ART. 148 . . **I. L. R. 14 Bom. 113**

See MORTGAGE—ACCOUNTS.
I. L. R. 14 Bom. 113

See MORTGAGE—CONSTRUCTION.
I. L. R. 12 All. 175
I. L. R. 13 All. 28
I. L. R. 21 All. 4
I. L. R. 26 Mad. 662
I. L. R. 26 Bom. 252
L. R. 29 I. A. 148
[9 C. W. N. 1001

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 58—*contd.*

See MORTGAGE—FORM OF MORTGAGE.
I. L. R. 9 All. 183
I. L. R. 12 All. 203
I. L. R. 14 All. 195
I. L. R. 27 Bom. 600
I. L. R. 26 Bom. 33
I. L. R. 25 Mad. 220

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 22 Calc. 33

See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ.
I. L. R. 7 All. 258; 343

See REGISTRATION ACT, s. 49.
I. L. R. 15 Mad. 253

See WAJIB-UL-ARZ.
I. L. R. 26 All. 337

——— s. 58—*Mortgage by conditional sale—Whether sale or mortgage to be ascertained from whose instrument—Transfer of interest need not be in express terms—"Meddatu Krayam," meaning of.* The question whether a document operates as a mortgage, or as a conditional sale must be determined on a consideration of the whole document. The mere description of the document as "Meddatu Krayam" is not conclusive. The transfer of interest necessary to create a mortgage need not be in express terms. It is sufficient if the instrument taken as a whole operates to create such a transfer. KOLA VENKATANARAYANA *v.* VUPALA RATNAM (1906) . . . . **I. L. R. 29 Mad. 531**

——— s. 58 (4).

See VENDOR AND PURCHASER.
8 C. W. N. 41

——— ss. 58, 59.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 545.
I. L. R. 31 Mad. 330

See MORTGAGE . **10 C. W. N. 276**

——— ss. 58, 59, 100.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 985

1. **———** *Attestation, absence of—Charge.* Where a transaction evidenced by a document was a mortgage as defined by s. 58 of the Transfer of Property Act, but the document was not attested by two witnesses as required by s. 59 of the Act:—*Held,* that it did not operate as a charge under s. 100 of the Act. *Rani Kumari Bibi* v. *Sri Nath Roy, 1 C. W. N. 81,* and the observations of BANERJEE, *J.* in *Tofal-uddi Peada* v. *Mahar Ali Shaha, I. L. R. 26 Calc. 78,* approved. PRAN NATH SARKAR *v.* JADU NATH SAHA (1905)
I. L. R. 32 Calc. 729
9 C. W. N. 697

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 58—*concld.*

2. ——— *Simple mortgage—Transfer of interest—Charge—Attestation by one witness—Invalidity.* A bond for the repayment of a debt contained the statement, "as collateral security for payment of the said money, I do mortgage 23 bighas, etc., etc.," but there was no statement in it showing that there was any actual transfer of any interest. *Held* (MACLEAN, *C.J.*, *dubitante*), that the bond amounted to a simple mortgage as defined in s. 58 of the Transfer of Property Act and not to a charge merely as contemplated by s. 100 of that Act. Such a document cannot operate as a valid mortgage, unless attested by at least two witnesses. NOBINCHAND NASKAR *v.* RAJ KOOMAR SARKAR (1905) . . **9 C. W. N. 1001**

3. ——— ss. 58 (b), 67, 68, 98—*Combination of simple and usufructuary mortgage—Personal covenant to pay—Right of mortgagee to decree for mortgage-money and for sale.* A mortgage-deed, after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct apparently being taken in lieu of interest), contained the following proviso as to redemption :—"Thereafter on [naming a date] on paying [the amount advanced] we shall redeem our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay [the amount advanced] on [naming the date] of any year, then you shall deliver back our lands to us." *Held*, that this contained a promise by the mortgagor to pay on the date named, and that the mortgagee was entitled to a decree for the mortgage-money, under cl. (*a*) of s. 68 of the Transfer of Property Act, and to a decree for sale under s. 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of s. 68 (*b*). KANGAYA GURUKAL *v.* KALIMUTHU ANNAVI (1904) **I. L. R. 27 Mad. 526**

——— s. 59.

See ATTESTATION . **I. L. R. 33 Calc. 831**

See BENGAL TENANCY ACT, s. 12. **3 C. W. N. 499**

See COMPROMISE—COMPROMISE OF SUITS UNDER CIVIL PROCEDURE CODE. **I. L. R. 9 Mad. 103**

See DEED—EXECUTION. **5 C. W. N. 454**

ATTESTATION . **I. L. R. 27 Bom. 91**
7 C. W. N. 160 ; 384

See DEPOSIT OF TITLE-DEEDS.
I. L. R. 14 All. 238
I. L. R. 17 All. 252
I. L. R. 24 Calc. 348

See EVIDENCE ACT, 1872, s. 68.
I. L. R. 18 Mad. 29
I. L. R. 26 Calc. 228

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 59—*contd.*

See MORTGAGE . **9 C. W. N. 1001**

See REGISTRATION ACT (III OF 1877), s. 28 . . **I. L. R. 29 Calc. 654**

See SIGNATURE . **I. L. R. 24 All. 319**

1. ——— *Oral agreement for kanom—Suit for ejectment by a jenmi.* A jenmi in Malabar sued to eject a tenant, who proved by oral evidence that he had one year before suit paid to the plaintiff a sum of money as a renewal fee and the plaintiff agreed to demise the land to him on kanom for a period of twelve years. *Held*, that although no instrument had been executed and registered the plaintiff was not entitled to eject the defendant. ITTAPPAN *v.* PARANGODAN NAYAR **I. L. R. 21 Mad. 291**

2. ——— *Registration of mortgage—Interest in land—Right to redeem immoveable property mortgaged.* Two documents were produced in evidence ; one of which was in terms an absolute sale. This document had been registered. The other document (which was not dated) had apparently been written contemporaneously with the first, but it had not been registered. The document purported to show that the transaction between the parties was a mortgage. *Held*, that the second document could not be received as evidence of a mortgage transaction not below R100, and that the registration of the first document, which was on the face of it an absolute and unconditional sale, could not be regarded or operate as the registration of a mortgage. Though there is nothing to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached, yet the requirements as to registration cannot be said to have been complied with, if some of such papers are registered while others are left unregistered. A document which gives a person a right to redeem a mortgage on immoveable property on payment of money creates an interest in immoveable property and its registration is compulsory under s. 7 of the Registration Act. MUTHA VENKATACHELAPATI *v.* PYANDA VENKATACHELAPATI (1904) **I. L. R. 27 Mad. 348**

3. ——— *Mortgage—Attestation of mortgage. Held*, that the attestation of a mortgage-deed spoken of in s. 59 of the Transfer of Property Act, 1882, does not mean only attestation of the execution of the deed in the presence of the witnesses thereto, but includes also attestation after execution of the deed of the acknowledgment by the executant of the signature on the deed. *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee*, *I. L. R. 26 Calc. 246*, and *Abdul Karim* v. *Salimun*, *I. L. R. 27 Calc. 190*, dissented from. *Ramji* v. *Parvati*, *4 Bom. L. R. 869*, and the *obiter dictum* in *Sheikh Ghazi* v. *Bhawani Prasad*, *All. Weekly Notes*, (*1896*) *89*, followed. GANGA DEI *v* SHIAM SUNDAR (1904) . . **I. L. R. 26 All. 69**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 59**—*contd.*

4. ——— *Deposit of title deeds—Equitable mortgage—Subsequent legal mortgage—Priority—Registration Act (III of 1887), ss. 17 and 48—Whether equitable sub-mortgage requires registration.* *R* executed mortgages in favour of *D* some time before June 1893. On the 3rd June 1893, *D* deposited these mortgage-deeds with *G's* agent in Calcutta as security for his debt to *G*. On the 19th June 1893, *D* wrote a letter to *G's* agent which, after reciting the amount of the debt, contained amongst others the following clause :— "That I shall pay him one-fourth of R70,000 within a fortnight, one-fourth by promissory note payable six months from date, and the remaining half by a promissory note payable within a year. In the meantime and until payment of the claim in full of Raja Gokul Doss (*G*) you will hold as agent for him the mortgage *kistbandi*, dated 25th Falgoon 1292, executed in my favour by Babu Bagabatty Charan Roy and others as enumerated below, which I have already made over to you as such agent as aforesaid as security for the due payment of the said debt, not to be parted with by you without mutual consent of myself and Raja Gokul Dass, or under an order of Court." *Held*, that the mortgage was concluded on the day when the deeds were deposited with *G's* agent in Calcutta, and that under s. 59 of the Transfer of Property Act a valid equitable sub-mortgage was created in favour of *G* on that day. *Kadar Nath Dutt* v. *Sham Lal Khettry, 20 W. R. 150*, referred to. Upon a suit by the equitable sub-mortgagee (*G*) to enforce his mortgage against the original mortgagor *R* and a subsequent mortgagee, the defence was that the alleged equitable mortgage, which was created by a letter, not being registered under s. 17 of the Registration Act had no validity at all ; and that it could not have priority over the subsequent legal mortgage. *Held*, that a deposit of title-deeds of certain property under a verbal arrangement to secure payment of a debt was not an oral agreement or declaration relating to such property within the meaning of s. 48 of the Registration Act, but the transaction was a valid equitable mortgage within the meaning of s. 59 of the Transfer of Property Act, and it did not require registration. *Coggan v. Pogose, I. L. R. 11 Calc. 158*, followed. *Held*, further, that in India there is no such distinction between legal and equitable estates as is known in England, and if the claim of the subsequent legal mortgagee can be sustained, it can only be sustained under s. 48 of the Registration Act. *Webb* v. *Macpherson, I. L. R. 31 Calc. 57*, referred to. GOKUL DASS *v.* EASTERN MORTGAGE AND AGENCY COMPANY (1905) . . **I. L. R. 33 Calc. 410**

5. ——— *Provisions of section not sufficiently complied with when witnesses not present at execution but attest on executant's acknowledgment of signature.* A mortgage-deed is "attested" by witnesses within the meaning of s. 59 of the Transfer of Property Act only when such attesting witnesses are actually present at the time of execution. The provisions of the section are not complied with when the witnesses are not present at the execution of the document, but attest it subsequently on the acknowledgment by the mortgagor of his signature. *Abdul Karim* v. *Salimun, I. L. R. 27 Calc. 193*, followed. *Ramji* v. *Bai Parvati, I. L. R. 27 Bom. 91*, dissented from. *Ganga Dei v. Shiam Sundar, I. L. R. 26 All. 69*, dissented from. *Per* WALLIS, *J.*—The provisions of s. 50 (cl. 3) of the Indian Succession Act prescribing the manner in which wills must be attested and allowing attestation by witnesses on the testator's acknowledgment of his signature, cannot be regarded as statutory definition of an attestation applicable to other Indian Acts. *Per* SANKARRAN-NAIR, *J.*—The absence in s. 59 of the Transfer of Property Act of the provision as to attestation on acknowledgment of signature contained in s. 50 (3) of the Succession Act, shows that, under s. 59 of the Transfer of Property Act, attestation of the actual signature is necessary. SHAMU PATTER *v.* ABDUL KADIR RAVUTHAN (1908) **I. L. R. 31 Mad. 215**

6. ——— *Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 63 (a)—Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.* A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of s. 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by s. 59 of the Transfer of Property Act (IV of 1882). *Held*, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage. An attesting witness is a "witness who has seen the deed executed and who signs it as a witness." *Burdett* v. *Spilsbury, 10 C. & F. 340*, followed. RANU *v.* LAXMANRAO (1908) . . . **I. L. R. 33 Bom. 44**

7. ——— *Evidence Act, s. 68—Mortgage registered or unregistered not duly attested admissible to prove personal covenant to pay.* A mortgage, which is not attested or attested by only one witness, is admissible as evidence of a personal covenant to pay contained therein, whether such mortgage is registered or unregistered. *Madras Deposit and Benefit Society* v. *Oonnamalai Ammal, I. L. R. 18 Mad. 29*, overruled. *Sadakavaur* v. *Tadepally Basaviah, I. L. R. 30 Mad. 284, 288*, followed. A document which purports to be a mortgage, but is not a mortgage owing to non-compliance with the provisions of s. 50 of the Transfer of Property Act regarding attestation, is not a document which is required by law to be attested within the meaning of s. 68 of the Evidence

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 59—*concld.*

Act, and is admissible to prove the personal covenant to pay therein, which is not required by law to be attested. PULAKA VEETIL MUTHALAKULANGARA KUNHU MOIDU *v.* THIRUTHI PALLI MADHAVA MENON (1909) **I. L. R. 32 Mad. 410**

8. ——— *Zurpeshgi patta—Attestation—Document executed by purdanashin lady.* Where it appeared from the evidence of the attesting witnesses to a *zurpeshgi patta* executed by a *purdanashin* lady that the witnesses were present in the room where the lady signed the document, but that she was behind a *purda* or screen at the time when she actually affixed her signature:—*Held*, per BRETT, *J.*, that having regard to the custom of this country there was a sufficient compliance with the provisions of s. 59 of the Transfer of Property Act. *Horendra Narain* v. *Chandra Kanta, I. L. R. 16 Calc. 19, Abdul Karim* v. *Salimun, I. L. R. 27 Cal. 190, Sasi Bhusan Pal* v. *Chandan Peshakar, 4 C. L. J. 41*, referred to. *Held*, on appeal under the Letters Patent (RAMPINI *C. J.* and MITRA, *J.*), that there was nothing to show that the attesting witnesses did not see the lady sign the deed, and that moveover the Court could not interfere at this stage with the concurrent findings of three Courts on a question of fact. HARMONGAL NARAIN SINGH *v.* GANAUR SINGH (1907) . . . . **13 C. W. N. 40**

——— ss. 59, 98.

See KANOM . **I. L. R. 30 Mad. 300**

——— ss. 59, 100.

See COMPROMISE **I. L. R. 35 Calc. 867**

——— *Mortgage-deed not attested as required by s. 59 cannot create charge under s. 100.* An instrument, which is invalid as a mortgage for want of attestation under s. 59 of the Transfer of Property Act, cannot operate to create a charge under s. 100 of the Act. *Royzuddi Sheik* v. *Kalinath Mukerjee, I. L. R. 33 Calc. 985*, followed. SAMOO PATTER *v.* ABDUL SAMMAD SAHEB (1908) . . **I. L. R. 31 Mad. 337**

——— s. 60.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—EQUITY OF REDEMPTION.
I. L. R. 21 Bom. 226

See MALABAR LAW—MORTGAGE.
I. L. R. 16 Mad. 328

See MORTGAGE—REDEMPTION—REDEMPTION OF PORTION OF PROPERTY.
I. L. R. 17 All. 63
I. L. R. 21 Mad. 369
I. L. R. 20 All. 23
4 C. W. N. 507
I. L. R. 22 Mad. 209

See MORTGAGE—REDEMPTION—REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM . **I. L. R. 16 Mad. 486**
I. L. R. 23 Mad. 33

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 60—*contd.*

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION . **5 C. W. N. 83**
I. L. R. 22 All. 238
I. L. R. 24 Mad. 409; 449

See RES JUDICATA—ESTOPPEL BY JUDGMENT . **I. L. R. 24 All. 44**

1. ——— *Right of redemption, extinguishment of—Breach of condition in mortgage-deed—Conditional sale.* The breach of a condition in a mortgage-deed to the effect that on default of payment on a certain date the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to s. 60 of the Transfer of Property Act, 1882. PERAYYA *v.* VENKATA . **I. L. R. 11. Mad. 403**

2. ——— *Redemption of mortgage—Clog on equity of redemption—Bond subsequent to mortgage providing that the bond should be paid off before the mortgage was redeemed.* After the execution of a usufructuary mortgage, the mortgagor executed a bond, which, in addition to the usual stipulation for repayment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed until the principal money and interest due under the bond had been paid. *Held*, that such provision was a clog or fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and therefore a provision not to be enforced. *Browne* v. *Ryan, 2 I. R. 653*, and *Noakes & Co., Ld.* v. *Rice, [1902] A. C. 24*, referred to. *Allu Khan* v. *Roshan Khan, I. L. R. 4 All. 85*, not followed. SHEO SHANKAR *v.* PARMA MAHTON (1904) . . . . **I. L. R. 26 All. 559**

3. ——— *Mortgage—Effect of mortgagee purchasing part of the mortgaged property—Redemption.* Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage-money, but he cannot compel the mortgagee to allow him to redeem the shares of other persons, in which he is not interested. *Kuray Mal* v. *Puran Mal, I. L. R. 2 All. 565*, followed. *Lachmi Narain* v. *Muhammad Yusuf, I. L. R. 17 All. 63*, referred to. *Mora Joshi* v. *Ramchandra Dinkar Joshi, I. L. R. 15 Bom. 24*, distinguished. KALLAN KHAN *v.* MARDAN KHAN (1905)
I. L. R. 28 All. 155

4. ——— *Mortgage—Purchase of part of the mortgaged property—Mortgage foreclosed, purchaser not being made a party—Right of purchaser to redeem part of the mortgaged property.* The plaintiff's father purchased some sir land, which along with other property, was the subject of a

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 60—*contd.*

mortgage by conditional sale. The mortgagees subsequently instituted a suit for foreclosure, in which they obtained a decree and an order absolute for foreclosure. But the mortgagees, although they had notice of his interest in the mortgaged property, did not join the purchaser as a party to their suit. *Held*, that therewas no bar to the plaintiff's suing to redeem that portion of the mortgaged property in which their father had acquired an interest, and that they were not bound to redeem the whole mortgage. BRIJ KISHORE *v.* MADHO SINGH (1905) . . **I. L. R. 28 All. 279**

5. ——— *Mortgage—Redemption—Effect of purchase by mortgagees of part of the mortgaged property.* When the integrity of a mortgage has been broken up upon the purchase by the mortgagees of the equity of redemption in a portion of the mortgaged property, the right of redemption of each of the several mortgagors is confined to his own interest in the mortgaged property; he cannot redeem the remainder of the mortgaged property against the wishes of the mortgagees. *Nawab Azimut Ali Khan* v. *Jowahir Singh, 13 Moo. I. A. 404; Kuray Mal* v. *Puran Mal, I. L. R. 2 All. 565*, and *Girish Chander Dey* v. *Juramoni Dey, 5 C. W. N. 83*, followed. MUNSHI *v.* DAULAT (1906) . . **I. L. R 29 All. 262**

6. ——— *Inheritance of mortgagors' rights by mortgagee—Integrity of mortgage broken up.* Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee whether by purchase or by inheritance or otherwise, there is a merger of rights and the integrity of the mortgage is broken up. *H* mortgaged certain property to *B* who transferred his mortgage right to *M*. *M* died leaving *A* as his sole heir. *H* died leaving 51 heirs one of whom was *A*. Some heirs of *H* brought this suit for redemption of their shares only. *Held*, that the plaintiffs were entitled to redeem their shares, inasmuch as the mortgagee having inherited part of the property mortgaged the integrity of the mortgage was broken up. *Luchmi Narain* v. *Muhammad Yusuf, I. L.R. 17 All. 63*, distinguished. *Sobha Sah* v. *Inderjeet, 5 N.-W. P. H. C. Rep. 148*, followed. *Azimat Ali Khan v. Jawahir Singh, 13 Moo. I. A. 404, Ballan Khan* v. *Mardan Khan, I. L. R. 28 All. 155*, and *Munshi* v. *Daulat, I. L. R. 29 All. 262*, referred to. HAMIDA BIBI *v.* AHMAD HUSAIN (1909) . . **I. L. R. 31 All. 335**

——— ss. 60, 83, 95—*Redemption of mortgage—Clog on equity of redemption—Parties to suit for redemption—Effect of payment of mortgege-money into Court.* After the execution of a usufructuary mortgage the mortgagor executed a bond, which, in addition to the usual stipulation of re-payment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed until the principal money and interest due under the bond had been paid off.

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 60—*concld.*

Held, that such a provision amounted to a clog or fetter on redemption, placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and was therefore a provision not to be enforced. *Sheo Shankar* v. *Parma Mahton, I. L. R. 26 All. 559*, followed. *Held*, also, that, where the purchaser of part of equity of redemption comes into Court seeking to redeem the whole mortgage, and pays into Court the entire amount due at the time upon that mortgage, the rights of a purchaser of another portion of the equity of redemption claiming only to redeem his proportionate share in the mortgage, cannot be dealt with in that suit, for upon payment by the plaintiff of the full amount due, the mortgage has ceased to exist. RUGAD SINGH *v.* SAT NARAIN SINGH (1905) . . . **I. L. R. 27 All. 178**

——— s. 61—*Redemption, clog on—Contract to pay off subsequent mortgages before redeeming prior mortgage—Validity—Contract to pay off an unsecured debt.* In a suit for redemption by a mortgagor the mortgagee set up by way of defence a contract entered into at the time of the execution of four bonds of later dates, to the effect that the mortgage in suit was not to be redeemed without paying off the sums due under the subsequent bonds. One of these bonds was a simple bond, the others mortgage-bonds secured on the same property. *Held*, that, so far as these mortgage-bonds were concerned, the contract was enforceable and must be given effect to, but as regards the simple bond the contract was a clog on the equity of redemption and was not enforceable. DURGA PERSHAD *v.* DUKHI RAY (1905) . **9 C. W. N. 789**

——— ss. 61, 62.

See MORTGAGE—REDEMPTION—RIGHT OF —REDEMPTION . **I. L. R. 16 All. 295**

——— s. 62.

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE . **I. L. R. 8 All. 402**

See MORTGAGE—REDEMPTION—REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM . **I. L. R. 16 Mad. 486**
I. L. R. 23 Mad. 33

——— ss. 62, 63.

See MORTGAGE REDEMPTION.
I. L. R. 29 All. 471

——— ss. 62, 83—*Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Res judicata—Usufructuary mortgage—Suit for possession of mortgaged property—Tender of mortgage-money—Deposit in Court—Redemption decree—Second suit to recover mesne profits from the date of deposit to the date of recovery of possession of mortgaged property—Position of mortgagee in possession after the tender of deposit of mortgage-money.* In 1884 the plaintiffs executed a usufructuary mortgage in favour of the defendant

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 62**—*concld.*

and placed him in possession of the property. In 1901 the plaintiffs tendered the amount of the principal to the defendant, but it was not accepted. The plaintiffs in consequence filed a suit under s. 62 of the Transfer of Property Act (IV of 1882) to recover possession of the mortgaged property, and at the same time, under s. 83 of the Act, deposited the amount of the principal in Court as the amount payable on the mortgage. The Court passed a decree for possession. In 1904 the plaintiffs filed another suit to recover mesne profits from the defendant from the date of the deposit to the date when he recovered possession of the mortgaged property from the defendant in execution of the redemption decree in the previous suit. The claim was disallowed on the ground of *res judicata*. *Held*, that the plaintiffs having failed to ask for mesne profits in the previous suit, his present claim was barred either under s. 13 or 43 of the Civil Procedure Code (Act XIV of 1882). The profits derived by a mortgagee after a proper tender made or after the amount due has been deposited in Court are profits for which he has to account to the mortgagor in virtue of a liability tacked on, so to say, by the Statute to the mortgage contract ; and as such a claim to them by the mortgagor is one arising from and connected with his right to redeem or recover possession of the property. From the date of the tender or of the deposit, as the case may be, the mortgagee continues as mortgagee but with a statutory liability to account for the profits received by him from that date. He is not then a mere trespasser but a mortgagee still, holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profits. RUKHMINIBAI *v.* VENKATESH (1907)
I. L. R. 31 Bom. 527

——— **s. 63.**

See MORTGAGE—ACCOUNTS.
I. L. R. 17 All. 282

——— **s. 65.**

See LANDLORD AND TENANT—TRANSFER BY TENANT . **I. L. R. 10 Calc. 443**

1. ——— **Cl. (a)**—*Duty of mortgagor to pay public revenue on mortgaged land—Default in payment—Sale for arrears of revenue—Subsequent sale by purchaser at revenue sale to original mortgagor—Right of mortgagee under original mortgage.* It is the duty of a mortgagor, under s. 65 (*c*) of the Transfer of Property Act, to pay the public revenue accruing due on the mortgaged property, when it continues in his possession. If he fails to perform that duty, and the land is sold for arrears of revenue, and the purchaser at the revenue sale sells the land to the original mortgagor, the mortgage is not extinguished. A man cannot be allowed to take advantage of his own wrong ; and, notwithstanding that the land might have vested in the purchaser at the revenue sale free of the mortgage, the original mortgagor (or his son), on his purchase from the auction-purchaser, cannot plead, for his own benefit, that by reason of such wrong there has been a statutory extinction of the original mortgage. *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan, 10 Moo. I. A. 540, 557*, followed. SANAGAPALLY LAKSHMAYYA *v.* INTOORY BOLLA REDDY (1902)
I. L. R. 26 Mad. 385

2. ——— *Purchaser of equity of redemption from mortgagor not bound to pay public charges and is not when he purchases the lands at a revenue sale a constructive trustee under s. 90 of the Trusts Act—Mortgage, lien of property paying prior, extinguished when part of mortgaged property is purchased for such amount—Sale for revenue—Trusts Act (II of 1882), s. 90.* Where person paying off a prior mortgage, purchases a portion of the mortgaged properties, in consideration of the amount so paid to him, the lien acquired by such payment is extinguished and cannot be used as a shield against a subsequent mortgagee by such purchaser. The assignee of a mortgage decree purchasing a portion of the mortgaged properties, acquires over such portion a lien for only a proportionate share of the mortgage amount. The implied covenant on the part of the mortgagor, under s. 65 of the Transfer of Property Act, to pay the public charges on the properties mortgaged does not extend to the purchaser of the equity of redemption from the mortgagor. Such purchaser in omitting to pay such charges does not fail to discharge any obligation owing from him to a mortgagee of the said properties, and in purchasing such properties at a revenue sale for non-payment of such charges, he does not gain an advantage as qualified owner in derogation of the rights of the mortgagee or other persons interested in the property so as to constitute him a constructive trustee for them under s. 90 of the Trusts Act. RENGA SRINIVASA CHARI *v.* GNANAPRAKASA MUDALIAR (1906) . . **I. L. R. 30 Mad. 67**

3. ——— **ss. 65 and 68**—*Mortgagor and Mortgagee—Construction of mortgage—Sale of premises at suit of a prior mortgagee—Right of a second mortgagee to sue the mortgagor personally.* The defendants, having already mortgaged certain land to another, executed a hypothecation-bond comprising the same land in favour of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewoods of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff then brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation-bond. *Held*, that the hypothecation-bond contained no personal covenant by the obligors, but that on the construction of ss. 65 and 68 of the Transfer of Property Act the obligors

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 65—*concld.*

had committed default so as to entitle the obligee to sue them personally under the former section. SINGEE *v.* TIRUVENGADAM. **I. L. R. 13 Mad. 192**

4. ——— ss. 65 and 90—*Prior and subsequent incumbrancers—Implied covenants binding upon the mortgagor.* A puisne mortgagee of property, upon which there existed several prior incumbrances, obtained a decree for sale after redemption of the prior incumbrances. The prior incumbrances were redeemed and the mortgaged property was put up to sale; but the sum realized by the sale was not sufficient to cover even the amounts due upon the prior incumbrances, not to mention the amount due upon the mortgage in suit. *Held*, that, having regard to s. 65 (*e*) of the Transfer of Property Act, 1882, the puisne mortgagee decree-holder was entitled to a decree under s. 90 of the said Act in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage. ALI JAN *v.* MARIAM BIBI (1904) **I. L. R. 26 All. 93**

——— s. 67.

See post, s. 99. **I. L. R. 30 Calc. 463**

See COSTS . . **9 C. W. N. 372**

See LIMITATION ACT, 1877, SCH. II. ART. 122 . **I. L. R. 24 Calc. 473**

See LIMITATION ACT, 1877, SCH. II, ART. 132 . **I. L. R. 20 Calc. 269**

See LIMITATION ACT, 1877, SCH. II, ART. 147 . **I. L. R. 16 Mad. 64**

See MORTGAGE—POWER OF SALE. **I. L. R. 26 Bom. 241**
I. L. R. 12 Mad. 109
I. L. R. 21 Bom. 267

REDEMPTION—RIGHT OF REDEMPTION. **I. L. R. 23 All. 1**

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES. **I. L. R. 9 All. 68**

See PUBLIC DEMANDS RECOVERY ACT (BEN. ACT VII OF 1880), SS. 2, ETC. **I. L. R. 29 Calc. 537**

See SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY. **I. L. R. 24 All. 549**

See SURETY—ENFORCEMENT OF SECURITY . **I. L. R. 30 Calc. 1060**

1. ——— *Right of suit for sale by usufructuary mortgagee.* Under s. 67 (*a*) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Choudhri Umrao Singh* v. *Collector of Moradabad, S. D. A. N. W. (1859) 13; Dulli* v. *Bahadur, 7 N. W. 55; Ganesh Kooer* v. *Deedar Buksh, 5 N. W. 128; Venkatasami* v. *Subramanya,*

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 67—*contd.*

I. L. R. 11 Mad. 88, and *Jhabbu Ram* v. *Girdhari Singh, I. L. R. 6 All. 289*, referred to. UMDA *v.* UMRAO BEGAM . . **I. L. R. 11 All. 367**

2. ——— *Usufructuary mortgage—Remedy of mortgagee.* A usufructuary mortgagee is not entitled in the absence of a contract to that effect, to sue for sale of the mortgaged property. *Semble:* The construction placed on s. 67 (*a*) of the Transfer of Property Act, 1882, in *Venkatasami* v. *Subramanya, I. L. R. 11 Mad. 88*, that a usufructuary mortgagee can sue either for foreclosure, or for sale, but not for one or other in the alternative is wrong. CHATHU *v.* KUNJAN **I. L. R. 12 Mad. 109**

3. ——— and s. 58 (d)—*Usufructuary mortgage with a personal covenant—Suit by mortgagee for sale—Right of suit.* In a suit for sale by a mortgagee it appeared that the mortgage comprised a covenant by the mortgagor for payment of the mortgage amount, but otherwise answered the definition of a usufructuary mortgage contained in the Transfer of Property Act, s. 58 (*d*). *Held*, that the mortgagee was not precluded by the Transfer of Property Act, s. 67, from bringing the property to sale under the mortgage. RAMAYYA *v.* GURUVA **I. L. R. 14 Mad. 232**

4. ——— and s. 68—*Usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Right of suit.* The plaintiff, at the request of the mortgagors, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which has been in the enjoyment of the mortgagee so paid off, who executed a release. The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgaged premises were sold "subject to the establishment" of the plaintiff's claim: the decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff then sued the mortgagors and mortgagees and the defendants above referred to. *Held*, that the plaintiff was not entitled to a decree for sale. *Semble:* The plaintiff might have sued to have the sale, which had taken place at the suit of the first usufructuary mortgagee, declared to be invalid as against him. SAMAYYA *v.* NAGALINGAM **I. L. R. 15 Mad. 174**

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5. ——— and s. 68 (a)—*Mortgagee's right to sue for mortgage-money and for sale—Usufructuary mortgage—Covenant to repay mortgage-money—Right of suit.* The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband. It contained a covenant to pay the mortgage-money in Chittrai Kalavadi of the year 1883. This covenant was followed by these words: "If I fail to pay the mortgage amount in the said Kalavadi,

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——— **s. 67**—*contd.*

then you shall receive the said mortgage amount in the Chittri Kalavadi of whatever year I may pay it, deliver the said lands to my possession having cleared off the arrears of Government revenue, and also give back the bond.'' The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property. *Held*, by a Full Bench, that the bond contained a covenant to pay, and that therefore the suit was maintainable. SIVAKAMI AMMAL *v.* GOPALA SAVUNDRAM AYYAN

I. L. R. 17 Mad. 131

6. ——— **and ss. 83, 84**—*Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree.* In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of payment into Court when he filed his suit. *Held*, that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree. SITARAMAYYA *v.* VENKATRAMANNA

I. L. R. 11 Mad. 371

7. ——— **and ss. 86, 89**—*Usufructuary mortgage dated 20th April 1882 sued on in 1884—Form of decree.* In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage-money, or in default for the sale of the mortgaged property. *Held* (*Semble* under the Transfer of Property Act), that the decree for sale was the right decree. VENKATASAMI *v.* SUBRAMANNYA

I. L. R. 11 Mad. 88

8. ——— **and s. 90**—*Suit for money-decree on mortgage with personal covenant—Execution against mortgaged property—Sale of security in execution of decree.* A mortgage-deed contained a personal covenant to pay and a suit was brought on such personal liability. *Held*, that the mortgagees were entitled to waive their right to proceed against the mortgaged property and to bring a suit only for a money-decree, but that they could not bring to sale the mortgaged property in execution of such decree without recourse to the provisions of s. 67 of the Transfer of Property Act. RAM KESHUB DEB *v.* SONATUN PAL . . **2 C. W. N. 320**

9. ——— *Decree for payment of money by instalments on specified dates—Charge—Consent decree—Separate suit.* Where by a consent decree it is ordered that payment of the decretal amount be made by instalments, and that the properties set forth in a schedule annexed to the decree stand charged with payment of the said instalments, the said properties cannot be sold in execution of the decree, but a separate suit must be brought under s. 67 of the Transfer of Property Act. AUBHOYESSURY DABEE *v.* GOURI SUNKUR PANDAY.

I. L. R. 22 Calc. 859

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 67**—*contd.*

10. ——— **and s. 99**—*Charge for maintenance created by a decree, how enforced—Civil Procedure Code, 1882, s. 244 (c)—Separate suit.* Where a decree, after declaring the amount payable to the plaintiff in respect of future maintenance, and that it should be a charge on certain immoveable property which formed a specific item in the general estate of a testator, went on to direct that for the purpose of securing the payment of the future maintenance a deed should be executed in favour of the plaintiff, charging such immoveable property, on her executing a release of all her rights and interest in the general estate:—*Held*, that such a charge was properly enforced by a suit brought on the deed, and that it could not be given effect to by proceedings in execution. *Aubhoyessury Dabee* v. *Gouri Sunkur Panday*, *I. L. R. 22 Calc. 859*, followed. *Ashutosh Banerjee* v. *Lukhimoni Debya*, *I. L. R. 19, Calc. 139*, distinguished. MATANGINI DASSEE *v.* CHOONEYMONEY DASSEE

I. L. R. 22 Calc. 903

11. ——— *Usufructuary mortgage—Sudbharna bond—Covenant to repay—Construction of bond—Suit for money and for sale—Form of decree.* In a sudbharna mortgage-bond it was stipulated, '' having paid the principal money in the month of Chait 1297 we shall take back the document and the land. In case we fail to repay the principal money on due date, the sudbharna bond shall remain in force :'' *Held*, that there was in this contract no agreement to repay the principal money, and no such agreement was implied by the provisions as to taking back the document and the land, and therefore there was no right to a money-decree. *Held*, also, that under s. 67 of the Transfer of Property of Act (IV of 1882) an usufructuary mortgage cannot as such (*i.e.*, unless there is anything in the contract which would imply the right) sue either for foreclosure or for sale. *Umda* v. *Umrao Begum*, *I. L. R. 11 All. 367*; *Chathu* v. *Kunjan*, *I. L. R. 12 Mad. 109*; and *Ramayya* v. *Guruva*, *I. L. R. 14 Mad. 232*, referred to. *Venkatasami* v. *Subramanya*, *I. L. R. 11 Mad. 88*, not followed. LUCHMESHAR SINGH *v.* DOOKH MOCHAN JHA . . **I. L. R. 24 Calc. 677**

12. ——— *Charge—Attachment without sale—Transfer of Property Act (IV of 1882), ss. 99, 100.* The plaintiff, a judgment-creditor, had in the High Court obtained a decree against the defendant, whereby it was ordered that the defendant should pay to the plaintiff a sum of R1,68,123, and that the said sum should be a charge on certain immoveable properties situated in the mofussil and specified in a schedule to the decree. In August 1894 the plaintiff obtained an order for transfer of the decree to a mofussil Court and sent a copy of the decree for execution there. He obtained in that Court an order for attachment and sale of the property, but the order was reversed on appeal in May 1895, the High Court holding that the properties could not be sold in execution of the

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 67—*contd.*

decree, but that a separate suit must be brought under s. 67 of the Transfer of Property Act. The plaintiff then applied to the Court that passed the decree for an order for transmission of the decree to the mofussil Court with a view to execution. That application was refused by SALE, *J.*, who held that the decision of May 1895 was conclusive as to the plaintiff's right to attach the property as distinct from a sale or to sell it except after a suit under s. 67 of the Transfer of Property Act. *Held*, on appeal (reversing the decision of SALE, *J.*), that an order for attachment only as distinct from a sale could be made. *Aubhoyessury Dabee* v. *Gouri Sunkar Panday, I. L. R. 22 Calc. 859*, explained. *Chundra Nath Day* v. *Burroda Shoondury Ghose, I. L. R. 22 Calc. 813*, referred to. GOURI SUNKER PANDAY *v.* ABHOYESWARI DABEE
I. L. R. 25 Calc. 262

See CHUNDRA MONI DASSEE *v.* MUTTY LAL MULLICK . . . . **2 C. W. N. 33**

13. ——— ss. 67, 99—*Decree—Setting aside sale—Void sale—Civil Procedure Code (Act XIV of 1882), s. 244—Mortgage—Sale of mortgaged property—Money-decree.* A sale in contravention of the provisions of s. 99 of the Transfer of Property Act is void, although a third party is the purchaser and only a portion of the property was under mortgage, the sale being of the whole undivided property. *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164*, and *Shib Dass Dass* v. *Kali Kumar Roy, I. L. R. 30 Calc. 463*, referred to. Such a sale may be set aside under s. 244 of the Code of Civil Procedure. *Mayan Pathuti* v. *Pakuran, I. L. R. 22 Mad. 347*, followed. SONU SINGH *v.* BEHARI SINGH (1905) . . **I. L. R. 33 Calc. 283**

——— ss. 67, 96, 97.

See MORTGAGE **I. L. R. 30 Mad. 408**

——— ss. 67, 99.

See EXECUTION OF DECREE.
I. L. R. 32 Calc. 494

——— ss. 67, 99 and 100—*Execution of decree—Attachment—Application in execution.* S. 99 of the Transfer of Property Act (IV of 1882) contemplates attachment of property by a judgment-creditor (even if he be a mortgagee), and he is entitled to attach the property by an application in execution of the decree. The proper time to consider the applicability of s. 99 of the Transfer of Property Act is when an application for sale is made in execution. NATHUBHAI *v.* BAI UJAM (1908) . . . **I. L. R. 32 Bom. 205**

——— ss. 67, 111, 116—*Lease by mortgagee in favour of mortgagor—Mortgagor holding over without payment of rent—Lease when determined—Limitation Act (XV of 1877), Sch. II, Art. 139—Suit by mortgagee for possession.* A usufructuary mortgagee executed a lease of the mortgaged property in favour of his mortgagors for

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 67—*concld.*

five years, but after the expiry of the term of the lease neither claimed nor received rent from his mortgagors for more than 12 years and then sued them for possession of the property:—*Held*, that the suit was barred by limitation. *Held*, also, that the lease determined on the expiration of five years and a tenancy from year to year did not come into existence as there was nothing to show that the landlord assented to the tenant's continuing in possession. *Prem Sukh* v. *Bhupia, I. L. R. 2 All. 517*, distinguished. *Held*, also, that no suit for sale could be brought upon the mortgage, as the mere fact that it provided for redemption upon payment of the principal did not make it a simple mortgage. KHUNNI LAL *v.* MADAN MOHAN LAL (1909)
I. L. R. 31 All. 318

——— s. 68.

See LIMITATION ACT, 1877, SCH. II, ART. 116 . **I. L. R. 21 Mad. 242**

See MORTGAGE—POSSESSION UNDER MORTGAGE . . **I. L. R. 6 All. 298**

See MORTGAGE—POWER OF SALE.
I. L. R. 26 Bom. 241

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE **I. L. R. 22 Mad. 332**

1. ——— *Mortgage of non-transferable property—Right to sue for mortgage-money.* Where a decree was obtained by a landholder for cancelment of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession and brought a suit against the mortgagor to recover the mortgage-money:—*Held*, that, inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security within the meaning of s. 68 (*b*) of the Transfer of Property Act (IV of 1882), and the mortgagee was therefore entitled to succeed. GANESH SINGH *v.* SUJHARI KUAR . . . . **I. L. R. 10 All. 47**

2. ——— *Sale of mortgaged premises under Land Acquisition Act—Personal suit by mortgagee.* The sale of mortgaged premises under the Land Acquisition Act is not a destruction of the security within the meaning of s. 68 of the Transfer of Property Act, and does not enable the mortgagee to sue the mortgagor personally. ARUMUGAM *v.* SIVAGNANA . **I. L. R. 13 Mad. 321**

3. ——— *Failure of mortgagor to give possession as stipulated—Personal suit for mortgage amount.* In a suit against a mortgagor for the principal and interest due on a mortgage, it appeared that the payment of interest had fallen into arrears, and that the mortgage-deed provided that in such event the mortgagee should be entitled to possession of the mortgage-premises; the mortgagor falsely alleged that all the interest due had

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 68—*contd.*

been tendered. *Held*, that the mortgagee was entitled under s. 68 of the Transfer of Property Act to sue for the amount due on the mortgage. SARAVANA *v.* CHINNAMMAL . . **I. L. R. 15 Mad. 65**

4. ——— *Personal decree against mortgagor—Right of suit.* Suit for a personal decree on a usufructuary mortgage which contained no express covenant to pay, but provided that, if the mortgagor repaid the secured debt before a certain date (now passed), he should be replaced in possession. The mortgaged premises had been attached in execution of a decree obtained by a third party against the mortgagor, and a claim preferred by the plaintiff having been erroneously rejected and the premises sold, he was dispossessed. The mortgagee accordingly brought his suit as above. *Held*, that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act, s. 68. GOPALASAMI *v.* ARUNACHELLA **I. L. R. 15 Mad. 304**

5. ——— *Right of suit—Usufructuary mortgage—Mortgagee kept out of possession by mortgagor's indirect conduct.* Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under s. 68 of the Transfer of Property Act, instead of for possession of the land. LINGA REDDI *v.* SAMA RAU . . **I. L. R. 17 Mad. 469**

6. ——— *Usufructuary mortgage—Lease of mortgaged premises by mortgagee to mortgagor—Mortgagor holding on after expiry of lease—Right of suit.* *H L* and others, mortgagees, under a usufructuary mortgage executed in their favour by one *G* (the usufruct being applicable in satisfaction of the interest of the debt), leased the mortgaged premises to the mortgagor. The lease was for a term certain with a covenant that the mortgagor might renew on compliance with certain conditions. The mortgagor, on the expiry of the lease, did not fulfil the conditions of the said covenant, but refused to give up possession of the mortgaged property to the mortgagees. *Held*, that the mortgagees were entitled, either under cl. (*b*) (as held by EDGE, *C.J.*, and TYRRELL, *J.*) or under cl. (*c*) (a) held by KNOX, BANERJI, and BURKITT, *JJ.*) of s. 68 of Act IV of 1882, to a money decree for the amount due under the mortgage. *Shitab Dei* v. *Ajudhia Prasad, All. Weekly Notes, (1887). 269*, and *Jhabbu Ram* v. *Girdhari Singh, I. L. R. 6 All. 298*, distinguished. HIRA LAL *v.* GHASITU **I. L. R. 16 All. 318**

7. ——— *Usufructuary mortgage—Dispossession of mortgagee by a trespasser—Suit for recovery of the mortgage-money.* The words "any other person" in the concluding portion ofcl. (*c*) of s. 68 of the Transfer of Property Act mean "any other person having a title." The disturbance of the mortgagee's possession by a trespasser will not confer upon the mortgagee a right to sue the mortgagor for the mortgage-money. *Gopalasami* v. *Arunachella, I. L. R. 15 Mad. 304*, followed. NAKCHEDI RAM *v.* RAM CHARITAR RAI **I. L. R. 19 All. 191**

8. ——— *Usufructuary mortgage—Possession not given—Suit for sale.* A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to claim in a suit for the money an order for the sale of such property. So *held* by the Full Bench in a case where the mortgage contained no covenant to pay. ARUNACHALAM CHETTI *v.* AYYAVAYYAM . **I. L. R. 21 Mad. 476**

9. ——— *Mortgage—Right of mortgagee to sue for mortgage-money.* Where on the execution of a usufructuary mortgage the mortgagor fraudulently suppressed the fact that there was outstanding against the mortgaged property a decree for sale on a prior mortgage, and this decree was subsequently put into execution, it was *held*, that the mortgagee was entitled, under s. 68 (*c*) of the Transfer of Property of Act, 1882, to sue the mortgagor for the mortgage-money. The mortgage in question contained a covenant that, if any "khalal" occurred, the mortgagor would be responsible and would repay the mortgage-money. *Held*, that the expression "khalal" could not be confined to an unforeseen event or accident; but would include the consequences of conduct such as that of which the mortgagor had been guilty. AHMAD-UL-LAH KHAN *v.* SALAR BAKHSH (1905) **I. L. R. 27 All. 488**

10. ——— s. 68 (b)—*Holder of unregistered mortgage deprived of his security by subsequent registered sale to third party can sue under s. 68 (b) of the Transfer of Property Act—The section applies even when there is a covenant to pay—Notice of prior unregistered mortgage, effect of.* Where the owner of properties, after having mortgaged them under an unregistered deed, sells them for valuable consideration by registered deed to one, who has no notice of the mortgage, the mortgagee is deprived of his security by the wrongful act of his mortgagor and is entitled to sue the mortgagor for his money under s. 68 (*b*) of the Transfer of Property Act. Such right exists independently of, and is not taken away by, any covenant to repay contained in the mortgage-deed. The purchaser under a registered sale-deed has no priority over a prior unregistered mortgage, of which he has notice. APPASAMI THEVAN *v.* VIRAPPA THEVAN (1906) **I. L. R. 29 Mad. 362**

11. ——— s. 68 (c)—*Mortgage—Construction of document—Power of sale in a usufructuary mortgage.* A mortgage-deed, which was primarily usufructuary, provided that, if the mortgagor failed to deliver possession, or if the mortgagee was dispossessed from the mortgaged premises, he might

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 68—*concld.*

recover the amount of the mortgage-debt from the mortgagor and the mortgaged property. *Held*, that the mortgagee failing to get possession was competent to sue for and obtain a decree for sale of the mortgaged property. *Jafar Husen* v. *Ranjit Singh, I. L. R. 21 All. 4* ; and *Kashi Ram* v. *Sardar Singh, I. L. R. 28 All. 157*, referred to. NARPAT *v.* RAM SARAN DAS (1908)
I. L. R. 30 All. 162

——— s. 69.

See MORTGAGE—POWER OF SALE.
I. L. R. 11 Mad. 201

See VENDOR AND PURCHASER.
I. L. R. 31 Bom. 566

——— *Limits of town of Bombay—Land situate in district of Mahim.* Land situate in the district of Mahim within the Island of Bombay, and within the local limits of the original jurisdiction of the High Court, is situate within the town of Bombay, in the sense in which that expression is used in s. 69 of the Transfer of Property Act. TRIMBAK GANGADHAR RANADE *v.* BHAGWANDAS MULCHAND . **I. L. R. 23 Bom. 348**

——— s. 70.

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 29 Calc. 803

——— ss. 70, 111, cl. (d).

See MERGER . **I. L. R. 33 Calc. 1212**

——— s. 72.

See MORTGAGE—ACCOUNTS.
I. L. R. 19 Mad. 327
I. L. R. 21 Mad. 32
I. L. R. 20 All. 401

See SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.
I. L. R. 30 Calc. 794

1. ——— S. 72 of the Transfer of Property Act only reproduces the rules of law which Courts of Justice in India have uniformly adopted. GIRDHAR LAL *v.* BHOLA NATH
I. L. R. 10 All. 611

2. ——— *Mortgagee in possession expending money to defend his title against mortgagor.* A mortgagee in possession is, under s. 72 of the Transfer of Property Act (IV of 1882), entitled to add to his mortgage-debt, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. The mere fact that in a redemption suit the mortgagee in possession did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed. DATTA RAM *v.* VINAYAK (1904)
I. L. R. 28 Bom. 18

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 72—*concld.*

3. ——— *Mortgage—Prior and subsequent incumbrances—Rights of usufructuary mortgagee, who satisfies a decree on a prior mortgage of the property mortgaged to him. Held*, that a usufructuary mortgagee, who satisfies a decree for sale on a prior mortgage affecting the property mortgaged to him is entitled to retain possession, until the amount so paid as well as the amount due in respect of his own mortgage has been realized. ABDUL QAYYUM *v.* SADR-UD-DIN AHMAD (1905) . . . **I. L. R. 27 All. 403**

4. ——— *Mortgage—Redemption of part—Whole burden on remainder—Purchase by mortgagee of portion of mortgaged property—Enhancement of Government revenue—Compensation for improvements.* *G*, the predecessor in title of the plaintiffs, mortgaged Kachaura to *N K*, the predecessor of the defendant, and subsequently mortgaged 11 biswas of Kachaura and 6 biswas of Agrana to *N K*. *N K* obtained a decree on the first mortgage and purchased the whole of Kachaura. The plaintiffs acquired from *G* the equity of redemption in 5 biswas of Agrana and brought the suit, out of which these two appeals arose, to redeem this 5½-biswa share on payment of a proportionate amount of the mortgage money and to recover surplus profits, if any. The parties submitted to the decision of the Lower Courts that the plaintiffs must redeem the whole 6-biswa share. *Held*, in S. A. 265 of 1904, that the answer to the question whether the defendant mortgagee could throw the whole burden of the second mortgage on the remainder of the mortgaged property depended on the circumstances under which his purchase was made. If two persons jointly mortgaged property to a third person, who subsequently purchased the equity of redemption from one of them, he could not throw the whole burden of his mortgage on the other. But in this case the purchase was made at an open sale and not subject to any charge, and the defendant could throw the whole burden on the remaining property. The second mortgage further contained clauses (*a*) that if the Government revenue was enhanced the mortgagor was to be liable for the amount of the enhancement, (*b*) that if the mortgagee spent any money in the construction of wells the mortgagor would refund him the amount at the time of redemption. *Held*, in S. A. 298 of 1904, (*a*) that the defendant mortgagee, having paid enhanced revenue to save the property, upon failure by the mortgagor, was entitled to receive from the plaintiff the whole amount of the enhancement with interest. *Girdhari Lal* v. *Bhola Nath, I. L. R. 16 All. 611, 614*, referred to. (*b*) That defendant mortgagee having himself acquired the property in Kachaura could not recover the money spent in constructing wells in Kachaura. BOHRA THAKUR DAS *v.* COLLECTOR OF ALIGARH (1906)
I. L. R. 28 All. 593

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 73.

See LIMITATION ACT, 1877, SCH. II, ART. 132 . . . 5 C. W. N. 356

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.
I. L. R. 15 Calc. 546
8 C. W. N. 332
9 C. W. N. 989
I. L. R. 33 Calc. 87

See SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE.
I. L. R. 20 Calc. 214
I. L. R. 24 Calc. 746

1. ——— *Rent-sale, with power to purchaser to annul incumbrances—Bengal Tenancy Act (VIII of 1885), s. 167—Right of mortgagor to have his lien transferred to sale-proceeds.* In the case of a rent sale (under the Bengal Tenancy Act), with express power to the purchaser to annul all incumbrances, so long as such power remains in the purchaser, the lien of a mortgagee is in jeopardy. In such a case the mortgagee may abandon his lien and ask to have it transferred to the surplus sale proceeds. *Prem Chand Pal* v. *Purnima Dasi, I. L. R. 15 Calc. 546*, referred to. NIM CHAND BABOO *v.* ASHUTOSH DUTT (1905) . 9 C. W. N. 117

2. ——— *Sale of mortgaged property under a decree for rent—Mortgagee's charge on surplus sale-proceeds—Bengal Tenancy Act (VIII of 1885), ss. 159, 161, 162, 163, 164, 165, 166, 167.* When mortgaged property is sold under a decree in a rent suit, the mortgagee would have, under the provisions of s. 73 of the Transfer of Property Act, a charge on the surplus sale-proceeds whether under the decree in the rent suit the property was put up for sale with power to the purchaser to avoid encumbrances or not. Ss. 159 and 161 to 167 of the Bengal Tenancy Act cannot prejudice the right of a mortgagee in that respect. GOBIND SAHAY *v.* SIBBUTRAM (1906) . I. L. R. 33 Calc. 878

——— s. 74.

See DECREE—FORM OF DECREE—MORTGAGE . . I. L. R. 18 All. 189

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 24 All. 185
I. L. R. 19 All. 527

FORECLOSURE—RIGHT TO FORECLOSURE . I. L. R. 24 All. 179

1. ——— *Redemption of prior mortgage—Extinguishment of prior mortgage—Title by possession.* The trustees of a religious institution improperly mortgaged land forming part of its endowment, and put the mortgagee into possession on the 27th June 1877 as usufructuary mortgagee. The mortgagee assigned his mortgage to defendant No. 1 on the 7th December 1882. On the 23rd December 1889 the mortgagors executed to the plaintiff a deed of usufructuary mortgage of the same land to secure

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 74—*concld.*

R1,400; the deed stated that the money was borrowed with a view to discharge a prior mortgage, and proceeded "as you have undertaken to pay R1,000 to the mortgagee, I credit you with R1,000 and receive R402 in cash." The plaintiff paid off the prior mortgagee on the 18th April 1890, but did not obtain possession, other persons having entered in the interests of the institution. The plaintiff now sued for possession and a declaration of his mortgage right, the persons in possession and the prior mortgagee, but not the mortgagors, being joined as defendants. *Held*, that the Transfer of Property Act, s. 74, was not applicable to the case, and that the plaintiff was not entitled to a decree. KOOPMIA SAHIB *v.* CHIDAMBARAM CHETTI I. L. R. 19 Mad. 105

2. ——— *Mortgage of property—Subsequent mortgage to same mortgagee—Third mortgage, with possession—Decree obtained by first mortgagee—Usufructuary mortgagee not a party—Subsequent suit by first mortgagee against usufructuary mortgagee for amount of decree.* The owner of land mortgaged it to plaintiffs, and, at a subsequent date, gave plaintiffs a second mortgage over it. At a still later date, the mortgagor gave a further usufructuary mortgage over it to the predecessor in title of the third defendant. Plaintiffs then sued the mortgagors on their two mortgages, obtained a decree and brought the property to sale, when it was purchased by the second plaintiff, the undivided brother of the first plaintiff. The third defendant was not made a party to this suit. Plaintiffs now sued the mortgagors as well as the third defendant, and prayed that the third defendant might be decreed to pay them the amount of their decree, and that in default it be declared that the third defendant be absolutely debarred of his right to redeem the prior mortgagee, and that he be ordered to surrender possession of the property to plaintiffs. *Held*, that the right of the third defendant was not affected by either the decree or the sale; the only effect of the sale being to transfer to the purchaser (the first mortgagee) the equity of redemption of the mortgagor. *Held*, also, that the only right that the third defendant had now was that which he could have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, a right to redeem that mortgage with the view of enforcing his own mortgage. *Muhammad Usan Rowthan* v. *Abdulla, I. L. R. 24 Mad. 171, 174, 175*, followed. GOVERDHANA DOSS *v.* VEERASAMI CHETTI (1902) I. L. R. 26 Mad. 537

——— ss. 74, 86.

See CIVIL PROCEDURE CODE, 1882, s. 244. I. L. R. 27 All. 325

——— s. 75.

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION. . I. L. R. 33 All. 1

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 75—*concld.*

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.
I. L. R. 20 Bom. 390

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGEGEES.
I. L. R. 19 All. 527

——— s. 76.

See LANDLORD AND TENANT—TRANSFER BY TENANT . I. L. R. 10 Calc. 443

See MORTGAGE—ACCOUNTS.
I. L. R. 6 All. 303
I. L. R. 15 Mad. 290

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY.
I. L. R. 16 All. 386

——— s. 78.

See MORTGAGE—MARSHALLING.
I. L. R. 12 Mad. 424, 429
I. L. R. 13 Mad. 383
I. L. R. 15 Mad. 268

1. ——— *Transfer of Property Act (IV of 1882), ss. 3, 78—Gross negligence—How far registration amounts to notice—Registration Act, s. 50.* Where a mortgagee prior in date duly investigated the title of the mortgagor, but after the execution of the mortgage returned the title-deeds to the mortgagor, according to the custom prevailing in the mofussil, and subsequent thereto a mortgagee in Calcutta advanced moneys on one of those title-deeds without any actual notice of the prior mortgage, but without having duly investigated the mortgagor's title or searched the register:—*Held*, that the prior mortgagee was not within s. 78 of the Transfer of Property Act guilty of such gross negligence as would postpone her mortgage to the subsequent mortgagee and the conduct of the subsequent mortgagee was not such as to create any predominating equity in his favour. The fact that there is in this country a universal system of registration is one of the circumstances to be taken into consideration in determining the question of gross negligence; *Semble*: The question whether registration is notice or not is a question of fact, and as each case arises it should be determined whether the omission to search the register together with the other facts amounts to such gross negligence as to attract the consequence which results from notice. *Tomb* v. *Rand, 2 Bro. C. C. 652; Evans* v. *Bicknell, 6 Ves. 174; Martinez* v. *Cooper, 2 Russ. 198; Farrow* v. *Rees, 5 Beav. 18; Hunt* v. *Elmes, 2 DeG. F. & J. 578;* and *Agra Bank* v. *Barry, L. R. 7 H. L. 148*, referred to. MONINDRA CHANDRA NANDY *v.* TROYLUCKHOO NATH BURAT . . . 2 C. W. N. 750

2. ——— *Gross negligence—Failure to get possession of title-deed does not necessarily amount to gross negligence where system of registration exists—Delay, effect of, in registration of documents.* A mortgaged property to *B* on 21st December 1896 and subsequently mortgaged the same property to *C* on 20th January 1897. *A* wilfully delayed the registration of the mortgage-deed to *B*, which was finally registered on the 21st April 1897. The title-deeds of the property were not given to *B*, but were given to *C*, when the property was mortgaged to him. The mortgage was executed outside Madras and was in respect of property in the mofussil. In a suit by *C* to recover the amount due on his mortgage-deed, *C* claimed priority over *B* on the ground that *B* was guilty of gross negligence in not obtaining possession of the title-deeds. *Held*, that the failure on *B's* part to obtain the title-deeds from *A* did not, under the circumstances, amount to gross negligence within the meaning of s. 78 of the Transfer of Property Act and did not postpone his mortgage to that of *C*. *Held*, further, that the delay in the registration being due to the default of *A*, which *B* could not have anticipated, did not make *B's* failure in obtaining the title-deeds amount to gross negligence. What amounts to gross negligence must be determined according to the circumstances of each case; and one of the circumstances to be taken into consideration in this country is that a universal system of registration is established by law. As registration puts subsequent incumbrancers in a position, with the exercise of reasonable care, to find out prior incumbrances, failure on the part of the prior mortgagee to get possession of the title-deeds must not be imputed to him as gross negligence. The system of registration having caused mortgagees to attach little importance to the possession of title-deeds, the existence of a practice by which the title-deeds are left with the mortgagor must also be taken into consideraion. Another fact to be considered is that the possession of title-deeds in the Presidency towns, where mortgages may be created by depositing them, is of greater importance than in the mofussil. *Damodara* v. *Somasundara, I. L. R. 12 Mad. 429*, considered and distinguished. *Shan Maun Mull* v. *Madras Building Company, I. L. R. 15 Mad. 208*, considered and distinguished. *Monindra Chandra, Nundy* v. *Troyluckho Nath Burat, 2 C. W. N. 750*, followed. *The Agra Bank* v. *Barry, L. R. 7 H. L. 135*, referred to. RANGASAMI NAIKEN *v.* ANNAMALAI MUDALI (1907) . I. L. R. 31 Mad. 7

——— s. 80.

See MORTGAGE—REDEMPTION—MISCELLANEOUS . I. L. R. 23 All. 429
8 C. W. N. 690

See RIGHT OF SUIT—SALE IN EXECUTION OF DECREE . I. L. R. 12 All. 546

——— s. 81.

See MORTGAGE—MARSHALLING.
I. L. R. 12 Mad. 235
I. L. R. 23 Calc. 790
2 C W. N. 793

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 81—*concld.*

See REGISTRATION.
I. L. R. 26 Bom. 538

——— ss. 81, 82.

See CIVIL PROCEDURE CODE, 1882, s. 13
8 C. W. N. 30

——— s. 82.

See MORTGAGE—MARSHALLING.
I. L. R. 22 All. 284

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 29 Calc. 803

See SALE IN EXECUTION OF DECREE—JOINT PROPERTY.
I. L. R. 23 All. 355

1. ——— *Mortgage—Contribution—Apportionment of the mortgage-debt—mortgage-decree.* *A* brought a suit upon a mortgage-bond. Five of the defendants, who have subsequently purchased all the mortgaged properties, contended that under s. 82 of the Transfer of Property Act the mortgaged debt should be apportioned between the various mortgaged properties, and that each defendant should be allowed to pay off his rateable share of the mortgage-debt. *Held*, that the intention of s. 82 was not that the lien of the mortgagee should be split, but simply to determine the liabilities of the purchasers *inter se*; and that therefore all the mortgaged properties were liable in satisfaction of the plaintiff's claim. ROGHU NATH PERSHAD *v.* HARLAL SADHU
I. L. R. 18 Calc. 320

2. ——— *Partial redemption of mortgage—Apportionment of mortgage-debt—Contribution.* In 1884 *A* and *B*, being divided brothers, hypothecated to *X* and *Y* the house now in suit which was *A's* family property, and a house belonging to *B*. In 1886 *A* hypothecated the house now in suit to the plaintiff. In 1888 *B* sold his house for R700 by a conveyance attested by *X* and *Y*, who accepted R550 in discharge of a moiety of the debt secured by the hypothecation of 1884, the balance of R150 being retained by *B*. In this suit the plaintiff sought to recover the principal and interest due on his security of 1886, and he contended that *X* and *Y* who were defendants 4 and 5, were not justified in permitting *B* to retain R150 of the price, and that that sum should accordingly be debited against them in the accounts. *Held*, that, under the Transfer of Property Act, s. 82, plaintiff was not entitled to compel defendants 4 and 5 to satisfy their debt against *B's* house so far as it extended. NEELAMEGAN *v.* GOVINDAN . I. L. R. 14. Mad. 71

3. ——— *Mortgage-debt apportionment of—Contribution, suit for—Principles upon which contribution is to be assessed.* On the 4th of July 1874 thirty-eight villages were mortgaged by *K* and *U* to *S*, the father of the appellant. On the 28th of February 1878 the mortgagee obtained a decree for sale on his mortgage. At the date of this mortgage, some of the villages comprised therein were liable under one or both of two decrees obtained on prior mortgages. Subsequently to the decree of the 28th of February 1878, four of the villages affected by that decree were sold in execution of a simple money-decree and were acquired from the purchasers by one *A*. On the 20th of August 1879 and the 20th of August 1882 these same four villages were brought to sale in execution of the decree of the 28th of February 1878, and were sold for R44,500. Thereupon the former purchaser *A* brought a suit against the representative of the mortgagee of 1874 and certain other persons for contribution, alleging that the said four villages had been sold for considerably more than the amount for which they were proportionately liable under the mortgage-decree; that the defendants were owners of villages which were equally liable with his (the plaintiff's) villages under the decree of the 28th of February 1878, but which had contributed nothing towards the satisfaction of that decree; that six of those villages and an eighth share in a seventh had been purchased by *S* (the predecessor in title of one of the defendants *H*), in execution of simple money-decrees, and that a share in an eighth village had been similarly purchased by the predecessor in title of the other defendants. Against these villages the plaintiff sought contribution. *Held*, that, in calculating the amount to which the plaintiff was entitled by way of contribution, the plaintiff was bound to take into account the liabilities which existed on most of the villages in respect of which the suit was brought under the two prior mortgages; that the plaintiff was entitled to obtain contribution from those villages only which had not been sold in execution of the decree of the 28th of February 1878; that the unrealized balance of that decree must be regarded as the amount which the villages purchased by the decree-holder himself had contributed to the decree; and further that, in determining the amount which the plaintiff was entitled to recover, regard must be had to the claims for contribution of the owners of such of the other mortgaged villages as had been sold in execution of the decree of the 28th of February 1878, and had, like the plaintiff's villages, fetched more than their quota of liability for the decree. HARI RAJ SINGH *v.* AHMAD-UD-DIN KHAN
I. L. R. 19 All. 545

4. ——— Contribution—*Liability of several properties to rateable contribution "in the absence of a contract to the contrary."* The owner of certain lands mortgaged them, and subsequently effected a partition of the family property between himself and his three sons. By the terms of that partition, the father and his sons each took a fourth share in the family property and each became liable for a fourth of the mortgage-debt. One of the sons then sold the greater portion of his

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 82—*contd.*

share in the mortgaged property to plaintiff giving plaintiff a security bond for a sum of money and hypothecating other lands to indemnify plaintiff from any loss which might arise if the original mortgagee should bring the mortgaged lands to sale. The mortgagee obtained a decree on his mortgage, in execution of which a portion of the mortgaged land was sold, including that which plaintiff had bought. The proceeds of sale of the said portion were sufficient to satisfy the mortgagee's decree. Plaintiff then sued on his security bond, and the land hypothecated to him was sold, plaintiff receiving the amount secured by the bond. He now sued under s. 82 of the Transfer of Property Act, and claimed rateable contribution from the other portions of the mortgaged property which had not been sold to satisfy the mortgagee's decree. *Held*, that he was entitled to recover, and that his right to rateable contribution was in no way affected by the indemnity bond or the payment made to him thereunder. *Held*, further, that the words "in the absence of a contract to the contrary," in s. 82 of the Transfer of Property Act, apply to contracts between a mortgagor and mortgagee, and that an agreement which is binding only as between the mortgagors is not "a contract to the contrary," within the meaning of the section. RAMABHADRACHAR *v.* SRINIVASA AYYANGAR (1900)
I. L. R. 24 Mad. 85

5. ——— *Contribution to mortgage-debt—Liability of land in possession of third person.* Certain land was mortgaged to *R*. Subsequently a portion of the land comprised in *R's* mortgage was mortgaged to plaintiffs together with other land. *R* then obtained a decree on his mortgage, in pursuance whereof the said portion of *R's* security which was also mortgaged to plaintiffs was sold. *R's* decree was thus satisfied, without the necessity for the sale of the remaining land which comprised *R's* security. This remaining land was purchased by some of the defendants. Plaintiffs now sued on their mortgage, and claimed not only as against their mortgagors, and the property comprised in their security, but also, on the principle of contribution, sought to charge any balance which might still remain due as against the remaining land already referred to as having been purchased by some of the defendants. *Held*, that plaintiffs were not entitled to enforce contribution against the defendants. *Semble:* That, if the claim for contribution were maintainable, it ought not to have been joined with the ordinary claim on a mortgage. Plaintiffs had purchased a portion of the property comprised in their own mortgage when it was sold in execution of *R's* decree, already referred to. By that purchase they had made a profit. It was contended that plaintiffs in their character of second mortgagees stood in a fiduciary position towards their mortgagors, and that they were not entitled to be treated as independent strangers

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 82—*contd.*

buying at an auction-sale. There was nothing to show that plaintiffs had taken any advantage of their position. *Held*, that plaintiffs took an absolute title, such as strangers might have taken. *Held*, also, that their claim on their mortgage was not affected by their purchase of part of the property, since under the circumstances they must be taken to have paid the full value of the unincumbered property. The owners of certain property, wishing to raise a sum of R10,500 on mortgage, executed two mortgages in favour of the same mortgagees over the same lands, on the same day;—one for R10,000 and another for R500. The later instrument recited the bond for R10,000 as a prior mortgage. The mortgagees then sued on the mortgage for R500, and obtained a decree, under which portions of the security were sold, subject to liability under the mortgage for R10,000. The mortgagees now sued on the mortgage for R10,000, when it was objected that the suit was not maintainable by reason of s. 43 of the Code of Civil Procedure. *Held*, that this objection was not sustainable, and that, regarding the case as one of a mere personal claim on the instrument of mortgage, s. 43 did not apply. SESHA AYYAR *v.* KRISHNA AYYANGAR (1900)
I. L. R. 24 Mad. 96

6. ——— *Contribution, suit for—Mortgage-debt—Mortgage-decree directing sale of some of the mortgaged properties first—Purchase of properties by different parties—Payment of mortgage-decree by some of the purchasers in execution of decree against purchased properties—Liability of purchasers of other properties for contribution, if any.* S. 82 of the Transfer of Property Act makes it clear that mortgaged properties are only liable to contribute rateably to a mortgage-debt in the absence of a contract to the contrary. Although all the properties mortgaged may be originally equally liable for the mortgage-debt, this liability may be altered by a mortgage-decree or by arrangement made by the parties, by which the incidence of the debt may be thrown, as was done in this case, primarily on some of the properties, and the other properties are only liable if the debt is not realized by the sale of those properties. Whatever might have been the right of the purchaser of some of the properties if such a mortgage-decree had not been passed, he cannot, when he has purchased the properties subsequently to the decree, and subject to the mortgage and the arrangements made with regard to it, call upon the purchasers of the other properties to contribute except as provided in that decree. SATYA KRIPAL BANDOPADHYA *v.* GOPI KISHORE MANDUL (1902) . . . . . **6 C. W. N. 583**

7. ——— *Mortgage—Contribution—Valuation of properties for the purpose of ascertaining their liability to contribution.* In estimating—for the purpose of giving effect to a claim for contribution—the respective values of two

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 82—*contd.*

or more properties, the subject of a mortgage the time to be regarded is the date of the execution of the mortgage in virtue of which contribution is claimed. MARDAN SINGH *v.* THAKUR SHEO DAYAL (1905) . . **I. L. R. 27 All. 549**

8. ——— *Purchase by the mortgagee of some of the mortgaged properties in execution of another decree, effect of—Contribution—Execution proceeding—Separate suit.* If by reason of it being necessary to sell the remaining share in the mortgaged properties of the judgment-debtor, any equity should arise between the decree-holder and other persons interested in the properties mortgaged to have the decretal money distributed over the whole property mentioned in the decree, that equity must be enforced by an independent suit. *Nafar Chunder Mundul* v. *Baikanto Nath Roy, 4 C. L. R. 15*, referred to. A mortgagee having purchased the equity of redemption in a part of the mortgaged property previously applied subsequently to enforce his decree against the remaining mortgaged properties without bringing the property purchased into hotchpot and without making all the persons interested in the said properties, parties. On objections being taken that the decree-holder was not entitled to do so, and that even if he could do so the decretal amount ow sought to be recovered should be apportioned between the properties purchased by him and the remaining properties. *Held*, that the decree-holder was entitled to execute his decree against any of the mortgaged properties. *Held*, further, that the question of apportionment must be tried and disposed of in a separate litigation, and could not properly be considered and decided in execution proceedings. *Harendra Kumar Guha* v. *Din Dayal Saha, 4 C. L. J. 195*, dissented from. AMIN CHAND *v.* BUKSHI SHEO PERSHAD SINGH (1906) **I. L. R. 34 Calc. 13**

9. ——— *Mortgagor and mortgagee—Requisites of valid tender—Mortgagee wishing to gain possession—Mortgagor's right to redeem—Construction of mortgage-deed.* In a mortgage-deed after enumerating several contingencies provision was made under on the happening of any of them in the following terms : " Notwithstanding anything contained to the contrary the mortgage-debt for the time being owing on the security of these presents shall at once become payable as if the due date or extended date, if any, had elapsed, and in such case all such rights and remedies shall be available to the Banker as will be available to her under the terms of these presents upon default being made in payment of the principle moneys or interest and all other moneys thereby secured and the Banker may in such event in her discretion without any further consent on the part of the Company forthwith enter upon and take possession of the mortgaged premises or any of them of which she is not already in possession." Owing to the happening of some of the contingencies the plaintiff, the mortgagee, claimed that the debt owing on the security of the mortgage-deed had become payable and that she was entitled to enter upon and take possession of the premises mortgaged to her. She contended that the expression " as if the due date had elapsed " not only served to accelerate the due date, but also to fix the amount of the mortgage-money at what it would have been if in fact the due date had elapsed. The defendant alleged a tender of the mortgage-money to the plaintiff's attorneys and a refusal to accept the same, and claimed to redeem the property. *Held*, (i) that the words " as if the due date had elapsed " were used merely to accelerate payment and they could not be construed to cover the further amount that would have been due on the expiry of the due date of the mortgage. (ii) That the tender was not good, as the plaintiff's attorney disclaimed authority to receive it. (iii) That the defendant was entitled to redeem the property. *Per* CURIAM.—A tender must be made either to the principal, whose business it is to consider it, or to his authorised agent, and a tender made to a person, who disclaims authority to receive it is made at the maker's risk. *Watson* v. *Hetherington, I. C. & K. 36 ;* and *Bingham* v. *Allport, 1 N. & M. 398*, followed. BAI RUTTONBAI *v.* FRASER ICE FACTORY (1907) . . . **I. L. R. 32 Bom. 521**

10. ——— **ss. 82 and 100**—*Mortgage—Co-mortgagors—Sale of property of one or more out of several co-mortgagors—Proceeds of such sale not sufficient to satisfy the decree—Contribution. Held* by STANLEY, *C.J.*, and BURKIT, *J.* (BANERJI, *J., dissentiente*) that one of two or more mortgagors (including the transferees of the equity of redemption from any of them) whose portion of the mortgaged property has been sold in execution of a decree for sale on the mortgage and has fetched at auction a larger sum than was rateably attributable to it, but has not discharged the whole of the mortgage-debt, has no right against his co-mortgagors to compel them to contribute and indemnify him to the extent by which the proceeds of the sale of his portion of the mortgaged property was in excess of the amount rateably due from it. He therefore does not acquire a charge in respect of such excess against his co-mortgagor's portions of the mortgaged property. *Ibn Husain* v. *Ramdai, I. L. R. 12 All. 110 ; Pancham Singh* v. *Ali Ahmad, I. L. R. 4 All. 58 ; Ex parte Gifford, 6 Ves. 805 ; 6 R. R. 53 ; Davis* v. *Humphreys, 6 M. & W. 153 ; 55 R. R. 547 ; Kinu Ram Das* v. *Mozaffer Hosain Shaha, I. L. R. 14 Calc. 809 ; Rajah of Vizianagram* v. *Rajah Setrucherla Somasekharaz, I. L. R. 26 Mad. 686 ; Dakhina Mohon Roy* v. *Saroda Mohan Roy, I. L. R. 21 Calc. 142 ; Sesha Ayyar* v. *Krishna Ayyangar, I. L. R. 24 Mad. 96 ; Pattabhiramay Naidu*, v. *Ramayya Naidu, I. L. R. 20 Mad. 23 ; Seth Chittor Mal* v. *Shib Lal, I. L. R.*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 82—*contd.*

14 All. 273 ; Platt v. *Mendel, L. R. 27 Ch. D. 246 ; Kissory Mohan Roy* v. *Kally Churn Ghose, I. L. R. 22 Calc. 100,* and *Tombs* v. *Roch, 2 Collyer 490,* referred to. *Per* BANERJI, *J.*—As regards the application of the doctrine of contribution there is no distinction between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. *Rodgers* v. *Maw, 15 M. & W. 444 ; Bhagirath* v. *Naubat Singh, I. L. R. 2 All. 115 ; Ibn Hosain* v. *Ram Dai, I. L. R. 12 All. 110 ; Baldeo Sahai* v. *Baij Nath, I. L. R. 13 All. 371 ; Hari Raj Singh* v. *Ahmud-ud-din Khan, I. L. R. 19 All. 545 ; Ramabhadrachar* v. *Srinivasa Ayyanger, I. L. R. 24 Mad. 85 ;* and *Rajah of Vizianagram v. Rajah Setrucherla Somasekharaz, I. L. R. 26 Mad. 686,* referred to. It is not essential to be accrual of the right of contribution that the whole of the debt in respect of the payment of which contribution is claimed should have been satisfied. A right to contribution arises when the payment made by the claimant for contribution or the amount realized by the sale of his property exceeds the amount for which that property was rateably liable and the property of the person from whom contribution is sought has to that extent benefited by being relieved of liability. *Dering* v. *The Earl of Winchelsea, 2 W. & T. (7th ed.), p. 535 ; Davies* v. *Humphreys, 6 M. & W. 153 ; Craythorne* v. *Swinburne, 14 Ves. 160 ; Bhagirath* v. *Naubat Singh, I. L. R. 2 All. 115 ; Ibn Husain v. Ram Dai, I. L. R. 12 All. 110 ; Hari Raj Singh* v. *Ahmad-ud-din Khan, I. L. R. 19 All. 545 ; Rajah of Vizianagram* v. *Rajah Setrucherla Somasekharaz, I. L. R. 26 Mad. 686 ; Lalji Mal* v. *Nand Kishore, I. L. R. 19 All. 332 ;* and *Cottingham* v. *The Earl of Shrewsbury, 3 Hare 627,* referred to. A person who is entitled to contribution, also acquires, in the case of a mortgage, a charge upon the property of his co-mortgagors. *Bhagirath* v. *Naubat Singh, I. L. R. 2 All. 115 ; Pancham Singh* v. *Ali Ahmad, I. L. R. 4 All. 58 ; Ibn Hosain* v. *Ram Dai, I. L. R. 12 All. 110 ; Baldeo Sahai* v. *Baij Nath, I. L. R. 13 All. 371 ; Hari Raj Singh* v. *Ahmad-ud-din Khan, I. L. R. 19 All. 545 ; Shanto Chandar Mukerji* v. *Nain Sukh, I. L. R. 23 All. 355 ; Dannappa* v. *Yamnappa, I. L. R. 26 Bom. 379 ;* and *Dakhina Mohan Roy* v. *Saroda Mohan Roy, I. L. R. 21 Calc. 142,* referred to. *Seth Chitor Mal* v. *Shib Lal, I. L. R. 14 All. 273 ; Kinu Ram Das* v. *Muzaffar Hosain Shaha, I. L. R. 14 Calc. 809 ;* and *Shivrao Narain* v. *Pundlik Bhaire, I. L. R. 26 Bom. 437,* distinguished. IBN HASAN *v.* BRIJBHUKAN SARAN (1904) . . . **I. L. R. 26 All. 407**

11. ——— *Mortgage—Effect of satisfaction of entire mortgage-debt by one co-mortgagor—Charge—Subrogation. Held,* (i) that a mortgagor who discharges the whole mortgage-debt obtains thereby a charge on his co-mortgagor's share of the mortgaged property in respect of the amount paid by him in excess of the share of the mortgage-debt for which he is proportionately liable ; and (ii) that suh charge takes-priority over a subsequent mortgage on the same property created by one of the other co-mortgagors. *Bhagwan Das* v. *Har Dei, I. L. R. 26 All. 227 ;* and *Pancham Singh* v. *Ali Ahmad, I. L. R. 4 All. 58,* referred to. HAR PRASAD *v.* RAHUNANDAN PRASAD (1908) . . **I. L. R. 31 All. 166**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 8—*concld.*

——— s. 83.

See MORTGAGE.
8 C. W. N. 153 ; 216 ; 332.

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION **I. L. R. 26 Bom. 312**

MISCELLANEOUS CASES.
I. L. R. 27 Bom. 23

See RIGHT OF SUIT—REVENUE, SALE FOR ARREARS OF . **I. L. R. 13 All. 195**

See SPECIFIC PERFORMANCE — SPECIAL CASES . . **I. L. R. 13 Mad. 316**

1. ——— *Deposit in Court by mortgagor.* The deposit intended by the Transfer of Property Act, s. 83, must be made unconditionally. Accordingly when the mortgagor in making the deposit prays that the amount should be paid out to the mortgagee on his producing certain deeds, the provisions of the section are not complied with. NANU *v.* MANCHU
I. L. R. 14 Mad. 49

2. ——— *Deposit in Court by mortgagor—Full and unconditional tender.* The fact that a certain sum of money tendered under s. 83 of the Transfer of Property Act, and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount, and that the tender is accompanied by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds does not render the tender conditional and therefore invalid. *Nanu* v. *Manchu, I. L. R. 14 Mad. 49,* distinguished. KORA NAYAR *v.* RAMAPPA
I. L. R. 17 Mad. 267

3. ——— and s. 84—*Deposit in Court to the account of the mortgagee of amount remaining due on mortgage—Deposit to credit of persons not entitled in addition to persons entitled.* A mortgagor before bringing a suit for redemption deposited the mortgage-money in Court to the credit of persons who were not entitled to it in addition to that of persons who were entitled to it. *Held,* that he was not entftled to claim the benefit of ss. 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it. MADHABI AMMA *v.* KUNHI PATHUMMA . . **I. L. R. 23 Mad. 510**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 83—*contd.*

4. ——— *Mortgage—Repayment of money lent—Lender not bound to accept payment by instalments, unless he has so agreed.* Where no stipulation or covenant has been made between the contracting parties as to the repayment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time. BEHARI LAL *v.* RAM GHULAM (1902) **I. L. R. 24 All. 461**

5. ——— *Redemption of mortgage—Deposit in Court by the mortgagor of the the sum alleged by him to be due on the mortgage—Conditions of such deposit.* A mortgagor paid into Court, under the provisions of s. 83 of the Transfer of Property Act, the sum which in his estimation was sufficient to redeem his mortgage. The mortgagees refused to accept this sum in discharge of the mortgage, and the mortgagor filed a suit for redemption, without, however, withdrawing from Court the money which he had deposited, In this suit the mortgagor obtained a decree for redemption on payment of the sum deposited, *plus* a small item for costs ; and an appeal by the defendants from this decree was dismissed. The defendants then appealed to the High Court, but, pending their appeal, were allowed by the Court in which it was deposited to withdraw the money, paid in by the plaintiff under s. 83. *Held*, that the defendants had, after such withdrawal of the money deposited by the plaintiff, no right to proceed with their appeal. The money deposited by the mortgagor plaintiff continued to be held by the Court on the terms upon which it was originally deposited, and the defendants were only entitled thereto upon fulfilling the conditions laid down in s. 83 of the Transfer of Property Act, that is to say, if they stated their willingness to accept the money deposited in full discharge of their mortgage, and deposited the mortgage-deed (if in their possession or power) in Court. DAL SINGH *v.* PITAM SINGH (1902) **I. L. R. 25 All. 179**

6. ——— *Mortgage—Payment of mortgage-money into Court—Payment made to credit of mortgagee and a third person. Held,* that a payment of mortgage-money into Court purporting to be made under s. 33 of the Transfer of Property Act, 1882, but made not to the credit of the mortgagee alone, but to the credit of the mortgagee and a third person, was not such a payment as would entitle the mortgagor to the benefit of the provisions of s. 83, nor would the omission of the mortgagee to take any notice of such irregular payment be any bar to his bringing a suit for sale on his mortgage. DEBENDRA MOHAN RAI *v.* SONA KUNWAR (1904) **I. L. R. 26 All. 291**

7. ——— *Money deposited under, becomes property of mortgagee only when conditions stated in section complied with.* Money deposited in Court by the mortgagor for payment to the mortgagee under s. 83 of the Transfer of Property Act, does not become the property of the latter, until he has complied with the conditions prescribed by the sections as conditions precedent to his drawing the money out of Court. *Dal Singh* v. *Pitam Singh, I. L. R. 125 All. 179,* followed. MOTHIAR MIRA TARAGAN *v.* AHMATTI AHMED PILLAI (1905). **I. L. R. 29 Mad. 232**

——— *Deposit made in full discharge of mortgage-bond—Withdrawal of money by Receiver as agents of mortgagees—Withdrawal without following the provisions prescribed by the Act—Principal and Agent—Sonthal Pergunnahs Settlement Regulation III of 1872, s. 6, as amended by s. 24 of Regulation V of 1893, construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree.* On 27th July 1885 a simple mortgage-bond for R34,000 providing for interest at 18 per cent. per annum and on default in payment compound interest at the same rate was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by s. 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1890, interest to the amount of R23,403-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1895, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum of R44,596-0-6, a sum fixed, as amounting together with the interest already paid, to R68,000, which by s. 6 of Regulation III of 1872, as amended by s. 24 of Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of s. 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed and without the provisions of the Transfer of Property Act, for such withdrawals being followed. On 7th February 1900 the mortgagee and his partner brought a suit on the bond for R33,698-9, in which they credited the amount of R44,596-0-6 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 83** *concld.*

at 12 per cent. on the entire sum (R22,859-5) shown to be due on that date. The pleas in defence were s. 6 of the Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under s. 83 of the Transfer of Property Act as being a full discharge of the bond. The High Court, affirming the decree of the Subordinate Judge, held on the construction of the Regulations that the plaintiffs having received the principal and a sum for interest equal to the principal there was nothing more due and dismissed the suit. *Held* by the Judicial Committee, that in the absence of anything to show that he had any greater power or authority to withdraw the money than the plaintiffs themselves had the Receiver must be taken to have withdrawn it subject to the conditions prescribed by s 83 of the Transfer of Property Act, that is, in full discharge of the bond. The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if everything prescribed by the Act had been rightly done. RAM CHANDRA MARWARI *v.* KESHOBATI KUMARI (1909) **I. L. R. 36 Calc. 840**

——— **s. 84.**

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION **I. L. R. 26 Bom. 312**
8 C. W. N. 153 ; 216

MISCELLANEOUS CASES . **I. L. R. 27 Bom. 23**

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE . **I. L. R. 8 All. 502**

——— **s. 85.**

See HINDU LAW—ALIENATION—ALIENATION BY FATHER.
I. L. R. 27 Calc. 724
I. L. R. 28 Calc. 517
I. L. R. 24 All. 211

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 30 Calc. 599
11 C. W. N. 1078

PURCHASERS . . **I. L. R. 23 All. 467**

REDEMPTION—RIGHT OF REDEMPTION.
5 C. W. N. 83
I. L. R. 23 All. 25

MORTGAGED PROPERTY. **I. L. R. 24 All. 549**

See PARTIES—PARTIES TO SUITS—MORTGAGES, SUITS CONCERNING.

See PRACTICE . **I. L. R. 32 Calc. 748**

See RES JUDICATA.
I. L. R. 31 Calc. 428

See SALE IN EXECUTION OF DECREE—JOINT PROPERTY **I. L. R. 25 All. 214**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 85**—*contd.*

1. ——— ——— *Parties—Mortgage of mortgagees rights—Suit by sub-mortgagee for sale of the interest of his mortgagor. Held*, that in a suit by a sub-mortgagee to recover a debt secured by a mortgage of the defendant's rights as mortgagee the defendant's mortgagor is not a necessary party. In such a suit the plaintiff cannot bring to sale the mortgagee rights of the defendant. *Ganga Prasad* v. *Chunni Lal, I. L. R. 18 All. 113*, referred to. RAM JATAN RAI *v.* RAMHIT SINGH (1905) . . . . **I. L. R. 27 All. 511**

2. ——— *Non-joinder of necessary parties—Civil Procedure Code, 1882 s. 32.* Even if the non-joinder as a party defendant of a person who ought, in view of s. 85 of the Transfer of Property Act, 1882, to have been made a party to a suit for sale on a mortgage is by itself a defect fatal to the suit, such defect is cured, if the Court acting under s. 32 of the Code of Civil Procedure adds such person as a defendant. *Kali Charan* v. *Ahmed Shah Khan, I. L. R. 17 All. 48*, referred to. *Salig Ram* v. *Har Charan Lal, I. L. R. 12 All. 548*, considered. KUNDAN LAL *v.* FAQIR CHAND (1905) . . . **I. L. R. 27 All. 75**

3. ——— *Does not authorise Court to introduce unnecessary complications—Mortgagee not compellable to distribute liability among mortgaged properties—Contribution, right of, against properties not included in suit—Marshalling not compellable so as to prejudice mortgagee—Power of Court executing mortgage-decree.* There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. *Timmappa* v. *Lakshmamma, I. L. R. 5 Mad. 385*, referred to. He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties, who are liable, though the properties in their hands have not been included in their suit. *Jagat Narain* v. *Qutub Husain, I. L. R. 2 All. 807*, followed. *Chagandas* v. *Gansing, I. L. R. 20 Bom. 615*, followed. *Semble :* Where, however, the mortgagor sells not merely the equity of redemption but conveys a portion of the property itself free from any liability to contribute to the mortgage-debt, the purchaser may insist upon the mortgagee proceeding in the first instance, against the property in the hands of the mortgagor. Marshalling cannot be enforced so as to compel a mortgagee to proceed against a security, which may be insufficient or may involve him in litigation to realise. *Flint* v. *Howard*, [*1893*] *2 Ch. D. 54*, distinguished. *Ram Dhan Dhur* v. *Mohesh Chunder Chowdhry, I. L. R. 9 Calc. 406*, distinguished. *Obiter :* It is competent to the Court in

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 85**—*contd.*

executing a mortgage-decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust the equities of the parties before it, who are interested. KRISHNA AYYAR *v.* MUTHUKUMARASAWMIYA PILLAI (1905) . **I. L. R. 29 Mad. 217**

4. ——— *Parties to suit—Suit for foreclosure—Exemption of part of the mortgaged property—Persons interested only in the portion exempted not necessary parties.* If a plaintiff (mortgagee), suing on the basis of his mortgage for either sale or foreclosure, thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder, there is nothing in law to prevent his doing so. If such a plaintiff exempts a portion of the mortgaged property from his suit he is not obliged to make parties to the suit the persons interested in the portion of the property so exempted. *Chandika Singh* v. *Pokhar Singh, I. L. R. 2 All. 906,* distinguished. *Sheo Prasad* v. *Bihari Lal, I. L. R. 25 All. 79; Jai Gobind* v. *Jasram, All. Weekly Notes, (1898) 120,* and *Nazir Husain* v. *Nihal Chand, All. Weekly Notes, (1905) 156,* referred to. SHEO TAHAL OJHA *v.* SHEODAN RAI (1905) **I. L. R. 28 All. 174**

5. ——— *Mortgagee holding two mortgages on same property and who has sued on the first mortgage and sold the property without mentioning the second mortgage, cannot sue on his second mortgage.* A mortgagee who is made a defendant under s. 85 of Transfer of Property Act and who omits to set up a mortgage is barred from suing on such mortgage when in consequence of his omission the property is ordered to be sold free from the mortgage which had not been pleaded. *Sri Gopal* v. *Pirthi Singh, I. L. R. 24 All. 429,* referred to. A party holding two mortgages on the same property and suing on the first mortgage alone, is in respect of the second mortgage a party to the suit under s. 85 of the Transfer of Property Act; and if he omits to mention his second mortgage and the property is ordered to be sold free of such mortgage, he cannot afterwards sue to enforce his second mortgage against such property. *Sundar Singh* v. *Bholu, I. L. R. 20 All. 322,* dissented from. *Dorasamy* v. *Venkatasesha Aiyar, I. L. R. 25 Mad. 108,* followed. NATTU KRISHNAMA CHARIAR *v.* ANNANGARA CHARIAR (1907) **I. L. R. 30 Mad. 353**

6. ——— *Mortgage—Suit for sale on a mortgage—Parties.* Whether or not s. 85 of the Transfer of Property Act, 1882, refers solely to persons interested in the equity of redemption, it is not essential to join as a party defendant in a suit for sale on a mortgage a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee. *Jaggeswar Datt* v. *Bhuban Mohan Mitra, I. L. R. 33 Calc. 425,* referred to. KHAIBATI *v.* BANNI BEGAM (1908) . . . . **I. L. R. 30 All. 240**

7. ——— *Mortgagee releasing part of mortgaged property cannot enforce entire claim against the other properties—S. 85 of the Transfer of Property Act does not necessitate the dismissal of a suit, where no relief is claimed against persons not joined as parties.* "A mortgagee cannot release of post office mortgaged land and then seek to enforce his entire claim upon another portion in which third parties have become interested as assignees of the equity of redemption." A suit is not liable to be dismissed under s. 85 of the Transfer of Property Act for non-joinder of persons interested in portions of the mortgaged property, when no relief is claimed against them. The plaintiffs ought, in such cases, to be allowed to recover what is due to them not exceeding the amount rateably due on the property they proceed against. PONNUSAMI MUDALIAR *v.* SRINIVASA NAIKAN (1908) . **I. L. R. 31 Mad. 333**

8. ——— *Mortgage suit—Parties — Omission to join all the heirs of a purchaser of mortgaged property within time—Effect—Limitation—Notice—Apportionment of debt.* Where three days before the period of limitation would expire a mortgagee instituted a suit on his mortgage making the original mortgagors and one out of several heirs of a purchaser of the mortgaged properties defendants and the latter in his written statement filed after the period of limitation had expired objected that the suit was not maintainable by reason of the other heirs of the purchaser not having been made parties:—*Held,* that the suit could not be dismissed on the ground of defect of parties, unless it was found that the plaintiff was aware at the the date of the suit of the interest of these persons in the mortgaged property. *Held,* further, that the proper procedure was to add these heirs as parties, and if it appeared that at the date of the suit the plaintiff was not aware of their interest in the property, to ascertain what proportion of the debt was due by the heir, who had been made a party in time and to pass a decree against his share for the amount. *Hari Kissen* v. *Veliat Hossein, 7 C. W. N. 723;* s. c. *I. L. R. 30 Calc. 755;* and *Ghulam Kadir* v. *Mustakin Khan, I. L. R. 18 All. 190,* referred to. BASIRUDDIN BISWAS *v.* DEBENDRA NATH BISWAS (1908) . . . **12 C. W. N. 911**

9. ——— *Mortgage—Suit for sale on a mortgage—Parties.* In a suit for sale on a mortgage the ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. *Jageswsar Dutt* v. *Bhuban Mohan Mitra, I. L. R. 33 Calc. 425, Mon Mohini Ghose* v. *Parvati Nath*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 85—*concld.*

Ghosh, I. L. R. 32 Calc. 746, and *Kairati Lal* v. *Banni Begum, All. Weekly Notes, (1908) 100*, referred to. JOTI PRASAD *v.* AZIZ KHAN (1908).
I. L. R. 31 All. 11

10. ——— ss. 85, 86—*Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings.* There is nothing in the provisions of the Transfer of Property Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted by all the parties and order the sale to be subject to them and s. 96 of the Act does not militate against this view. *Quære:* Whether s. 85 of the Act requires such persons, whose rights are admitted, to be made parties. Where the decree omits to reserve such rights, it ought to be construed with reference to the admissions contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties. SRINIVASA RAO SAHEB *v.* YAMUNABHAI AMMALL (1905) . . . . **I. L. R. 29 Mad. 84**

——— s. 86.

See ante, s. 2.
I. L. R. 12 Calc. 436 ; 505 ; 583
I. L. R. 11 Calc. 582
I. L. R. 6 All. 262
I. L. R. 14 Calc. 599

See DECREE—CONSTRUCTION OF DECREES—MORTGAGE . **I. L. R. 20 Calc. 279**

See INTEREST—OMISSION TO STIPULATE FOR, OR STIPULATED TIME HAS EXPIRED.

See LIMITATION ACT, 1877, SCH. II, ART. 135 . . . **I. L. R. 12 Calc. 614**

See LIMITATION ACT, 1877, SCH. II, ARTS. 178 AND 179.
I. L. R. 24 All. 542

See PENALTY . **I. L. R. 31 Calc. 138**

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.
I. L. R. 13 Calc. 346

1. ——— *Power of Court to make preliminary decree absolute when appeal is pending.* Pendancy of an appeal against a preliminary decree made under s. 86 of the Transfer of Property Act does not prevent the Court which passed the decree from making it absolute. MADAN MOHUN MITTER *v.* RAM HURI SAHU
1 C. W. N. 197

2. ——— *Mortgage—Foreclosure—Prior and puisne incumbrancer—Transfer of Property Act (IV of 1882), ss. 74, 83, 86—Decree obtained by prior mortgagee against mortgagor—Payment by puisne mortgagee—Puisne mortgagee, rights acquired by—If enforcible in execution—Civil Procedure Code (Act XIV of 1882), s. 244—Separate suit when lies—Form of foreclosure decree—Proper form.* A decree obtained by a prior mortgagee directed foreclosure in the event of the decretal amount not being paid into Court by the mortgagor within a specified time. The amount was paid by a puisne mortgagee, who was a party in the suit and was taken out by the decree-holder: *Held*, that under s. 74 of the Transfer of Property Act the puisne mortgagee acquired all the rights and powers of the prior mortgagee as such, but the rights so acquired were not such as could be worked out in execution of the decree made in favour of the prior mortgagee, that decree having been discharged by the payment. A separate suit to enforce those rights was not therefore barred by s. 244 of the Civil Procedure Code. The existence of a decree cannot, by the operation of s. 244 of the Civil Procedure Code, bar a fresh suit between the parties in respect of rights, which cannot be worked out without additions to the decree which the Court of execution has no power to make. The form of order given in s. 86 of the Transfer of Property Act contemplates a suit between one mortgagee and the mortgagors only and should be treated as a common form not to be literally followed in every suit for foreclosure but to be adapted to the particular circumstances of each case. For the purpose of making decree in which the rights of puisne incumbrancers to redeem would be recognised and provision made for the event of their being exercised, a form similar to that which obtains in the Chancery Division of the High Court in England might be found appropriate. GOPI NARAIN KHANNA *v* BABU BANSIDHAR (1905) . . . . **9 C. W. N. 577**
s.c. L. R. 32 I. A. 123

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 86—*contd.*

3. ——— ss. 86, 87—*Order absolute for foreclosure without notice to defendant in foreclosure suit—Application to set order aside.* A plaintiff in a foreclosure suit obtained a decree for foreclosure under s. 86 of the Transfer of Property Act, and, the time limited for redemption by the defendant having expired without being extended, the plaintiff obtained, under s. 87, but without notice to the defendant, an order absolute debarring the defendant from redeeming, and also for delivery of possession of the mortgaged property. On the contention being raised, on appeal, that the order was null and void for want of notice to the defendant:—*Held*, that the view of the majority of the Court in *Mallikarjunadu Setti* v. *Lingamurty Pantulu, I. L. R. 25 Mad. 244*, which related to proceedings under s. 89, was applicable to proceedings under s. 87 and that such proceedings are proceedings in execution of the decree passed under s. 86. In the present case, the application had been made within one year of the date of the decree, and, in consequence, under s. 248 of the Code of Civil Procedure, no notice was necessary to the defendant. *Narayana Reddi* v. *Papayya, I. L. R. 22 Mad. 133*, proceeds upon the view that the defendant could

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 86—*contd.*

apply for an execution of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of s. 87—a view which has been dissented from, by the Full Bench in *Vedapuratti* v. *Vallabha Valiya Rajah, I. L. R. 25 Mad. 300.* PANDU PRABHU *v.* JUJE LOBO (1903) **I. L. R. 27 Mad. 40**

4. ——— *Mortgage—Suit for foreclosure—Appeal—Application for order absolute for foreclosure—Limitation—Execution of decree—Limitation Act (XV of 1877), Sch. II, Art. 178.* The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages. On the 19th of June 1899 he obtained a decree, but it was in respect of three villages only. As to these the decree provided for foreclosure in default of payment by the defendants of a sum of R39,584-6-8 on or before the 19th of December 1899. The plaintiff did not ask for an order absolute for foreclosure in respect of this decree, but appealed against the dismissal of his suit as regards the two remaining villages. This appeal was dismissed on the 4th of August 1902. No part of the mortgage-money was paid ; and on the 15th of September 1903, the decree-holder appealed under s. 87 of the Transfer of Property Act, 1882, for an order absolute for foreclosure. *Held*, that the decree-holder's application was not barred by limitation. The nature of proceedings for foreclosure is such that a mortgage must be forclosed as a whole or not at all. The decree-holder in this case could not have applied for an order absolute for foreclosure on the decree of the 19th of June 1899, without giving up his appeal from that decree. *Raham Ilahi Khan* v. *Ghasita, I. L. R. 20 All. 375*, and *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar, I. L. R. 16 Calc. 246*, referred to. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278*, discussed and doubted. *Mul Chand* v. *Mukta Pal, All. Weekly Notes, (1896) 100*, and *Mahabir Prasad* v. *Sital Singh, I. L. R. 19 All. 520*, referred to. SHAM SUNDAR *v.* MUHAMMAD IKTISHAM ALI (1905) **I. L. R. 27 All. 501**

5. ——— *Foreclosure suit—Costs if may be recovered from mortgagor personally.* A mortgagee who has obtained an order absolute for foreclosure may proceed against the mortgagor personally for the costs of the suit. *Ratnessur Sein* v. *Jusoda, I. L. R. 14 Calc. 185*, followed. *Raj Kumar Singh* v. *Sheo Narain Sahu, 12 C. W. N. 364 :* s. c. *I. L. R. 35 Calc. 431*, distinguished. SHAFFAR KHAN *v.* SATYANUNDA DAS GUPTA (1908) **13 C. W. N. 742**

——— ss. 86 and 88.

See DECREE . **I. L. R. 34 Calc. 157**
I. L. R. 35 Calc. 221

See INTEREST . **I. L. R. 29 All. 322**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 86—*concld.*

——— *Construction of decree—Decree for sale on a mortgage—Interest after date fixed by decree for payment of the mortgage-money—Power of Court to allow interest.* In a decree under s. 88 of the Transfer of Property Act (IV of 1822) for sale of mortgaged property, the Court has power to allow interest beyond the date fixed by the decree for payment of the mortgage-money. Interest may be awarded up to the realization of the money. *Maharaja of Bharatpur* v. *Rani Kanno Dei, L. R. 28 I. A. 35 ; I. L. R. 23 All. 18*, followed. BALWANT SINGH *v.* AMOLAK RAM (1905) . . **I. L. R. 28 All. 223**

——— ss. 86, 88, 89.

See MORTGAGE . **I. L. R. 31 Calc. 863**

——— *Sale of mortgaged property—Execution of decree—Right to redeem—Order absolute for sale—Stoppage of sale by payment of mortgage-debt—Civil Procedure Code (Act XIV of 1882), s. 291—High Court Circular Order No. 13 of 27th April, 1892.* The concluding words of s. 89 of the Transfer of Property Act, *viz.*, "thereupon the defendant's right to redeem and the security shall both be extinguished," relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale. A mortgagor judgment-debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage-decree by payment of the debt before the sale actually takes place, although an order absolute for sale may have already been passed. *Mallikarjunadu Setti* v. *Lingamurti Pantulu, I.L.R. 25 Mad. 244 ; Krishnaji* v. *Mahadev Vinayak, I. L. R. 25 Bom. 104 ; Raja Ram Singhji* v. *Chuni Lal, I. L. R. 19 All. 205*, and *Shyam Kishan* v. *Sundar Koer, I. L. R. 31 Calc. 373*, followed. *Jogendra Nath Mukerjee* v. *Methana Abraham, 6 C. W. N. 769*, and *Popple* v. *Sylvester, L. R. 22 Ch. D. 98*, referred to. BIBIJAN BIBI *v.* SACHI BEWAH (1904) **I. L. R. 31 Calc. 863**

——— s. 87.

See APPEAL—DECREES.
I. L. R. 12 All. 61
I. L. R. 14 All. 520

See DECREE—CONSTRUCTION OF DECREES—MORTGAGE **I. L. R. 20 Calc. 279**
I. L. R. 25 Calc. 311

See LIMITATION ACT, 1877, SCH. II, ART. 147 . . . . **I. L. R. 16 Mad. 64**

See LIMITATION ACT, 1877, SCH. II, ARTS. 178 AND 179.
I. L. R. 25 All. 542

See LIMITATION ACT, 1877—ART. 179—PERIOD FROM WHICH LIMITATION RUNS—DECREES FOR SALE.
I. L. R. 20 All. 357

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION . **I. L. R. 25 All. 231**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 87—*concld.*

FORECLOSURE—RIGHT OF FORECLOSURE. **6 C. W. N. 654**

DEMAND AND NOTICE OF FORECLOSURE . **I. L. R. 29 Calc. 644**

REDEMPTION—RIGHT OF REDEMPTION . **I. L. R. 16 Calc. 246**
I. L. R. 20 All. 358 ; 446
I. L. R. 19 Mad. 40
I. L. R. 19 All. 180
I. L. R. 22 Mad. 133
I. L. R. 27 Calc. 705

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY. **I. L. R. 13 Calc. 346**

——— ss. 87, 89—*Foreclosure—Sale—Notice to mortgagee—Order absolute for sale.* Where an order absolute has been made under s. 87 or s. 89 of the Transfer of Property Act without notice to the mortgagor, the Court has an inherent power to deal with an application to set aside the order made *ex parte* and can set it aside upon a proper case being substantiated. *Tarapada Ghose* v. *Kamini Dassi, I. L. R. 29 Calc. 644,* dissented from. TASLIMAN *v.* HARIHAR MAHTO (1905). **I. L. R. 32 Calc. 253**
s.c. 9 C. W. N. 81

——— s. 88.

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE. **I. L. R. 16 All. 259**

See DECREE—CONSTRUCTION OF DECREE—GENERAL CASES **I. L. R. 20 All. 397**

See DECREE—CONSTRUCTION OF DECREE—MORTGAGE . **I. L. R. 20 Mad. 78**
I. L. R. 25 Calc. 311
5 C. W. N. 137

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT . **I. L. R. 25 All. 541**

See HINDU LAW—ALIENATION—ALIENATION BY FATHER **I. L. R. 15 All. 75**

See INTEREST—MISCELLANEOUS CASES—MORTGAGE . **6 C. W. N. 769**

See INTEREST—OMISSION TO STIPULALE FOR, OR STIPULATED TIME HAS EXPIRED—CONTRACTS.

See LIMITATION ACT, 1877, SCH. II, ART. 179—STEP IN AID OF EXECUTION—SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER. **I. L. R. 24 Mad. 695**

See LIS PENDENS . **I. L. R. 23 All. 331**

See MORTGAGE—SALE OF MORTGAGED PROPERTY — RIGHT OF MORTGAGEES. **I. L. R. 18 All. 31**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 88—*contd.*

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES. **I. L. R. 22 Mad. 286**

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE — IRREGULARITY . **I. L. R. 23 Calc. 682**

1. ——— *Mortgage—Sale of mortgaged property in execution of a simple money-decree—Subsequent sale of same property in execution of a decree on the mortgage—Rights of the two auction-purchasers inter se.* Certain property subject to a mortgage was sold by auction in execution of a simple money decree, and the purchasers were put into possession. Subsequently the mortgagee brought a suit for sale on his mortgage and the property was again sold, and was purchased by a third party. To these proceedings the previous auction-purchasers were not made parties. *Held,* on a suit by the purchaser at the sale held in virtue of the mortgage-decree asking for payment of the amount due under the mortgage or in default for possession of the mortgaged property, that the defendants must be allowed to redeem upon payment of what was found due upon the mortgage at the time the mortgage-decree was passed ; but if they did not pay within the time fixed by the decree, then the plaintiff was entitled to a decree for foreclosure of the defendants' rights and possession of the property. *Goverdhana Doss* v. *Veerasami Chetti, I. L. R. 26 Mad. 537,* referred to. *Hargu Lal Singh* v. *Gobind Rai, I. L. B. 19 All. 541,* and *Madan Lal* v. *Bhagwan Das, I. L. R. 21 All. 235,* referred to. RAM PRASAD *v.* BHIKARI DAS (1904) . **I. L. R. 26 All. 464**

2. ——— *Execution of decree—Civil Procedure Code, s. 231—Certificate of satisfaction of decree filed by one of two joint decree-holders—Application by the other for an order absolute for sale.* One of two joint holders of a decree under s. 88 of the Transfer of Property Act cannot alone certify satisfaction of the whole decree so as to bind the other decree-holder though he may certify satisfaction in respect of his own interest therein. Hence, where one of such decree-holders purported to certify satisfaction of the whole decree, it was *held* that the other decree-holder, who had refused to recognise the certificate, was entitled to obtain an order absolute for sale of the mortgaged property in respect of one-half of the mortgage-debt. *Bibi Budhun* v. *Hafeah, 4 C. L. R. 70,* followed. TAMMAN SINGH *v.* LACHHMIN KUNWARI (1904) . **I. L. R. 26 All. 315**

3. ——— *Decree for sale—Mortgagor can pay decretal amount at any time after decree and before sale completed—Right to make such payment not lost at the expiry of the period limited—S. 244 of the Civil Procedure Code—Court executing may put mortgagor so paying in possession under s 244 of the Civil Procedure Code—Interest, rate of, to be allowed to mortgagee*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd*

——— s. 88—*contd.*

A decree for sale under s. 88 of the Transfer of Property Act in a final decree; and all subsequent proceedings are proceedings in execution of that decree and the provisions of the Code of Civil Procedure apply to them so far as they are applicable. In the absence of anything to the contrary in the decree the judgment-debtor is entitled to stop execution by payment of the debt at any time after the decree is passed, and before the sale in execution is complete; and it is not finally complete, until he has had an opportunity of obtaining its rescission under s. 310 (A) of the Code. *Mallikarjunadu Setti* v. *Lingamurti Pantulu, I. L. R. 25 Mad. 244*, followed. *Bibijan Bibi* v. *Sachi Bewah, I. L. R. 31 Calc. 863*, followed. The provision in a decree for sale at the suit of a mortgagee for delivery of possession in the event of payment within time need not, to that extent, be necessarily considered as a decree or order in favour of the mortgagor with all the incidents of a decree for redemption in a suit brought by the mortgagor himself. The provision may well be regarded as laying down the conditions on which the mortgagee is to receive payment. Even if regarded as a decree in favour of the defendant mortgagor, a decree forced on him by the mortgagee. It is not easy to see why the mortgagee by forcing this decree on the mortgagor should be enabled to convert his decree for sale into one for foreclosure. The mortgagor as decree-holder may waive the benefit of the decree thus forced on him; his right as judgment-debtor to pay the debt into the execution Court and have satisfaction entered up will remain unaffected. *Vallabha Valia Rajah* v. *Vedupuratti, I. L. R. 19 Mad. 40*, considered. The rule of law laid down that a mortgagor, who has obtained a decree for redemption, cannot apply for execution of the decree after expiry of the time limited, must be confined to a decree for redemption passed at the suit of the mortgagor. The right of the mortgagor to possession on payment of the decretal amount raises a question relating to the satisfaction of the decree within the meaning of s. 244 of the Code, and must be determined by the Court executing the decree. He is not bound to bring a separate suit for possession. The deed of usufructuary mortgage on which the suit was brought provided for redemption in the month of May. The decree contained no restrictions as to the date of payment and the mortgagor paid the money into Court in November and ousted the mortgagee. In determining the amount to which the mortgagee was entitled as interest:—*Held*, that the original contract to take the usufruct in lieu of interest was determined when the mortgagee sued for and obtained a decree for sale and that the mortgagee was not entitled to the melwaram for the whole year, but might, in the agreement of the parties, be given a proportionate share for the six months after May. The parties not agreeing, the Court on further consideration awarded interest at the Court rate of 6 per cent. after the period fixed for redemption.
ADIPURANAM PILLAI *v.* GOPALASAMI MUDALI (1907)
I. L. R. 31 Mad. 354

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 88—*concld.*

4. ——— *Transfer of Property Act (IV of 1882), ss. 52, 88, 89—Lis pendens, applicability of, to mortgage suit heard ex parte—"Contentious suit"—Mortgage decree nisi, mortgagor selling the mortgaged property after, but before decree absolute—Duty of the purchaser to apply to be made party—Subsequent purchaser in execution of the mortgage-decree—Priority.* Where after the passing of an *ex parte* preliminary mortgage decree under s. 88 of the Transfer of Property Act but before that decree was made absolute under s. 89 the mortgagor sold his interest in the property:—*Held*, that after the passing of the decree under s. 88, all that the mortgagor could convey was his equity of redemption as bound by that decree and therefore all that the purchasers got by the sale was that equity of redemption which could not entitle them to prevent the sale of the mortgaged property in execution of the mortgage-decree without redeeming the mortgage. That it was not incumbent upon the mortgagee decree-holder to make the purchasers parties to the proceedings even if the decree-holder was aware of the sale. But it was the duty of the purchasers to apply to be made parties to the proceedings and, in those proceedings, to claim under their purchase the right to redeem the mortgage. That not having done so their purchase did not confer on them any right in the mortgaged properties as against the mortgagee decree-holder who subsequently purchased the properties in execution of the mortgage-decree. *Semble:* The doctrine of *lis pendens* applies to *ex parte* decrees and in mortgage suits. BROJO KISHOREE BASHNAVI *v.* MEAJAN BISWAS (1909)
13 C. W. N. 1138

——— ss. 88 and 89.

See CIVIL PROCEDURE CODE, 1882, s. 244—QUESTIONS IN EXECUTION OF DECREE.
I. L. R. 18 Calc. 139
I. L. R. 25 Calc. 133

See CIVIL PROCEDURE CODE, 1882, s. 257A
I. L. R. 19 All. 186

See EXECUTION OF DECREE—PROCEEDINGS IN EXECUTION.
I. L. R. 13 All. 278

See LIMITATION ACT, 1877, SCH. II, ART. 179—PERIOD FROM WHICH LIMITATION RUNS—DECREES FOR SALE.
I. L. R. 19 All. 520
I. L. R. 20 All. 302; 357

See SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY.
I. L. R. 18 All. 31
I. L. R. 19 All. 205
I. L. R. 20 All. 354

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— ss. 88 and 89—*contd.*

1. ——— *Application for order for decree absolute—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 244, 540—Sale of mortgaged property in execution of mortgaged decree—Proceeding in execution.* An appeal lies from an order passed upon an application made under s. 89 of the Transfer of Property Act. *Per* SIR ARNOLD WHITE, *C.J.*, and MOORE, *J.*—Such an order is not an order made in a proceeding in execution, and is not appealable as such. It, however, has the effect of a final decree, and an appeal lies therefrom under s. 540 of the Code of Civil Procedure. *Per* DAVIES, BENSON and BHASHYAM AYYANGAR, *JJ.*—An application made under s. 89 of the Transfer of Property Act is, in effect, an application for execution of the decree passed under s. 88, and an order made thereon is appealable under s. 244 of the Code of Civil Procedure. *Ajudhia Pershad* v. *Baldeo Singh, I. L. R. 21 Calc. 818*, and *Tara Prosad Roy* v. *Bhobodeb Roy, I. L. R. 22 Calc. 931*, discussed. MALLIKARJUNADU SETTI *v.* LINGAMURTI PANTULU (1902) **I. L. R. 25 Mad. 244**

2. ——— *Mortgage—Decree for sale on a mortgage—Prior and subsequent mortgagees—Rights of purchasers of the mortgaged property, who have paid off prior incumbrances.* Where a subsequent mortgagee is seeking to bring to sale the property mortgaged to him, and there are parties, defendants to the suit, who have purchased the property and paid off prior mortgages, the plaintiff is not entitled to an order absolute for sale, unless he pays, not merely the amount which such defendants paid in respect of the prior mortgages, but the full amount due on such mortgages. But where such defendants had obtained possession of the mortgaged property, it was *held* that, having the usufruct, they were not entitled to interest after the date of such possession. *Dip Narain Singh* v. *Hira Singh, I. L. R. 19 All. 527*, and *Delhi and London Bank Ld.* v. *Bhikari Das, I. L. R. 24 All. 185*, followed. SRI RAM *v.* KESRI MAL (1904) . . . **I. L. R. 26 All. 185**

3. ——— *Civil Procedure Code, s. 235—Execution of decree—Limitation Act (XV of 1877), Sch. II, Arts. 178 and 179. Held,* that an application, framed as an application under s. 235 of the Code of Civil Procedure, for execution of a decree under s. 88 of the Transfer of Property Act, being in substance, though not in form, an application for an order absoulte under s. 89 of the Act, is an application for execution made in accordance with law, and as such will give a fresh starting point for limitation. *Oudh Behari Lal v. Nageshar Lal, I. L. R., 13 All. 278 ; Chunni Lal* v. *Harnam Dass, I. L. R. 20 All. 302 ; Ahmad Ali* v. *Naziran, I. L. R. 24 All., 542*, and *Udit Narain* v. *Jagannath, 1 All. L. J. 15*, referred to. BALDEO PRASAD *v.* IBN HAIDAR (1905) **I. L. R. 27 All. 625**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— ss. 88 and 89—*concld.*

4. ——— *Execution of decree—Decree for sale on a mortgage—Civil Procedure Code, s. 248—Decree made absolute without notice being served under s. 248—Validity of decree.* So long as an order under s. 89 making absolute a decree for sale under s. 88 of the Transfer of Property Act, 1882, subists, it is enforceable, and its operation cannot be impugned. If for any reason the order under s. 89 is defective, the remedy of the judgment-debtor is to get it set aside in accordance with law, but, until it is set aside, the decree, which it makes absolute, is capable of enforcement, and its validity cannot be questioned in execution proceedings. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278, Imam-un-nissa Bibi* v. *Liakat Husain, I. L. R. 3 All. 424*, and *Sahdeo Pandey* v. *Ghasiram Gyawal, I. L. R. 21 Calc. 19*, distinguished. *Quære :* Whether non-compliance with the provisions of s. 248 of the Code of Civil Procedure is anything more than a mere irregularity ? *Tasadduk Rasul Khan* v. *Ahmad Husain, I. L. R. 21 Calc., 66*, referred to. RAM JAS *v.* SHEO PRASAD (1905) **I. L. R. 28 All. 193**

5. ——— *Civil Procedure Code (Act XIV of 1882), s. 258—Execution of decree—Alleged payment out of Court not certified.* Applications for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882), are applications for the execution of the decree under s. 88 of the Act. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278*, and *Mallikarjunadu Setti* v. *Lingamurti Pantulu, I. L. R., 25 Mad., 244*, referred to. To such applications s. 258 of the Code of Civil Procedure is applicable and bars the recognition of payments made out of Court in pursuance of the decree, unless such payments are certified to the Court in the manner prescribed by the section. *Vaidinadasamy Ayyar* v. *Samasundram Pillai, I. L. R. 28 Mad. 473*, followed. *Mullikarjuna Sastri* v. *Narasimha Rao, I. L. R. 24 Mad. 412*, and *Hatem Ali Khundkar* v. *Abdul Ghaffur Khan, 8 C. W. N. 102*, dissented from. HAKIM SINGH *v.* RAM SINGH (1908) . **I. L. R. 30 All. 248**

——— ss. 88, 89, 90.

See EXECUTION OF DECREE—MODE OF EXECUTION—MORTGAGE.

1. ——— *Decree for sale—Sale partly in India and partly in England—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 178.* A mortgagee obtained a decree under s. 88 of the Transfer of Property Act for sale of all the property included in the mortgage and in pursuance of the decree some of the mortgaged property was sold in India, and, at the request of the mortgagor, to enable a better price to be obtained, some of it was subsequently sold in England. The mortgagee then applied for a decree under s. 90. *Held,* that the sale which took place in England must be treated as a sale

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— ss. 88, 89, 90—*concld.*

had in connection with the decree passed in this country, and that the defendants appellants could not be heard to say that the property ordered to be sold was not exhausted by proceedings under s. 89 and that a decree could be passed under s. 90. *Muhammad Akbar* v. *Munshi Ram, All. Weekly Notes (1899) 208* and *Badri Das* v. *Inayat Khan, I. L. R. 22 All. 404*, referred to. *Held*, further, that limitation must be held to run from the date of the sale in England. GAJADHAR LAL *v.* ALLIANCE BANK OF SIMLA **I. L. R. 28 All. 660**

2. ——— *Personal liability of mortgagor, if adjudicated in suit, not to be treated as a nullity.* S. 90 of the Transfer of Property Act read with ss. 88 and 89, show that the proper procedure to follow in mortgage suits is to postpone the consideration of personal liability for the amount decreed until the need for it arises when the sale-proceeds of the mortgaged property prove insufficient to pay the decree amount. It does not necessarily follow however that where, with the consent of the parties, the Court had decided the question in the course of the suit, such decision is to be considered a nullity. The reopening of the question under s. 90 will be barred by *res judicata*. ABBAKKI *v.* KRISHNAYA (1909) **I. L. R. 32 Mad. 534**

1. ——— ss. 88, 90—*Execution—Mortgage decree—Recovery of balance due on mortgage—Civil Procedure Code (Act XIV of 1882), s. 230—Decree for payment of money—Limitation—Continuation of previous application for execution.* A combined decree under ss. 88 and 90 of the Transfer of Property Act is contrary to the procedure prescribed by that Act. When such a decree is passed and the decree-holder proceeds to execute it for the realization of the balance, after the mortgaged property has been sold, the provisions of s. 230 of the Civil Procedure Code shall apply, and an application for execution after the expiry of twelve years from the commencement of proceedings against the person and other property of the judgment-debtor will be barred. *Kartic Nath Pandey* v. *Juggernath Ram Marwary, I. L. R. 27 Calc. 285*, explained. *Fazil Howladar* v. *Krishna Bundhoo Roy, I. L. R. 25 Calc. 580*, referred to. *Jadunath Prasad* v. *Jagmohan Das, I. L. R. 25 All. 541*, dissented from. CHANDI CHARAN ROY CHOWDHRY *v.* AMBICA CHURAN DUTTA (1904) **I. L. R. 31 Calc. 792**

2. ——— *Execution of decree—Decree to be executed a combination of a decree for sale and a personal decree.* Where a decree in a suit for sale of hypothecated property is both a decree for sale of the property under s. 88 and a personal decree under s. 90 of the Transfer of Property Act, 1882, there is no need for the decree-holder to apply for a separate decree under s. 90, and if he does so and his application is rejected, this will not operate as a bar to his executing

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— ss. 88, 90—*concld.*

the decree against the judgment-debtor personally. SADHO SINGH *v.* THE MAHARAJA OF BENARES (1906) . . . . **I. L. R. 29 All. 12**

3. ——— *Mortgage decree under s. 88 cannot impose personal liability for costs—Such liability should be enforced under s. 90.* It will be contrary to the scheme of the Transfer of Property Act and to the practice of the English Courts of Equity to make the mortgagor personally liable for costs in any case before the sale-proceeds have proved insufficient to satisfy the mortgage claim. *Sharples* v. *Adams, 32 Beav. 213*, referred to. *Liverpool Marine Credit Co.* v. *Wilson, L. R. 7 Ch. 507*, referred to. A decree under s. 88 of the Transfer of Property Act must not order the defendants personally to pay the costs. It may contain a declaration of the personal liability of defendant for principal or costs, but such a declaration is not part of the usual form of decree under the Transfer of Property Act and is enforceable only under s. 90. The words "the amount due on the mortgage for the time being" in s. 90 must be taken to include costs. *Maqbul Fatima* v. *Lalta Prasad, I. L. R., 20 All. 523*, referred to. KAMALAMMA *v.* KOMANDUR NARASIMHA CHARLU (1907) . . . **I. L. R. 30 Mad. 464**

——— ss. 88 and 99—*Decree-holder holding a decree for sale on a mortgage and also a simple money-decree against the same judgment-debtor—Sale in execution of combined decrees not unlawful.* Where a decree-holder holds both a decree for sale on a mortgage as well as a simple money-decree against the same judgment-debtor it is not unlawful for him to bring to sale the mortgaged property in pursuance of an application that it may be sold for the realization of the amounts of both the decrees. BEHARI BHARTHI *v.* BHAGWAN GIR (1908) . . . . **I. L. R. 31 All. 114**

——— s. 89.

See ante, s. 88.

See post, s. 90, AND s. 89.

See CIVIL PROCEDURE CODE, 1882, s. 108 **I. L. R. 25 All. 42**

See CIVIL PROCEDURE CODE, 1882, s. 244—QUESTION IN EXECUTION OF DECREE **I. L. R. 24 Calc. 473**

See CIVIL PROCEDURE CODE, 1882, s. 310A **I. L. R. 31 All. 346**

See DEKKAN AGRICULTURISTS ACT, s. 44 **I. L. R. 23 Bom. 644**

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT . **I. L. R. 21 Calc. 818** **I. L. R. 25 Mad. 537**

See INTEREST—MISCELLANEOUS CASES—MORTGAGE . . **6 C. W. N. 769**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 89—*contd.*

See INTEREST—OMISSION TO STIPULATE FOR OR STIPULATED TIME HAS EXPIRED —CONTRACTS . I. L. R. 17 All. 581
I. L. R. 18 All. 316
I. L. R. 19 All. 174
I. L. R. 24 Calc. 766

See LIMITATION ACT, 1877, SCH. II, ART. 122 . . . I. L. R. 24 Calc. 473

See LIMITATION ACT, 1877, SCH. II, ART. 178 . . . . I. L. R. 16 All. 23
I. L. R. 22 Calc. 924

See LIMITATION ACT, SCH. II, 1877, ART. 179. LAW APPLICABLE TO EXECUTION. I. L. R. 23 Bom. 644

See LIMITATION ACT, 1877, SCH. II, ART. 179—STEP IN AID OF EXECUTION—SUITS AND OTHER PROCEEDINGS BY DECREE-HOLDER. I. L. R. 24 Mad. 695

See LIS PENDENS . I. L. R. 23 All. 331

See MORTGAGE . I. L. R. 31 Calc. 863
I. L. R. 34 Calc. 886

See SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY. I. L. R. 25 Mad. 506

SETTING ASIDE SALE—GENERAL CASES I. L. R. 25 Bom. 104

1. ——— *Mortgage—Order absolute for sale of mortgaged property, application for—Decree—Execution—Uncertified payment to decree-holder—Appeal Civil Procedure Code (Act XIV of 1882), ss. 244, 258, 540, 578—Court-fee, insufficiency of—Error affecting merits or jurisdiction.* Proceedings under s. 89 of the Transfer of Property Act are not proceedings in execution of a decree, but in continuation of the original suit; and an appeal from an order absolute made under that section lies, under the provisions of s. 540 of the Code of Civil Procedure, as an appeal from an original decree. *Tiluck Singh* v. *Parsotein Proshad*, *I. L. R. 22 Calc. 925*, and *Tara Prosad Roy* v. *Bhobodeb Roy*, *I. L. R. 22 Calc. 931*, relied upon. The decision of the majority of the Full Bench in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, *I. L. R. 25 Mad. 244*, dissented from, and that of the minority (SIR ARNOLD WHITE, *C.J.*, and MOORE, *J.*) followed. In an application under s. 89 of the Transfer of Property Act for an order absolute for sale of the mortgaged property, s. 258 of the Civil Procedure Code is no bar to an inquiry into the plea of payment of the mortgage-debt. PRAMATHA CHANDRA ROY *v.* KHETRA MOHAN GHOSE (1902) I. L. R. 29 Calc. 651

2. ——— *Prior and subsequent incumbrances—Rights of puisne mortgagee who has satisfied in part a prior mortgage.* A prior mortgagee obtained a decree for sale upon his mortgage in a suit to which the puisne mortgagee was a party, though the Court refused to let an account be taken in that suit of what was due to the second mortgage. The prior mortgagee's decree being partly satisfied the puisne mortgagee paid the balance of what was due under that decree and then proceeded to apply for an order absolute for sale not only of the property comprised in the prior mortgage, in respect of which a decree had been obtained, but of the property comprised in his own mortgage. *Held*, that the applicant was not entitled to any order in respect of his own mortgage. *Bansi Dhar* v. *Gaya Prasad*, *I. L. R. 17 All. 179*, referred to. JAMNA DAS *v.* MISRI LAL (1904) . . . . I. L. R. 26 All. 504

3. ——— *Civil Procedure Code, s. 310A—Mortgage—Order for sale—Discharge by third party.* Where a mortgage-debt, for the payment of which a sale has been ordered, is satisfied by a third party, who obtains a security for the advance made by him, such security is not extinguished by s. 89 of the Transfer of Property Act, and the incumbrance, in respect of which the sale was ordered, enures for the benefit of the party making the payment. *Quære:* Whether s. 310A is applicable to a sale carried out under the provisions of s. 89 of the Transfer of Property Act. *Bibijan Bibi* v. *Sachi Bewa*, *I. L. R. 31 Calc. 863*; *Vanmikaling Mudali* v. *Chidambara Chetti*, *I. L. R. 29 Mad. 37*, and *Tufail Batma* v. *Fitola*, *I. L. R. 27 All. 400*, referred to. SHIAM LAL *v.* BASHIR-UD-DIN . . I. L. R. 28 All. 778

4. ——— *Effect of order absolute for sale—Mortgagee, paying prior incumbrancer after sale, right of.* It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immoveable property, as, for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor to set aside such a sale under s. 310A of the Code of Civil Procedure. *Gokal Das Gopaldas* v. *Puranmal Premsukhdas*, *I. L. R. 10 Calc. 1035*, referred to and followed. The provisions of s. 89 of the Transfer of Property Act have reference to the execution of a mortgage-decree and ought not, in reason, to be so construed as to render the application of this principle impossible in cases where an order absolute for sale had been made on the ground that such order extinguished the security. *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*, *L. R. 29 I. A. 9*, referred to and followed in principle. VANMIKALINGA MUDALI *v.* CHIDAMBARA CHETTY (1906) I. L. R. 29 Mad. 37

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 89**—*contd.*

5. ——— *Refusing to make order absolute for sale—Ground for—Appeal from preliminary decree, pendency of—Time, extension of.* The pendency of an appeal against a decree under s. 88 of the Transfer of Property Act is of itself no ground for refusing to make an order absolute for sale under s. 89 of the Act. A Court has no power, of its own motion, to extend the time provided in s. 89 for making an order absolute. RAM GOLAM LAL SAHU *v.* CHOWDHRY BABU BARSATI SINGH (1902) . **10 C. W. N. 910**

6. ——— *Limitation Act (XV of 1877), Sch. II, Art. 179—Application under s. 89 of the Transfer of Property Act is an application for execution and s. 235 of the Code of Civil Procedure applies to it—Unverified application substantially in accordance with law sufficient to save limitation.* An application for an order absolute under s. 89 of the Transfer of Property Act is an application for execution of the decree and is subject to the provisions of s. 235 of the Code of Civil Procedure and falls within Art. 178 or 179 of Sch. II of the Limitation Act. Such an application, when defective, cannot be treated as a mere step in aid of execution, neither can it, when no notice is prayed for or issued, be treated as an application for issue of notice under s. 248, which, as a step in aid of execution, will save the bar of limitation. When such an application, unverified, but filed with the decree, does not fully comply with the requirements of s. 235 of the Code of Civil Procedure and is defective only in minor particulars, which can be easily gathered from the decree filed therewith, it may be treated as substantially an application for execution in accordance with law, sufficient to save limitation under Art. 179 of Sch. II of the Limitation Act. RAMAYYAN *v.* KADIR BACHA SAHIB (1907) **I. L. R. 31 Mad. 68**

7. ——— *Mortgage suit—Decree nisi—Interest not allowed after period of grace—Order absolute—Subsequent application for assessment of such interest, it may be entertained—Decree absolute Court's function ministerial in making—Civil Procedure Code (Act XIV of 1882), s. 209.* The functions of the Court in drawing up a decree absolute under s. 89 of the Transfer of Property Act are more or less ministerial. Where therefore the decree *nisi* in a mortgage suit allowed on interest after the expiry of the period of grace, the Court could not, upon the decree-holder's application made after the order absolute was passed, make an order granting such further interest. MOHA PROSAD SINGH *v.* RAMANI MOHAN SINGHA (1908) . . . **13 C. W. N. 744**

1. ——— **ss. 89, 90**—*Mortgage, release of portion of mortgaged property—Mortgagee's right to release—Personal decree against mortgagor.* The sale contemplated by s. 89 of the Transfer of Property Act is the sale of the whole or of a sufficient portion of the mortgaged property. A personal

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 89**—*contd.*

decree under s. 90 of the Transfer of Property Act can only be made, where the net proceeds of the sale under s. 89 are insufficient to pay the amount due on the mortgage. A mortgagee may release a portion of the mortgaged property from the debt, but he cannot by doing so impose upon the mortgagor a personal liability, to which otherwise he would not be subject. Where the mortgagee released substantial portions of the mortgaged property and the purchasers of those portions from the mortgage-debt, there being no consent or acquiescence on the part of the mortgagor, and there being nothing to show that the amount which the purchasers paid to the mortgagee was the full and true value of the property, which they purchased. *Held*, that the mortgagor was entitled to claim to have the mortgaged property sold before a decree could be passed against him under s. 90. *Sheo Prasad* v. *Behari Lal, I. L. R. 25 All. 79*, dissented from. RAM RANJAN CHAKRAVARTI *v.* INDRA NARAIN DAS (1906) **I. L. R. 33 Calc. 890 s.c. 10 C. W. N. 862**

2. ——— *Execution of decree—Mortgage—Order absolute for sale of part only of the mortgaged property—Property sold insufficient to satisfy the mortgage-debt—Application for personal decree against mortgagor.* A mortgagee in a suit for sale of the mortgaged property obtained a decree for sale of the whole : but when applying subsequently for an order absolute for sale relinquished his claim as against part of the mortgaged property and took an order for sale of part only, and that order became final. The property ordered to be sold was brought to sale, but realized an amount insufficient to satisfy the decree. *Held*, that the decree-holder was under these circumstances competent to apply for and obtain a personal decree against the mortgagor under s. 90 of the Transfer of Property Act, 1882. *Sheo Prasad* v. *Behari Lal, I. L. R. 25 All. 79*, followed. GHAFUR HASAN *v.* KIFAYAT-ULLAH KHAN (1905) **I. L. R. 28 All. 19**

3. ——— *Two separate suits on two mortgages held by same person—Sale under the decree on the first mortgage—Paid off first mortgage and part of second mortgage—Application under section 90—No decree absolute.* A person held two mortgages over the same property brought two separate suits on those mortgages and obtained two decrees. The first decree was made absolute and in execution thereof the decree-holder himself purchased the property. The sale-proceeds discharged the decree on the first mortgage in full and the second decree in part. He then applied for a decree under s. 90, Transfer of Property Act, to realise the balance due under the second decree. *Held*, that no decree under s. 90, Transfer of Property Act, could be passed, as the second decree had not been made absolute under s. 89, Transfer of Property Act, and no sale had taken place in execution thereof, the proceeds

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 89—*concld.*

of which had proved insufficient to discharge the second mortgage. *Muhammad Akbar* v. *Munshi Ram, All. Weekly Notes (1899) 208,* and *Badri Das* v. *Inayat Khan, I. L. R. 22 All. 404,* followed. KAMTA PRASAD *v.* SAIYED AHMAD (1909) **I. L. R. 31 All. 373**

——— ss. 89, 92.

See RES JUDICATA. **I. L. R. 34 Calc. 223**

——— ss. 89, 104—*Civil Procedure Code (Act XIV of 1882), ss. 244, 258—Preliminary mortgage-decree—Payment before decree absolute—Adjustment of decree—Limitation Act (XV of 1877), Sch. II, Art. 173A.* A Court to which an application is made under s. 89 of the Transfer of Property Act has full power to ascertain what balance of the mortgage-debt is really outstanding at the time of the application and to make the order absolute for the realisation of that amount only. S. 258 of the Civil Procedure Code does not apply to an application made under s. 89 of the Transfer of Property Act, that section not having been made applicable by any rule issued by the High Court under s. 104 of the Transfer of Property Act; consequently Art. 173A of Sch. II of the Limitation Act does not apply to the case of any payment made before a decree absolute is made. Any question that arises as to an order absolute for sale is not a question relating to the execution of the decree. *Kedar Nath Raut* v. *Kali Churn Ram, I. L. R. 25 Calc. 703; Tiluck Singh* v. *Parsotein Proshad, I. L. R. 22 Calc. 924; Akikunnissa Bibee* v. *Roop Lall Das, I. L. R. 25 Calc. 133;* and *Ajudhia Pershad* v. *Buldeo Singh, I. L. R. 21 Calc. 818,* relied on. HATEM ALI KHUNDAKAR *v.* ABDUL GAFFUR KHAN (1904) . . **8 C. W. N. 102**

——— s. 90.

See ante, ss. 88, 89, 90.

See CIVIL PROCEDURE CODE, 1882, s. 291 **I. L. R. 28 All. 28**

See COSTS—SPECIAL CASES—MORTGAGE. **I. L. R. 23 All. 439** **I. L. R. 35 Calc. 431**

See DECREE, EX PARTE **I. L. R. 35 Calc. 767**

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION, AND POWERS OF COURT . . **I. L. R. 25 All. 541**

See INTEREST—OMISSION TO STIPULATE FOR OR STIPULATED TIME HAS EXPIRED **I. L. R. 24 Calc. 766**

See LIMITATION . **I. L. R. 34 Calc. 672**

See LIMITATION ACT, 1877, SCH. II, ART. 178 . . **I. L. R. 21 All. 453**

See LIMITATION ACT, 1877, SCH. II, ART. 179—ORDER FOR PAYMENT AT SPECIFIED DATES . . **I. L. R. 18 All. 371**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 90—*contd.*

1. ——— *Decree for sale on a mortgage—Mortgaged property—Sale in execution of a decree held by a different mortgagee.* In order to make the remedy provided by s. 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under s. 90. That section does not apply where the mortgaged property has been sold under a decree held by some other person. *Mahammad Akbar* v. *Munshiram, All. Weekly Notes, (1899) 208,* followed. BADRI DAS *v.* INAYET KHAN . **I. L. R. 22 All. 404**

2. ——— and ss. 88 and 89—*Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage.* The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree. RAJ SINGH *v.* PARMANAND **I. L. R. 11 All. 486**

3. ——— *Mortgage-decree—Order under s. 90 not necessary when decree is a personal one.* S. 90 of the Transfer of Property Act contemplates the making of a supplemental decree in the special case provided for by that section, namely, the net proceeds of any sale of the mortgaged property proving insufficient to pay the amount due for the time being on the mortgage and does not apply to a case where the original decree is a personal one against the mortgagor, under which the mortgagee can, in execution, proceed against any property of the mortgagor other than that comprised in the mortgage. No supplemental decree under s. 90 is necessary in such a case. *Held,* upon a construction of the decree in this case, that it was a mortgage-decree as well as a personal decree against the defendant. DINA NATH MITTER *v.* BEJOY KRISHNA DAS (1903) **7 C. W. N. 744**

4. ——— *Mortgage—Decree for sale—Half of mortgaged property exempted from sale on suit by a third party—Remainder insufficient to satisfy the mortgage-debt.* A mortgagee held a decree for sale and an order absolute for sale of the property comprised in his mortgage. Before, however, the sale could be carried out, a third person succeeded in establishing his title to one half of the property mortgaged. The decree-holder brought to sale the remaining half of the property covered by his decree, but the amount realised proved insufficient to satisfy the mortgage-debt. *Held,* that, under such circumstances, there was no bar to the decree-holder obtaining a decree over against the unhypothecated property of the mortgagor under s. 90 of the Transfer of Property Act, 1882. *Muhammad Akbar* v. *Munshi Ram, All. Weekly Notes (1899) 208,* and *Badri Das* v. *Inayat Khan, I. L. R. 22 All. 404,* distinguished. KEDAR NATH *v.* CHANDU MAL (1904) **I. L. R. 26 All. 25**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 90—*contd.*

5. ——— *Mortgage—Suit for sale—Premature suit decreed in part on confession of judgment by some of the defendants—Subsequent suit for balance of the mortgage-debt*—In a usufructuary mortgage of a shop, a separate dwelling-house was hypothecated as collateral security. The dwelling-house was subsequently sold to third parties. Before the expiry of the term of the mortgage the mortgagee brought a suit to recover the mortgage-debt with interest, and the cost of certain repairs to the shop by sale of both the shop and the dwelling-house. This suit was decreed as against the representatives of the mortgagor, who confessed judgment, but dismissed as against the purchasers of the house as premature. After the expiry of the term of the mortgage, the plaintiff brought a second suit asking for sale of the dwelling-house. *Held*, that this second suit was not barred. The defendants' purchasers, having formerly pleaded that the plaintiff's suit was premature, could not now plead that his present claim ought to have been included in it; and neither s. 90 of the Transfer of Property Act, 1882, nor s. 244 of the Code of Civil Procedure applied. GANGA RAM *v.* KANHAIYA LAL (1905)
I. L. R. 27 All. 254

6. ——— *Limitation—Decree—Execution of—Mortgage Decree—Limitation Act (XV of 1877), Sch. II, Art. 179, cl. 4—Personal decree—Applying in accordance with law—Application which Court is not competent to grant.* An application for a decree under s. 90 of the Transfer of Property Act cannot be regarded as an application for the execution of the decree for sale or as an application to the Court to take some step in aid of execution of that decree within the meaning of Art. 179, cl. 4, of the second Schedule of the Limitation Act. An application, which the Court was not competent to grant, is not one in accordance with law within the meaning of Art. 179, cl. 4, Sch. II, of the Limitation Act. *Per* MOOKERJEE, *J.*—An application for execution of a decree made under s. 90 of the Transfer of Property Act cannot save from limitation an application for execution of the decree for sale. *Lalla Tirhini Sahai* v. *Lalla Hurruk Narain, I. L. R. 21 Calc. 26, Dina Nath Mitter* v. *Bejoy Krishna Das, 7 C. W. N. 744*, referred to. *Durga Dai* v. *Bhagwat Prasad, I. L. R. 13 All. 356*, and *Ram Sarup* v. *Ghaurani, I. L. R. 21 All. 453*, dissented from. *Munawar Hussain* v. *Jani Bejai Shankar, I. L. R. 27 All. 619*, followed. PURNA CHANDRA MANDAL *v.* RADHA NATH DASS (1906)
I. L. R. 33 Calc. 867

7. ——— "*Proceeds of any such sale.*" In a suit for sale on a mortgage the property sold was described in the decree and order under ss. 88 and 89 of the Transfer of Property Act as *haq zemindari*, whereas the property actually mortgaged comprised only *malikana*-rights. The plaintiff claimed a personal decree under the terms of the mortgage. *Held*, that the words "such sale" in s. 90 of the Transfer of Property Act mean a sale of the property directed to be sold by the decree under s. 88 and the order under s. 89, and that the decree-holder was entitled to a decree under s. 90. *Sheo Prosad* v. *Behari Lall, I. L. R. 25 All. 79*, followed. SHIAM SUNDAR LAL *v.* GANESH PRASAD (1906)
I. L. R. 28 All. 674

8. ——— *Mortgage—Mortgaged property totally incapable of being sold—Decree under s. 90 not obtainable.* Where property mortgaged was property which the mortgagee could by no possibility bring to sale in execution of a decree under his mortgage, it was *held* that no decree under s. 90 of the Transfer of Property Act, 1882, could be granted. *Kedarnath* v. *Chandumal, I. L. R., 26 All., 25*, distinguished. PIRBHU NARAIN SINGH *v.* BALDEO MISRA (1906)
I. L. R. 29 All. 260

9. ——— *Decree for sale on a mortgage—Property ordered to be sold in part not susceptible of sale—Abandonment of claim to sell such part. Held*, that on the true construction of the provisions of the Transfer of Property Act, 1882, a mortgagee is entitled to any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under s. 90 for any balance due after crediting the amount realized by the sale of the property actually sold. *Muhammad Akbar* v. *Munshi Ram, All. Weekly Notes (1899) 208*, distinguished. *Sheo Prosad* v. *Behari Lal, I. L. R. 25 All. 79; Kedar Nath* v. *Chandu Mal, I. L. R. 26 All. 25*, and *Ghafur Hasan Khan* v. *Muhammad Kifayatullah Khan, I. L. R. 28 All. 19*, referred to. PIRBHU NARAIN SINGH *v.* AMIR SINGH (1907)
I. L. R. 29 All. 369

10. ——— *Civil Procedure Code (Act XIV of 1882), s. 235 (g).—Decree on mortgage.—Direction for sale and recovery of deficit personally—Reservation of liberty to apply for personal decree—Personal decree contingent on the ascertainment of balance—Attachment—Suit for declaration of ownership and removal of attachment.* A decree on a mortgage directed that on default of payment of the mortgage-money within six months the property should be sold, and, if the sale-proceeds were insufficient to pay the amount due on the mortgage, the balance was to be recovered from the defendant-mortgagor personally. *Held*, that the decree was passed in disregard of the provisions of s. 90 of the Transfer of Property Act (IV of 1882) in so far as it directed personal payment by the mortgagor. The words of the section show that this direction should have been in a supplemental decree to be passed when the net proceeds of the sale should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under s. 90. A minor son of the mortgagor having brought a suit for a declaration of his ownership of an un-

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——— s. 90—*contd.*

divided half of a house and removal of an attachment which was levied under the personal clause of the aforesaid decree, before the birth of the minor:—*Held*, that the plaintiff was entitled to a direction that the house to the extent of the plaintiff's interest therein be released from attachment. *Held*, further, that the personal decree was contingent on the ascertainment of the balance and only became operative and capable of execution when the balance was ascertained. Until then the amount of the debt, for which alone the personal decree was passed, could not be stated as required by s. 235 (*g*) of the Civil Procedure Code (Act XIV of 1882). The balance of the debt being unascertained, the minor was entitled to establish any circumstance which affected the validity of the attachment against his interest in the property. DAMODAR *v.* VYANKU (1906)

I. L. R. 31 Bom. 244

11. ——— *Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage-money part of sale consideration—Personal liability of purchaser—Sale of mortgage rights.* *A* mortgaged certain property to *B* and sub-mortgaged certain other property by the same deed. He subsequently sold the whole of this property to *C* and left with him the bulk of the sale consideration for redemption of the mortgage and sub-mortgage. *B* obtained a decree for sale of the mortgaged property, but not of the sub-mortgaged property. The proceeds of the sale of the mortgaged property proving insufficient, the decree-holder applied for a decree under s. 90 of the Transfer of Property Act against *C* and the personal representative of *A*. *Held*, that by retaining in his hands parts of the purchase-money and expressly or impliedly agreeing to pay the amount to *B*, *C* did not become personally liable, and a decree under s. 90, Transfer of Property Act, could not be made against him. JAMNA DAS *v.* RAM AUTAR PANDE (1909) . . . . **I. L. R. 31 All. 352**

12. ——— *Mortgage—Construction—Unconditional promise to pay, if implies personal liability.* If a person promises to pay a certain sum of money with interest and hypothecates certain property as security without any express covenant that he would be personally liable or without stating any mode of payment, he is personally liable, and a decree under s. 90 of the Transfer of Property Act should be passed in such a case against the mortgagor if the sale-proceeds of the mortgaged property do not satisfy the entire debt and the right to have such a decree is not time-barred. *Parbati Charan Roy* v. *Gobinda Chandra Kundu, 4 C. L. J. 246*, approved. *Narotam Dass* v. *Sheo Pargash Singh, I. L. R. 10 Calc. 740*, and *Bunseedhar* v. *Sujaat Ali, I. L. R. 16 Calc. 540*, referred to. RAM KISHORE GIR *v.* SURAJDEO PERSHAD SINGH (1908)

13 C. W. N. 138

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 90 and s. 89—*Execution of decree—Mortgage—Decree for sale of part only of the mortgaged property—Property sold insufficient to satisfy the mortgage-debt.—Application for decree over, under s. 90.* A mortgagee holding a simple mortgage, by which certain immoveable property was hypothecated sued for, and obtained, a decree for the sale of part only of the mortgaged property. Such portion having been sold, and the net proceeds of the sale having proved insufficient to satisfy the mortgage-debt, the decree-holder applied for a decree over, under s. 90 of the Transfer of Property Act, against the unhypothecated property of the mortgagor. *Held*, that the original decree having been in fact passed, whether rightly or wrongly, for sale of a part only of the mortgaged property, and the sale of that part having realized an amount not sufficient to satisfy the mortgage-debt, there was, under the circumstances, no objection to the mortgagee obtaining a decree over, under s. 90. *Semble:* That there is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property, and, if the sale of the remaining portion proves insufficient to satisfy the mortgage-debt, obtaining a decree under s. 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor. SHEO PRASAD *v.* BEHARI LAL (1902)

I. L. R. 25 All. 79

——— ss. 90, 92 and 93—*Prior and subsequent incumbrancers—Redemption of mortgage—Execution of decree.* A puisne mortgagee of certain property sued the prior mortgagees for redemption. A decree was passed for redemption or sale. The plaintiff did not pay the amount decreed, and the property was sold, but it failed to realize the amount of the debt and costs due to the prior mortgagees. *Held*, that the decree, so far as it affected the puisne mortgagee not being a personal decree, the prior mortgagees could not recover the balance of the amount decreed by arrest of the puisne mortgagee. S. 90 of the Transfer of Property Act, 1882, could not be so construed as to make it applicable to the present case. *Ram Lal* v. *Sil Chand, I. L. R. 23 All. 439*, referred to. MATA AMBER *v.* SRI DHAR (1904)

I. L. R. 26 All. 507

——— ss. 90, 100—*Suit to enforce vendor's lien by sale—Determination in that suit of vendee's personal liability.—Application for decree under s. 90—Res judicata.* In a suit for enforcement of a vendor's lien by sale of the property the Court decided that "the defendants cannot, either personally or in their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable." Subsequently the plaintiffs applied for a decree under s. 90 of the Transfer of Property Act, 1882. *Held*, that it was within the competence of the Court to determine the personal liability or otherwise of the defendants at the stage at which it decided it, and that the matter so determined was *res judicata* in respect of their subsequent application. *Musaheb Zaman*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 90**—*concld.*

Khan v. *Inayat-ullah, I. L. R. 14 All. 513 ; Raj Singh* v. *Parmanand, I. L. R. 11 All., 486 ; Durga Dai* v. *Bhagwat Prasad, I. L. R. 13 All., 356 ; Miller* v. *Digambari Debya, All. Weekly Notes, (1890) 142,* referred to, and it was none the less *res judicata* because the finding as to the personal liability of the defendants was not embodied in the decree. *Jamait-un-nissa* v. *Lutf-un-nissa, I. L. R. 7 All. 606,* referred to. UTTAM ISHLOK RAI *v.* RAM NARAIN RAI (1906) . . **I. L. R. 28 All. 365**

——— **s. 91.**

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION **I. L. R. 25 All. 446**
5 C. W. N. 83
11 C. W. N. 495

——— **cl. (f).**

See MORTGAGE—SALE OF MORTGAGED PROPERTY—PURCHASERS.
I. L. R. 23 All. 467

1. ——— *Mortgage—Prior and subsequent incumbrancers—Effect of acquisition by mortgagees of equity of redemption in part of the mortgaged property.* The owners of shares in five separate properties mortgaged first all the five shares to one set of mortgagees, and subsequently four out of the five shares to a second set of mortgagees. The prior mortgagee without making the puisne mortgagees parties to their suit, brought a suit for sale on their mortgage, obtained a decree, and in execution thereof caused lots 1, 2, and 4 out of the property comprised in their mortgage to be sold. Of these lots they themselves purchased lots 1 and 2, and lot 4 was purchased by one Shib Lal. The puisne mortgagees next brought a suit for sale on their mortgage without joining the prior mortgagees as parties, and obtained a decree for sale, which decree was purchased from them by Shib Lal. The proceeds of the sale by the first mortgagees of lots 1, 2, and 4 being insufficient to satisfy their decree, lots 3 and 5 were caused to be put up for sale. Shib Lal thereupon instituted a suit for a declaration that this property could not be sold without giving him an opportunity to redeem, and a decree was passed in his favour. The prior mortgagees then brought a suit against Shib Lal, the mortgagors and the subsequent mortgagees to recover payment of the amount remaining due to the plaintiffs on foot of their prior mortgage by sale of lots 3 and 5. *Held,* (i) that by reason of the purchase of lots 1 and 2 by the prior mortgagees in execution of their decree the integrity of the mortgage was broken up ; (ii) that the prior mortgagees were entitled to recover by the sale of lots 3 and 5 a rateable portion of the mortgage-debt proportionate to the value of the said lots at the time when the prior mortgage was executed ; (iii) that Shib Lal as representing the puisne mortgagee was not entitled in the present suit, in which he was defendant, to claim to redeem the whole of the property mortgaged, notwithstanding that the puisne mortgagees were not mad parties to the suit of the prior mortgagees, in execution of the decree in which the latter brought to sale and purchased lots 1 and 2. *Dina Nath* v. *Lachmi Narayan, I. L. R. 25 All. 446 ; Bisheshur Dial* v. *Ram Sarup, I. L. R. 22 All. 284 ;* and *Mahtab Singh* v. *Misree Lall, N.-W. P. H. C. Rep. (1876) 98,* referred to. SHIB LAL *v.* BHAWANI SHANKAR (1904) . . **I. L. R. 26 All. 72**

2. ——— *Mortgage-Redemption—Who may redeem—Perpetual lessee.* In a suit for redemption of a mortgage the plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon payment of a premium of R800, with a yearly rental of R40 odd. By the terms of the lease the lessee was not liable to be ejected, even for non-payment of rent, while if the title of the lessors proved defective, the lessee was entitled to a refund of the premium. *Held,* that the lessee was under the above circumstances entitled to redeem. *Paya Matathil Appu* v. *Kovamel Amina, I. L. R. 19 Mad. 151 ; Radha Pershad Misser* v. *Monohur Das, I. L. R. 6 Calc. 317 ; Jugal Kissore Lal Singh Deo* v. *Kartic Chundra Chattopadhya, I. L. R. 21 Calc. 116 ; Kasumunnissa Bibee* v. *Nilratna Bose, I. L. R. 8 Calc. 79 ; Girish Chundra Dey* v. *Juramoni Dey, 5 C. W. N. 83 ;* and *Ram Subhag v. Nar Singh, I. L. R. 27 All. 472,* referred to. RAGHUNANDAN PRASAD *v.* AMBIKA SINGH (1907)
I. L. R. 29 All. 679

3. ——— *Mortgage—Fixed-rate tenant—Suit by zamindar to redeem a mortgage made by a fixed-rate tenant on the death of the tenant without heirs. Held,* that the zamindar is not within the meaning of s. 91 of the Transfer of Property Act (IV of 1882), a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of this holding made by a tenant at fixed rates, who has died without heirs. *Ranee Sonet Kower* v. *Mirza Himmut Bahadoor L. R. 39 I. A. 92,* referred to. RAM DIHAL RAI *v.* MAHARAJA OF VIZIANAGRAM (1908)
I. L. R. 30 All. 488

4. ——— *Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband. Held,* that the reversionary heirs of the deceased husband of a Hindu widow in possession as such of her husband's property are not persons who, within the meaning of s. 91 of the Transfer of Property Act (IV of 1882), have such an interest in the mortgaged property as would entitle them during the lifetime of the widow to redeem a mortgage made by the husband. RAM CHANDAR *v.* KALLU (1908) **I. L. R. 30 All. 497**

——— **s. 91 (b)**—*Redemption of mortgage—Right of sub-mortgage to redeem a prior mortgage.* In 1884 *G* and others, the owners of the mortgaged property, executed a usufructuary mortgage in

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 91—*concld.*

favour of *R D* and others to secure a principal sum of R349. In the mortgage it was provided that the property might be redeemed in *Chait* of any year. In April 1900 the same mortgagors executed a further mortgage of the same property in favour of one *B L* to secure a principal sum of R899. This mortgage contained a provision that the mortgagee should get possession of the property after redeeming the earlier mortgage of 1884. In the following month *B L* sub-mortgaged the property in favour of *R S* and *M R* to secure a principal sum of R599. Of this sum R349-15 were left in the hands of the mortgagees to enable them to redeem the mortgage of 1884 and obtain possession of the mortgaged property; and in the deed the sub-mortgagor in express terms transferred his interest in the land, the subject-matter of the mortgage, and agreed that the sub-mortgagees should remain in possession of the land from 1308 to 1314 Fasli, paying rent therefor to the proprietors of the mahal. *Held*, that the sub-mortgagees from *B L* were entitled to redeem the prior mortgage of 1884. *Ganga Prasad* v. *Chunni Lall, I. L. R. 18 All. 113*, distinguished. *Misri Lal* v. *Abdul Aziz Khan, All. Weekly Notes, (1901) 158*, overruled. *Muthu Bijia Raghunatha Ramchandra Vacha Mahali Thurai* v. *Venkatachallam Chetti, I. L. R. 20 Mad. 35*, and *Mata Din Kasodhan* v. *Kasim Husain, I. L. R. 13 All. 432*, referred to. RAM SUBHAG *v.* NAR SINGH (1905) **I. L. R. 27 All. 472**

——— s. 92.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 43 . **I. L. R. 30 All. 225**

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . **I. L. R. 24 All. 44**

ADJUDICATIONS. **I. L. R. 25 Mad. 300**

——— ss. 92 and 93.

See EXECUTION OF DECREE—DECREE TO BE EXECUTED AFTER APPEAL OR REVIEW . . **I. L. R. 15 Mad. 170**

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION—
REDEMPTION OTHERWISE THAN ON EXPIRY OF TERM—REDEMPTION AFTER EXPIRY OF TIME.
I. L. R. 26 Bom. 121

See RES JUDICATA—CAUSE OF ACTION.
I. L. R. 11 All. 386
I. L. R. 15 Mad. 366
I. L. R. 17 Mad. 96
I. L. R. 19 All. 202

1. ——— *Mortgage—Redemption—Application for enlargement of time—Application to be made to the Court of first instance, not to the Appellate Court.* Where a decree for redemption under s. 92 of the Transfer of Property Act, 1882, has been made by an Appellate Court an application under the last paragraph of s. 93 must be made, not to that Court, but to the Court of first instance. *Venkata Krishna Ayyar* v. *Thiagaraya Chetti, I. L. R. 23 Mad. 521*, followed. *Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278*, referred to. SHEONARAIN *v.* CHUNNI LAL (1900) **I. L. R. 23 All. 88**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 92—*concld.*

2. ——— *Usufructuary mortgage—Redemption—Form of decree in a suit for redemption.* An order declaring that the plaintiff's right to redeem shall be extinguished upon non-payment within the time limited by a decree for redemption of the amount found to be due is not a proper order when the mortgage sought to be redeemed is a usufructuary mortgage. Nevertheless where such an order has been made and the decretal money has not been paid within the time limited and the decree has been allowed to become final, the plaintiff cannot thereafter bring a second suit for redemption. *Sitaram* v. *Madho Lal, I. L. R. 24 All. 44*, referred to LACHMAN SINGH *v.* MADSUDAN (1907) **I. L. R. 29 All. 481**

3. ——— *Application for enlargement of time—Application to be made to Court of first instance, not to an Appellate Court* An application under s. 93 Transfer of Property Act, 1882, for extension of time for payment of mortgage-money in a decree passed under s. 92 of that Act by an Appellate Court must be made to the Court of first instance. *Sheo Narain* v. *Chunni Lal, I. L. R. 23 All., 88*, followed; *Babu Prasad* v. *Khiali Ram, All. Weekly Notes (1906) 203*, dissented from. RAM DHANI SAHU *v.* LALIT SINGH (1909) . . **I. L. R. 31 All. 328**

——— ss. 92 and 94. *Mortgage—Redemption—Subsequent suit for profits received by mortgagee barred.* In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagee right up to the time of actual redemption or sale, as the case may be. A mortgagor, therefore, who has obtained a decree for redemption and paid in what was found by the decree to be due from him, cannot subsequently sue for profits realized by the mortgagee in possession, which might and ought to have been taken into account at the time of passing the decree. *Vinayak Shivrao Dighe* v. *Dattatraya Gopal, I. L. R. 26 Bom. 661*, referred to. KASHI *v.* BAJRANG PRASAD (1907) . **I. L. R. 30 All. 36**

——— s. 93.

See CIVIL PROCEDURE CODE, 1882, s. 244.
I. L. R. 33 Bom. 273

See DECREE . **I. L. R. 33 Bom. 273**

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT . **I. L. R. 23 Mad. 521**

See MORTGAGE—REDEMPTION—MODE OF REDEMPTION AND LIABILITY TO FORECLOSURE **I. L. R. 16 Mad. 214**
I. L. R. 33 Bom. 273

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 93**—*concld.*

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . **I. L. R. 24 All. 44**

1. ——— *Mortgage—Redemption—Decree for payment and redemption within six months—Application for execution of decree after six months had expired.* S. 93 of the Transfer of Property Act (IV of 1882), under which a mortgagor, who has obtained a decree for redemption, may show cause for extending the time allowed by the decree for redemption, does not apply to decrees made before the Act was put in force. CHENNAYA *v.* MALKAPA . . . **I. L. R. 20 Bom. 279**

2. ——— *Failure to pay money on date fixed—Court's power to enlarge time for payment.* The failure to pay money on or before the date mentioned in the redemption decree does not absolutely bar the mortgagor's right to obtain possession of the mortgaged property: since the Court may, under s. 93 of the Transfer of Property (Act IV of 1882) upon good cause shown, enlarge the time for payment upon such terms as it thinks fit. The plaintiff within three years of the date of the decree produced in Court the decretal amount and prayed for possession of the mortgaged property. *Held*, that such an application could be treated as one for enlargement of time under s. 93 of the Transfer of Property Act. ISWAR LING *v.* GOPAL JIVAJI (1904) **I. L. R. 28 Bom. 102**

3. ——— *Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.* A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under s. 93 of the Transfer of Property Act. BEPIN BEHARY SHAHA *v.* MOKUNDA LAL GHOSH (1908) **I. L. R. 36 Calc. 122**

——— **s. 95.**

See LIMITATION ACT, 1877, SCH. II, ART. 148 . **I. L. R. 8 All. 295**

1. ——— *Suit for contribution—Plaintiff not in possession of mortgaged property—Interpretation of Statute—Limitation Act, 1877, Sch. II, Art. 132. Held*, that s. 95 of the Transfer of Property Act, 1882, cannot be interpreted absolutely according to the letter of the section, for it would then have reference to cases of usufructuary mortgage only, which could not have been the intention of the Legislature. To give effect to what was apparently the intention of the Legislature, it is necessary to read the section in some such way as the following: "Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, if the mortgagee be in possession, he has a charge, etc." Where, therefore, a person, who had a mortgagor's interest in a decree for sale on a mortgage, satisfied the decree and then brought a suit for contribution against his co-mortgagors without having obtained possession of the mortgaged property, it was *held* that the suit was maintainable and was governed as to limitation by Art. 132 of the second schedule to the Indian Limitation Act, 1877. *Moidin* v. *Oothumanganni, I. L. R. 11 Mad. 416*, and *Gulam Maula Khan* v. *Banno Khanam, 4 Oudh Cases 273*, referred to. BHAGWAN DAS *v.* HAR DEI (1904) **I. L. R. 26 All. 227**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 95**—*concld.*

2. ——— *Joint mortgage-bond in ordinary form—Payment of one mortgagor and redemption of whole property mortgaged—Charge on property of co-mortgagors—Failure of plaintiff in suit for money paid on mortgage to prove that he executed bond as surety only—Right to contribution—Pleadings—Relief.* The fact that a plaintiff has claimed too much on one cause of action, does not preclude him from recovering what he is actually entitled to on another cause of action, provided the pleadings are wide enough to cover such a claim. The construction of s. 95 of the Transfer of Property Act (IV of 1882) should not limit its operation to mortgages under which possession passes, and therefore on redemption properly repasses: the better way is to construe it distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow on redemption. To raise funds for the defence of a relative the plaintiff and defendants jointly executed a bond in the ordinary form, each pledging immoveable property as security. The plaintiff eventually paid off the amount due on the bond and redeemed all the property mortgaged. In a suit, in which he claimed the whole sum paid by him on the ground that he had executed the bond only as a surety, the defendant denied that he was a surety and pleaded that he was only entitled to a rateable amount from each of them. *Held*, that the plaintiff's failure to prove that he was merely a surety on the bond did not preclude him from recovering a proportionate share from each of the defendants; and that under s. 95 of the Transfer of Property Act, he was entitled also to a charge for such amount on the defendant's interests in the property respectively mortgaged by them. AHMAD WALI KHAN *v.* SHAMS-UL JAHAN BEGAM (1905) **I. L. R. 28 All. 482 s.c. L. R. 33 I. A. 81 10 C. W. N. 626**

——— **s. 96.**

See MORTGAGE—POWER OF SALE. **I. L. R. 25 Mad. 108**

——— **ss. 96, 97.**

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES. **I. L. R. 30 Calc. 953**

——— *Civil Procedure Code, s. 295—Mortgage—Suit for sale of entire property by holder of usufructuary and simple mortgages over the*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 96—*concld.*

same property. A mortgagee held several simple mortgages over properties A and B, and also a usufructuary mortgage of prior date over property B. *Held*, that the mortgagee was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of his mortgages, simple and usufructuary. BHAGWAN DAS *v.* BHAWANI (1904) . . . . **I. L. R. 26 All. 14**

——— s. 98.

See MORTGAGE—FORM OF MORTGAGES.
I. L. R. 27 Bom. 600
I. L. R. 12 All. 203
I. L. R. 21 Mad. 1

CONSTRUCTION. **I. L. R. 26 Bom. 252**

——— s. 99.

See CIVIL PROCEDURE CODE, 1882, ss. 232, 233 . **I. L. R. 31 Mad. 33**

See LIMITATION ACT, 1877, s. 8.
I. L. R. 16 Mad. 436

See LIMITATION ACT, 1877, SCH. II, ART. 179—NATURE OF APPLICATION—IRREGULAR AND DEFECTIVE APPLICATIONS.
I. L. R. 12 All. 64

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION **I. L. R. 22 Bom. 624**
I. L. R. 23 Bom. 119
I. L. R. 22 Mad. 347 ; 372
I. L. R. 23 Mad. 377
I. L. R. 30 Mad. 313 ; 362

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES.
I. L. R. 26 Bom. 88

See PUBLIC DEMANDS RECOVERY ACT (BEN. ACT VII OF 1880), ss. 2, ETC.
I. L. R. 29 Calc. 537

See RELINQUISHMENT OF, OR OMISSION TO SUE FOR, PORTION OF CLAIM.
I. L. R. 25 Bom. 161

See RES JUDICATA—COMPETENT COURT—GENERAL CASES.
I. L. R. 16 Mad. 481

See RES JUDICATA—COMPETENT COURT—REVENUE COURTS.
I. L. R. 18 All. 325

See SALE FOR ARREARS OF RENT.
I. L. R. 33 Calc. 11

See SALE IN EXECUTION OF DECREE—MORTGAGED PROPERTY.
I. L. R. 24 All. 549
11 C. W. N. 1011
I. L. R. 35 Calc. 61

See SURETY—ENFORCEMENT OF SECURITY.
I. L. R. 30 Calc. 1060

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 99—*contd.*

1. ——— *Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Sale of mortgaged property in execution of decree on a money-bond for interest due on the mortgage.* The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money-bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money-bond, and, having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person. *Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree. *Held*, further, *per* KERNAN, *J.*, that the sale in execution was invalid under the Transfer of Property Act, s. 99. SATHUVAYYAN *v.* MUTHUSAMI . . . . **I. L. R. 12 Mad. 325**

2. ——— *Money-decree "on the responsibility of" mortgaged premises—Attachment and sale of mortgaged premises—Purchase by mortgagee.* A usufructuary mortgagee left the mortgaged premises in the possession of the mortgagor under a rent agreement in 1878. The rent having fallen into arrear, the mortgagee sued the mortgagor in October 1882 and obtained a decree for the arrear which provided for its payment by the mortgagor "on the responsibility of the defendants mulgeni right" in the mortgaged premises. The decree-holder attached the mortgaged premises in execution, and having brought them to sale and purchased them himself, he sued for possession. *Held*, that the sale was invalid under the Transfer of Property Act, s. 99. DURGAYYA *v.* ANANTHA
I. L. R. 14 Mad. 74

See VIGNESWARA *v.* BAPAYYA
I. L. R. 16 Mad. 436

3. ——— *Usufructuary mortgage—Suit by usufructuary mortgagee for sale of equity of redemption of mortgaged property in execution of a decree for mesne profits and costs.* Certain usufructuary mortgagees, not having been put in possession of the mortgaged property by the mortgagor, sued and obtained a decree for possession with mesne profits and costs. Under this decree, the mortgagees were put in possession of the mortgaged property. They then applied for attachment and sale of the mortgaged property in execution of their decree for mesne profits and costs. This application was disallowed. The mortgagees then brought a suit for sale of the equity of redemption of the mortgaged property, reserving their rights and interests under the mortgage. *Held*, that such a suit would not lie as being opposed to the intention of s. 99 of the Transfer of Property Act, 1882. *Azim-ullah* v. *Najm-un-nissa, I. L. R. 16 All. 415*, and *Jadub Lall Shaw Chow-*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 99—*contd.*

dhry v. *Madhub Lall Shaw Chowdhry, I. L. R. 21 Calc. 34*, referred to. MAHABIR SINGH *v.* SAIRA BIBI . . . . I. L. R. 17 All. 520

4. ——— and s. 2—*Suit to set aside sale by mortgagee prior to coming into force of the Act—Construction of Statute.* In a suit brought to set aside a sale effected by a mortgagee prior to the date when Act IV of 1882 (Transfer of Property Act) came into force :—*Held*, that the Transfer of Property Act (ss. 2 and 99) has no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the defendants passed before that Act came into force. NARANAPPA *v.* SAMACHARLU . I. L. R. 19 Mad. 382

5. ——— and s. 67—*Sale of mortgaged property in execution of money-decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.* A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. S. 99 of the Transfer of Property Act limits the right of a decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act. *Quære :* Whether the suit to be instituted under s. 99 is a suit on the mortgage or is one on the charge created by attachment. JADUB LALL SHAW CHOWDHRY *v.* MADHUB LALL SHAW CHOWDHRY . . . I. L. R. 21 Calc. 34

6. ——— s. 99 and s. 67—*Usufructuary mortgage—Lease by mortgagee to mortgagor of mortgaged premises—Suit for recovery of rent—Attempt to sell mortgaged property in execution of money-decree for rent. Held*, that a usufructuary mortgagee who had leased the mortgaged premises to his mortgagor could not, in execution of a simple money-decree for rent against the mortgagor, attach and sell the mortgaged premises, but must bring a suit as provided by s. 67 of Act IV of 1882. AZIMULLAH *v.* NAJM-UN-NISSA . I. L. R. 16 All. 415

7. ——— *Sale of mortgaged property—Zur-i-peshgi mortgage—Purchase by the mortgagee.* S. 99 of the Transfer of Property Act (IV of 1882) applies to zur-i-peshgi mortgages, and a purchase of the mortgaged property by the mortgagee in execution of a decree for rent due by the mortgagor under a katkina lease of the property was held to be not merely irregular, but absolutely void. SHEODENI TEWARI *v.* RAMSARAN SINGH . . . . I. L. R. 26 Calc. 164

MOTI RAM TEWARI *v.* RAM LAKHAN SINGH 3 C. W. N. 290

8. ——— s. 99 and s. 67—*Application for the attachment and sale of mortgaged property in execution of a decree obtained not in accordance with the Transfer of Property Act, though suit instituted after the passing of the Act.* A mortgagee obtained a decree on the 15th February 1883 upon a mortgage-bond dated the 18th January 1879. The decree simply provided that the plaintiff do obtain the amount of his claim, and that the mortgaged property should remain liable for the satisfaction of the debt. The judgment-creditor, in execution of that decree, sold one of the mortgaged properties, and afterwards assigned over the decree, and the assignee, on the 18th August 1894, applied for the execution of the decree by attachment and sale of another of the mortgaged properties. *Held*, on the objection of the judgment-debtors, that s. 99 of the Transfer of Property Act was applicable to the case, and that the mortgaged property could not be sold, unless a suit under s. 67 of the Act be brought, and the procedure prescribed by the Transfer of Property Act followed. The property, however, could be attached, as there is nothing in s. 99 prohibiting such attachment. CHUNDRA NATH DEY *v.* BURRODA SHOONDURY GHOSE I. L. R. 22 Calc. 813

9. ——— *Mortgage-decree—Transfer of Property Act (IV of 1882), decree regarded as mortgage-decree under—Sale of mortgaged property in execution of decree.* In a suit for recovery of mortgage-money by sale, brought after the Transfer of Property Act (IV of 1882) had come into force, the decree of the Court was : "That a decree be passed in favour of the plaintiffs in respect of R387-10-13, together with costs and interests at the rate of 6 per cent. per annum up to the date of realization, and that the mortgaged properties be made liable (*pae band kea jae*) for realization of the decretal money." *Held*, that the decree was to be regarded as a mortgage-decree governed by the Transfer of Property Act, though not made in the form prescribed by that Act ; and it followed that it was not open to the decree-holder to proceed against properties other than the mortgaged properties before exhausting the latter, and without obtaining an order under s. 90 of the said Act. *Jogemaya Dassi* v. *Thackomoni Dassi, I. L. R. 24 Calc. 473*, and *Fazil Howladar* v. *Krishna Bandhoo Roy, I. L. R. 25 Calc. 580*, referred to. *Chundra Nath Dey* v. *Burroda Shoondury Ghose, I. L. R. 22 Calc. 813*, distinguished. LAL BEHARY SINGH *v.* HABIBUR RAHMAN . . . I. L. R. 26 Calc. 166

10. ——— and s. 67—*Landlord becoming mortgagee to tenant—Power to sell tenure in execution of rent-decree.* When a landlord has taken a mortgage of the holding of a tenant he is debarred by s. 99 of the Transfer of Property Act from bringing the tenure to sale in execution of his rent-decree otherwise than by instituting a suit under s. 67 of that Act. RAMANI DASI *v.* SURENDRA NATH DUTT . . . . 1 C. W. N. 80

11. ——— *Mortgage—Sale of mortgaged property—Money-decree—Transfer of Property Act (IV of 1882), ss. 67, 99—Execution—Purchase by the mortgagee, effect of—Mortgagee,*

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 99**—*contd.*

liabilities of—Account. A mortgagee, in execution of a decree obtained against the mortgagor on account of another debt, sold the mortgaged properties, purchased the equity of redemption himself, and obtained possession through the Court. And, in a subsequent suit upon the mortgage for sale of the mortgaged properties, the defence, *inter alia*, was that the proceedings were contrary to the provisions of s. 99 of the Transfer of Property Act that the purchase by the plaintiff was null and void; and that the mortgagee was bound to account for the period he was in possession of the mortgaged property. *Held*, that, having regard to the provisions of s. 99 of the Transfer of Property Act, the purchase by the mortgagee was null and void, and possession obtained by him was not in accordance with law, and he was therefore liable to render account of moneys realized from the mortgaged properties during the term of his possession. *Durgayya* v. *Anantha, I. L. R. 24 Mad., 74,* followed. *Sri Raja Papamma Rao* v. *Sri Vira Pratapa Ramachandra Razu, I. L. R. 19 Mad. 249,* referred to. SHIB DASS DASS *v.* KALI KUMAR ROY (1903) **I. L. R. 30 Calc. 463 s.c. 7 C. W. N. 532**

12. ——— *Civil Procedure Code, s. 43—Sale of mortgaged property in execution of money decree held by mortgagee—Sale set aside—Subsequent suit for sale on the mortgage.* Where a mortgagee had brought the mortgaged property to sale in execution of a simple money decree held by him against the mortgagor, and such sale was set aside with regard to the provisions of s. 99 of the Transfer of Property Act, 1882, it was *held* that the mortgagee was not debarred from subsequently bringing a suit for sale on his mortgage, notwithstanding s. 43 of the Code of Civil Procedure. *Azim-ullah* v. *Nuzm-un-nissa, I. L. R. 16 All. 415,* and *Govind Hari Dev* v. *Parashram Mahadev Joshi, I. L. R. 25 Bom. 161,* referred to. BHOLA NATH *v.* MUHAMMAD SADIQ (1904) **I. L. R. 26 All. 223**

13. ——— *Mortgage of land—Subsequent sale of equity of redemption in execution of decree in favour of third party—Purchase of equity of redemption by mortgagee—Subsequent suit by mortgagor to redeem—Maintainability.* In 1882, plaintiff's father mortgaged certain immoveable property belonging to the tarwad now represented by plaintiff; and, subsequently the mortgagee purchased the equity of redemption of the lands at a sale, which was held in execution of a decree in favour of a third party. Both the mortgage and the sale were binding on the tarwad. Plaintiff now sued to redeem the lands contending that she was entitled to do so, inasmuch as the sale of the equity of redemption had not been effected in a suit for sale by the mortgagee on his mortgage. *Held*, that plaintiff was not entitled to redeem. *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited, I. L. R. 23 Mad. 377,* not followed. IKHOTHA *v.* CHAKKIAMMA (1904) . . . . **I. L. R. 27 Mad. 428**

14. ——— *Civil Procedure Code, s. 233—Mortgagee holding also a simple money decree against mortgagor—Transfer of decree—Rights of transferee.* *H*, the holder of a usufructuary mortgage over the property of *B*, obtained against *B* a simple money decree, which had nothing whatever to do with the mortgage or the debt secured thereby. *H* transferred this simple money decree to *M*. *Held*, that there was nothing to prevent *M* from bringing to sale in execution of this decree the property mortgaged by *B* to *H*. *Chundra Nath Dey* v. *Burroda Shoondury Ghose, I. L. R. 22 Calc. 813,* distinguished. BANH BAL *v.* MANNI LAL (1905) . . **I. L. R. 27 All. 450**

15. ——— *Mortgage—Sale of equity of redemption by mortgagor—Purchase of equity of redemption by mortgagee in execution of a decree against mortgagor's vendees—Effect of such purchase—Suit by mortgagor's vendees for redemption—Parties.* The equity of redemption in certain mortgaged property was sold by the mortgagor to third parties. In execution of a decree for costs and mesne profits the mortgagee brought the equity of redemption in the hands of the purchasers to sale and purchased it himself. Years after this the purchasers of the equity sued to redeem the mortgaged property, treating the sale to the mortgagee as a nullity. They did not implead in this suit the representatives of the original mortgagee. *Held*, that the suit must fail for want of proper parties. But in any case the purchase by the mortgagee of the equity of redemption was voidable only and not void, and could not after the lapse of some twenty years be impeached. *Tara Chand* v. *Imdad Husain, I. L. R. 18 All. 325,* and *Mayan Pathuti* v. *Pakuran, I. L. R. 22 Mad. 347,* approved. *Khairaj Mal* v. *Daim, L. R. 32 I. A. 23; Bhuggobutty Dossee* v. *Shamachurn Bose, I. L. R. 1 Calc., 337; Martand* v. *Dhondo, I. L. R. 22 Bom. 624,* and *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164,* referred to. ABDUL RASHID KHAN *v.* DILSUKH RAI (1905) **I. L. R. 27 All. 517**

16. ——— *Mortgage—Suit for sale on a mortgage—Compromise resulting in a money decree—Mortgagee not competent to sell mortgaged property in execution of such decree.* A mortgagee brought a suit for sale on his mortgage. The suit was compromised, and the mortgagee took a money decree, in which, however, the property originally hypothecated to him was set out as being charged. *Held*, that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of his decree, but, if he wished to do so, he would have to institute a suit under s. 67 of the Transfer of Property Act on the decree. *Aubhoyessury Dabee* v. *Gouri Sunkur Panday, I. L. R. 22 Calc. 859,* followed. HEM BAN *v.* BEHARI GIR (1905) **I. L. R. 28 All. 58**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 99—*contd.*

17. ——— *Not merely declaratory of old Law—Purchase by mortgagee of equity of redemption in execution of decree not based on mortgage—Effect of on the rights of sons of mortgagor.* S. 99 of the Transfer of Property Act is not merely declaratory of what was accepted and enforced as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operatinn. *Muthuraman Chetty* v. *Ettappasami, I. L. R. 22 Mad. 372,* distinguished. When the mortgagee, at a Court sale perfected before the passing of the Act, and brought about in respect of a claim independent of the mortgage, purchases the right of redemption in the mortgaged property, such purchase passes to him the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself and the sons cannot sue to redeem the property so sold or their share therein. NANNUVIEN *v.* MUTHUSAMI DIKSHADAR (1905) **I. L. R. 29 Mad. 421**

18. ——— *Rights of purchaser—Landlord having a mortgage of the holding.* The sale of a holding in execution of a decree for rent obtained by a landlord, who also held a mortgage of the holding, is void, and the purchaser at the sale acquires no title against another mortgagee of the holding, who has purchased it under a decree on his mortgage. *Sheodeni Tewari* v. *Ram Saran Singh, I. L. R. 26 Calc. 164,* followed. BASIRUDDIN *v.* KAILAS KAMINI DEBI (1905) **I. L. R. 33 Calc. 113**

19. ——— *Money decree obtained by mortgagee against mortgagor—Transfer of the decree—Assignee bound by the provisions of s. 99.* The transferee of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by s. 99 of the Transfer of Property Act (IV of 1882). He can attach the mortgaged property, but he is not entitled to bring it to sale otherwise than by instituting a suit under s. 67 of the Act. CHHAGAN *v.* LAKSHMAN (1907) . **I. L. R. 31 Bom. 462**

20. ——— *Civil Procedure Code (Act XIV of 1882), s. 316—Mortgage—Simple money decree accepted by mortgagee—Sale of mortgaged property in execution of such decree.* Even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money decree, he is precluded by s. 99 of the Transfer of Property Act (IV of 1882) from bringing the mortgaged property to sale in execution of the simple money decree. *Madho Prasad Singh* v. *Baijnath, All. Weekly Notes (1905) 152,* followed. But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction-purchaser, the sale cannot afterwards be impeached upon the ground that it was in violation of s. 99 of the Transfer of Property Act. *Madan Makund Lal* v. *Jamna Kaulapuri, All. Weekly Notes (1907) 48 ; Raj Kishore De Sarkar* v. *Dina Nath Chandra, 12 C. W. N. lx ; Thaleri Pathumma* v. *Thandora Mammad, 10 Mad. L. J. 110 ; Durga Charan Mandal* v. *Kali Prasanna Sarkar, I. L. R. 26 Calc. 727 ;* and *Umed* v. *Jas Ram, I. L. R. 29 All. 612,* referred to. *Sonu Singh* v. *Bihari Singh, I. L. R. 33 Calc. 283,* dissented from. KISHAN LAL *v* UMRAO SINGH (1908) **I. L. R. 30 All. 146**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 99—*concld.*

——— **ss. 99, 67**—*Holder of usufructuary mortgage attaching mortgaged property for a decree on an independent claim may sue under s. 67 on the mortgage.* Where a usufructuary mortgagee, who had no right to sue for his mortgage amount, obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged properties :—*Held,* that he was entitled under the provisions of s. 99 of the Transfer of Property Act to bring a suit on his mortgage under s. 67 of the Act. The decree in such a suit should be one for the sale of property free from the mortgage claim and for the application of the sale-proceeds in satisfaction of the mortgages on the property, the balance, if any, to be applied towards the claim under attachment. GOVINDA BHATTA *v.* NARAIN BHATTA (1906) **I. L. R. 29 Mad. 424**

——— s. 100.

See CO-SHARERS—GENERAL RIGHTS IN JOINT PROPERTY. **I. L. R. 14 All. 273**

See LIMITATION ACT, 1877, SCH. II, ART. 148 . . **I. L. R. 8 All. 295**

See MORTGAGE—CONSTRUCTION. **I. L. R. 13 All. 28**

See MORTGAGE—FORM OF MORTGAGE. **I. L. R. 9 All. 158**

1. ——— *Charge on immoveable property—Mortgage—Construction of document—Limitation.* Under s. 100 of the Transfer of Property Act, for a document to create a charge on immoveable property, it must be a document that creates such charge immediately on its execution, and not operates only as a charge at some future time, such as in the event of non-payment of the money secured by it, the latter being the possibility of a charge ultimately arising on the land, and not "a charge" within the meaning of that section. *A* lent *B* R99, and *B* executed a document on the 24th July 1881, whereby he agreed to repay the amount with interest in the month of Baisakh 1289 F.S. (April 1882), and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land and that *A* should take possession thereof, and that after *A* took possession of the land no interest should be paid by him, *B*, and that *A* should pay the rent of the landlord out of the profits of the land without any objection. *A* instituted a suit on the 3rd

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 100—*contd.*

August 1885 to recover the R99. *Held*, that the document did not amount to a mortgage, nor did it create a charge under s. 100 of the Transfer of Property Act, and that the suit was barred by limitation, three years being the period applicable. MADHO MISSER *v.* SIDH BENAIK UPADHYA *alias* BENA UPADHYA . . **I. L. R. 14 Calc. 687**

2. ——— and s. 58—*Hypothecation-bond, suit on.* The period of limitation for suits upon hypothecation-bonds which contain no power of sale or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under Sch. II, Art. 132, of the Limitation Act of 1877. *Aliba* v. *Nanu, I. L. R. 9 Mad. 218*, followed. *Per* MUTTUSAMI AYYAR, *J.*—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages." RANGASAMI *v.* MUTTUKUMARAPPA . . **I. L. R. 10 Mad. 509**

3. ——— and s. 68—"*Charge*"—*Bengal Tenancy Act, s. 65.* The Provisions of s. 68 of the Transfer of Property Act are not amongst those made applicable by s. 100 of that Act to a person having a charge within the meaning of the latter section. *Semble:* The "charge" referred to in s. 65 of the Bengal Tenancy Act (VIII of 1885) is not such a "charge" as that defined by s. 100 of the Transfer of Property Act. *Lolit Mohun Roy* v. *Bindodai Dabee, I. L. R. 14 Calc. 14*, explained. FOTICK CHUNDER DEY SIRCAR *v.* FOLEY **I. L. R. 15 Calc. 492**

4. ——— *Mortgage—Suit by sons against father for partition—Subsequent mortgage of suit property by father—Consent-decree in partition suit—Subsequent decree in a suit on the mortgage against the father alone—Liability of property in execution—Effect of instrument intended to be a mortgage but defective in form—Charge.* Plaintiffs, who were the sons of first defendant, had, on 18th March 1893, instituted a suit against their father for partition. On 24th July 1893, their father executed a deed purporting to mortgage the house to defendants Nos. 2 and 3. That deed was, however, attested by only one witness. On 24th December 1894, a *razinama* was filed, and a decree based on it was passed in the partition suit between plaintiffs and their father, by which the father conveyed to plaintiffs the whole of his interest in the immoveable family property, retaining only sufficient money to satisfy certain incumbrances which existed on the property. These were in fact paid off, and the plaintiff took possession. Defendants Nos. 2 and 3 obtained, against the father alone a decree for the amount of their mortgage, and for sale in default of payment: and purchased it at a sale in execution thereof; and obtained possession through the Court. Plaintiffs then applied, under s. 332 of the Code of Civil Procedure, for an order restoring them to possession, and, as that application was dismissed, filed the present suit. *Held*, that plaintiffs were entitled to recover possession. As against the plaintiffs, the decree obtained by defendants Nos. 2 and 3 must be regarded as merely a personal decree against the father on his covenant to pay; and the house was not available in execution of it, inasmuch as it was the separate property of the plaintiffs, under the decree in the partition suit, at the time when the decree was obtained. *Quœre:* Whether an instrument which was intended to be a mortgage, but is invalid by reason of its not fulfilling the requirements of law, should be held, as between the parties to it, to operate so as to create a charge under s. 100 of the Transfer of Property Act. *Tofaluddi Peada* v. *Mahar Ali Shaha, I. L. R. 26 Calc. 78*, considered. MITHIRAM BHAT *v.* SOMANATHA NAICKAR (1901) **I. L. R. 24 Mad. 397**

5. ——— *Mortgage decree—Payment by one of several representatives of deceased mortgagor—Charge—Contribution.* A mortgagee having obtained a decree on his mortgage the decretal amount was paid off by one of several representatives of the deceased mortgagor. *Held*, that the latter did not thereby acquire a charge on the mortgaged property, within the meaning of s. 100 of the Transfer of Property Act. The provisions of s. 95 and s. 82 of the Transfer of Property Act do not apply to such a case. *Bhagwandas* v. *Hardei, I. L. R. 26 All. 227*, disapproved. *Danappa* v. *Yamnappa, I. L. R. 26 Bom. 379*, distinguished. *Upendra* v. *Girindra, I. L. R. 25 Calc. 565*, referred to. JAHAN ARA BEGAM *v.* MIRZA SHUJAUDDIN BUKHT BAHADUR (1905) . . **9 C. W. N. 865**

6. ——— *Documents executed in the mofussil—Contracts of the people of India—Liberal construction—Regard to be had to all the circumstances of a transaction—Intention to make land security for payment of debt—Charge.* Documents executed in the mofussil come within the statement of the Privy Council in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree, 6 Moo. I. A. 411*, that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses." Where having regard to all the circumstances of a transaction there remains no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the debt mentioned therein, the documents create a charge. JANARDAN *v.* ANANT (1908) . **I. L. R. 32 Bom. 386**

——— s. 101.

See BENGAL TENANCY ACT.
8 C. W. N. 451

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **s. 101**—*concld.*

See MORTGAGE—SALE OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEES
I. L. R. 16 Mad. 94
I. L. R. 20 Mad. 274
I. L. R. 26 Bom. 88
I. L. R. 31 Calc. 370

REDEMPTION—RIGHT OF REDEMPTION . . I. L. R. 23 All. 1

See SALE FOR ARREARS OF RENT—INCUMBRANCES . . 6 C. W. N. 834

——— *Lien on mortgaged property—Mortgagee, joint purchase of mortgaged property by—Mortgagor, objection to sale by.* Where the mortgagee purchases the mortgaged property along with other properties and jointly with other persons in undivided shares, his lien upon the property is not extinguished, but is existing, it being for his benefit within the meaning of s. 101 of the Transfer of Property Act. A mortgagor is precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgaged suit is invalid by reason of the decree *nisi* in that suit not having been made absolute, if such objection is not raised at an early stage of the proceedings. GUNINDRA PROSAD *v.* BAIJNATH SINGH (1904) . . . I. L. R. 31 Calc. 370

——— **s. 103.**

See MORTGAGE—REDEMPTION—MISCELLANEOUS CASES . I. L. R. 27 Bom. 23

——— **s. 104, rules framed under—**

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.
I. L. R. 25 Calc. 703
4 C. W. N. 474

——— *Rules made by High Court under s. 104, effect of—Applicability of Code of Civil Procedure to sales in execution of mortgage-decrees.* S. 104 of the Transfer of Property Act is an enabling section, and the rules made by the High Court (Circular Order No. 13, dated 27th April 1892) under the provisions of s. 104 of the Transfer of Property Act do not limit the applicability of the provisions of the Code of Civil Procedure as regards sales held in execution of mortgage-decrees. *Kedar Nath Raut* v. *Kali Charan Ram, I. L. R. 25 Calc. 703,* explained. DAKSHINA MOHAN ROY *v.* BASUMATI DEBI
4 C. W. N. 474

——— **s. 105.**

See EVIDENCE—PAROL EVIDENCE—VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . . L. R. 29 I. A. 138

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.
I. L. R. 24 Calc. 440
2 C. W. N. 292

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— **ss. 105, 106**—*Lease from month to month—Lessee to give his services as family doctor in lieu of rent—Lease for other than agricultural or manufacturing purpose—Termination of lease—Notice to quit, fifteen days', if sufficient.* Where it was agreed that, instead of paying rent, a lessee was to give his services as a family doctor to the lessor, the lease was a lease from month to month, terminable by 15 days' notice expiring with the end of a month of the tenancy. JYOTISH CHANDRA MUKERJI *v.* RAMANATH BHADRA (1904) . 8 C. W. N. 904
I. L. R. 32 Calc. 243

——— **ss. 105, 107.**

See LEASE . . I. L. R. 30 Mad. 322

——— **s. 106.**

See FISHERY, RIGHT OF.
I. L. R. 20 Calc. 446

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
I. L. R. 7 All. 596 ; 899
I. L. R. 17 All. 45
I. L. R. 20 Bom. 759
I. L. R. 22 Bom. 754
2 C. W. N. 383
4 C. W. N. 572 ; 790
8 C. W. N. 454
13 C. W. N. 513

See LEASE . I. L. R. 30 Mad. 109

See ONUS OF PROOF—LANDLORD AND TENANT . . I. R. R. 13 Mad. 60

——— **ss. 106, 107.**

See LEASE . . 11 C. W. N. 1124

——— **ss. 106, 111.**

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 339

——— **ss. 106, 116.**

See NOTICE TO QUIT.
I. L. R. 32 Calc. 128

——— *Lease for other than agricultural or manufacturing purposes—Term of three years—Holding over—Termination—Notice to quit, fifteen days,' if sufficient.* Where immoveable property was leased for other than agricultural or manufacturing purposes for a term of three years and the lessee was allowed to hold over, the lease would be terminable by 15 days' notice expiring with the end of a month of the tenancy. TRAILUKHO NATH ROY *v.* SARAT CHANDRA BANERJEE (1904)
8 C. W. N. 901

——— **s. 107.**

See EVIDENCE—PAROL EVIDENCE VARYING OR CONTRADICTING WRITTEN INSTRUMENTS . . L. R. 29 I. A. 138

See REGISTRATION ACT (III OF 1877), SS. 3 AND 17 . . I. L. R. 27 All. 462

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 107—*concld.*

See REGISTRATION ACT, s. 17, CL. (*d*).
I. L. R. 17 Mad. 275
I. L. R. 21 Mad. 109
I. L. R. 24 Mad. 421

See REGISTRATION ACT, s. 18.
I. L. R. 24 Calc. 20

1. ——— *Hât, lease of—General Clauses Act (I of 1868), s. 2, cl. 5—Immoveable property—Registration Act (III of 1877), s. 17.* A suit was brought for rent of a hât on the basis of a verbal settlement for three years at an annual jumma of R370. The defendants denied the settlement. The first Court found for the plaintiff; but on appeal an objection having been raised by the defendants that the verbal lease was illegal under the Transfer of Property Act, the suit was dismissed. *Held*, that a hât is a benefit arising out of land, and therefore within the definition of "immoveable property" as given in s. 2, cl. 5, of the General Clauses Act (I of 1868). The lease of a hât comes within s. 107 of the Transfer of Property Act (IV of 1882), and can be effected only by a registered instrument. SURENDRA NARAIN SINGH *v.* BHAI LAL THAKUR
I. L. R. 22 Calc. 752

2. ——— *Lease of immoveable property—Kabuliat not to lease. Held*, by BLAIR, *J.* (BANERJI, *J.*, *dubitante*), that a kabuliat, though registered, cannot be considered as a lease of immoveable property by a registered instrument within the meaning of s. 107 of the Transfer of Property Act, 1882. NAND LAL *v.* HANUMAN DAS (1904) . . . . I. L. R. 26 All. 368

3. ——— *Lease of immoveable property—Kabuliat not a lease.* Where a lease of immoveable property is for a period of more than one year, it must be made by means of a duly executed and registered patta; such a lease cannot be created by or proved by the production of a *kabuliat* only. *Nand Lal* v. *Hanuman Das*, *All. Weekly Notes* (*1904*) *46*, referred to. KASHI GIR *v.* JOGENDRO NATH GHOSE (1905)
I. L. R. 27 All. 136

4. ——— *Lien—Charge—Assignment—Lease unregistered when admissible in evidence—Conduct of parties to lease—"Collateral purpose."* S. 107 of the Transfer of Property Act does not say that if the parties without any such instrument (*i.e.*, a lease) conduct themselves towards each other as if they were landlord and tenant and moneys pass from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover that money. In such a case the right to recover arises not upon the lease because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel. ARDESIR BEJONJI *v.* SYED SIRDAR ALI KHAN (1908) . . . . I. L. R. 33 Bom. 610

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 108.

See LANDLORD AND TENANT—BUILDINGS ON LAND, RIGHT TO REMOVE, AND COMPENSATION FOR IMPROVEMENTS.
I. L. R. 22 Calc. 820

See LANDLORD AND TENANT—DAMAGE TO PREMISES LET . I. L. R. 17 Mad. 98
I. L. R. 23 Bom. 15

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.
I. L. R. 24 Calc. 440

See LANDLORD AND TENANT—TRANSFER BY TENANT . I. L. R. 17 Mad. 293
I. L. R. 22 Calc. 494
4 C. W. N. 574

See MINERAL RIGHTS.
I. L. R. 34 Calc. 358

See ONUS OF PROOF—LANDLORD AND TENANT . . I. L. R. 13 Mad. 60

——— s. 108, cl. (c).

See LANDLORD AND TENANT—OBLIGATION OF LANDLORD TO GIVE AND MAINTAIN TENANT IN POSSESSION.
I. L. R. 25 Bom. 269

See LEASE . . I. L. R. 33 Calc. 203

——— cl. (g).

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—GENERAL CASES.
6 C. W. N. 336

——— cls. (h), (o)—

See LANDLORD AND TENANT—PROPERTY IN TREES AND WOOD ON LAND.
I. L. R. 24 Mad. 47
I. L. R. 33 Calc. 54

——— cl. (j).

See LEASE, ASSIGNMENT OF.
I. L. R. 30 Mad. 410

1. ——— *Transfers before passing of Transfer of Property Act.* S. 108 of the Transfer of Property Act does not apply to transfers which took place before the passing of the Act. HARI NATH KARMAKAR *v.* RAJ CHANDRA KARMAKAR
2 C. W. N. 122

2. ——— *Removal of buildings during continuance of lease—Rule of common law in India—Buildings erected by tenant.* Certain land was leased in 1875 to a tenant for twenty years, it being recited in the lease that the tenant took a lease of the land for constructing a building thereon for the purposes of trade. A building was erected, and it was not contended that it was of a kind different from or of a value out of proportion to what was in the contemplation of the parties, when the lease was entered into. At the expiration of the term, the lessor sued to recover the land, but he did not claim that the tenant was no longer at liberty to remove the building (though this had

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 108—*concld.*

not been removed during the continuance of the lease). On its being contended that the tenant was entitled to be paid the value of the building, which he had erected on the land before he could be evicted: *Held*, that it is established that the maxim "*quicquid ædificatur solo, solo cedit*" does not generally apply in India and even in cases to which the English law as such was applicable, the Indian Legislature, by Act XI of 1885, departed from that maxim in the cases specified in s. 2 of that Act (corresponding to s. 51 of the Transfer of Property Act). Both under the Hindu and the Muhammadan law (as well as under the common law of India) a tenant, who erects a building on land let to him, can only remove the building and cannot claim compensation for it on eviction by the landlord. *Mahalatchmi Ammal* v. *Palani Chetti*, *6 Mad. H. C. 245*, discussed. ISMAI KANI ROWTHAN *v.* NIZARALI SAHIB (1904)
I. L. R. 27 Mad. 211

——— s. 111.

See FORFEITURE . **I. L. R. 35 Calc. 807**

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
I. L. R. 7 All. 596; 899
I. L. R. 20 Bom. 759

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.
I. L. R. 20 Bom. 354
I. L. R. 24 Calc. 440

See LANDLORD AND TENANT—NATURE OF TENANCY . **I. L. R. 26 Mad. 488**

See LEASE—CONSTRUCTION.
I. L. R. 17 All. 826

——— cl. (d).

See PATNI TENURE.
I. L. R. 28 Calc. 744

——— cl. (g).

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.
I. L. R. 26 Mad. 15

——— s. 114.

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—IMMOVEABLE PROPERTY . **I. L. R. 17 Mad. 216**

——— *Lease, forfeiture of, for non-payment of rent when period of grace allowed for payment.* A Mulageni chit or permanent lease of 1866 for building purposes provided that the lessee should pay to lessor a rent of R5 per annum by the 24th May of each year; and if any arrears remained due, they should be paid within a further period of three months or by the 24th August, and if not so paid, the Mulageni chit to stand cancelled. In a suit brought for cancelling the lease and recovering the demised premises on the ground amongst others that the rent due on the 24th May 1898 was not paid by the 24th August 1898:—*Held*,

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 114—*contd.*

affirming the decree of the lower Appellate Court, that the condition of forfeiture for non-payment was not penal as a period of grace was allowed and consequently no relief against forfeiture could be given. *Narayana Kamti* v. *Nandu Shetty*, *S. A. No. 89 of 1900* (*unreported*), referred to and followed. The provisions of the Transfer of Property Act do not apply to the lease. Even under s. 114 of the Transfer of Property Act, relief against forfeiture is discretionary and may depend on whether the lease allows a reasonable period of grace. NARAINA NAIKA *v.* VASUDEVA BHATTA (1905)
I. L. R. 28 Mad. 389

——— s. 116.

See BENGAL, NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT s. 21 . . . **9 C. W. N. 705**

See HOLDING OVER **9 C. W. N. 340**

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
I. L. R. 20 Bom. 759

See LANDLORD AND TENANT—HOLDING OVER AFTER TENANCY.

See LIMITATION ACT, 1877, SCH. II, ARTS. 139, 144 . . **I. L. R. 31 Mad. 163**

——— *Forfeiture—Denial of landlord's title—Pleading.* Where the tenants could not obtain possession of the whole area leased to them and on reference to their lessors got no satisfaction from them, and then took a lease of the portion, of which they could not get possession from a stranger, whom they found in possession:—*Held*, that there was no renunciation by the tenants of their character as such so as to entail forfeiture. FARMAN BIBI *v.* TASHA HADDAL HOSAIN (1908) . . . **12 C. W. N. 587**

——— ss. 116, 117.

See LANDLORD AND TENANT—HOLDING OVER AFTER TENANCY.
I. L. R. 28 Calc. 227

——— s. 117.

See BENGAL TENANCY ACT, SCH. III, ART. 2 . . **I. L. R. 27 Calc. 205**

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.
I. L. R. 20 Bom. 354

See LANDLORD AND TENANT—PROPERTY IN TREES AND WOOD ON LAND.
I. L. R. 24 Mad. 47

See LEASE—CONSTRUCTION.
I. L. R. 17 Mad. 98

——— s. 118.

See EXCHANGE . . **11 C. W. N. 342**

See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-URZ . **I. L. R. 7 All. 626**

See TRANSFER OF PROPERTY.
I. L. R. 11 Mad. 459

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 118—*concld.*

1. ——— *Exchange or partition—Transfer, without writing or registration.* Where plaintiff and defendants Nos. 4 to 6 were joint owners of certain property, and plaintiff alone was owner of other property, and by an oral arrangement plaintiff got the former property in its entirety :—*Held*, that the transaction was an exchange under s. 118 of the Transfer of Property Act, and not a partition, and was invalid in not being in writing and registered. *Gyannessa* v. *Mobarakannessa, I. L. R. 25 Calc. 210*, distinguished. RAJ NARAIN *v.* KHOBDARI RAI (1901) **5 C. W. N. 724**

2. ——— *Landlord and Tenant—Transfer of Property Act (IV of 1882), ss. 118, 119—Exchange.* Where a tenant voluntarily surrendered certain leasehold rights, and took from the landlord leasehold rights of some other property :—*Held*, that the transaction was not an exchange. WALIUL HASSAN *v.* GOPAL SARUN NARAIN SINGH (1902) . . **6 C. W. N. 905**

3. ——— *Exchange—Partition.* Some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties. *Held*, that this transaction was not an exchange within the meaning of s. 118 of the Transfer of Property Act, but the completed transaction amounted to a partition which is not required by law to be effected by an instrument in writing. *Firth* v. *Osborne, L. R. 3 Ch. D. 618*, referred to. GYANNESSA *v.* MOBARAKANNESSA **I. L. R. 25 Calc. 210**
2 C. W. N. 91

——— s. 119.

See ante, s. 118 . . **6 C. W. N. 905**

1. ——— *Exchange—Mutual covenants subsequently entered into to support title—Maxim "expressum facit cessare tacitum."* The plaintiff and defendant effected an exchange of land ; subsequently they executed to each other documents, of which that executed by the defendant recited the exchange and continued, "If any claim or dispute arises, I hereby bind myself to settle it." If I do not so get the dispute settled I hereby bind myself to pay an amount not exceeding R4,014-8-6 at the rate of R1-4-0 per kuli of land for lands which go out of your possession. The plaintiff, alleging that he had been ousted from the land conveyed to him, now sued to recover the land which he had given in exchange. *Held*, that the operation of the Transfer of Property Act, s. 119, was excluded by the express covenant in the document quoted above. SUBRAMANIA AYYAR *v.* SAMINATHA AYYAR . **I. L. R. 21 Mad. 69**

2. ——— *Breach of condition constituting cause of action under s. 119 of the Transfer of Property Act, arises at date of final decree on appeal—Limitation Act (XV of 1877), s. 10—Does not apply in suits against assignees for valuable consideration.* A, the trustee of a temple, exchanged certain temple lands with *B* and obtained certain lands from *B* in exchange. *C* brought a suit against *A* to recover the land obtained by *A* in exchange from *B* and possession was decreed in favour of *C*, and *A* was deprived of possession in execution of the decree on 18th December 1890. *A* preferred appeals successively to the District Court and to the High Court and the decree was confirmed on second appeal on the 23rd February 1892. On the 22nd February 1904, *A's* successor brought a suit against *B* to recover the lands got by *B* from *A* :—*Held*, that the dispossession of plaintiffs which entitled him to bring a suit under s. 119 of the Transfer of Property Act must be held to have taken place only when the decree for possession against him was confirmed on second appeal, by the High Court. *Held*, further, that s. 10 of the Limitation Act did not apply to the suit. The section proceeds upon the well-known distinction between transfers for valuable consideration and voluntary transfers, and the transfer in this case is not the less a transfer for valuable consideration because the consideration subsequently failed. S. 10 does not deprive transferees for valuable consideration of the benefits of the Statute. *Bassu Kuar* v. *Dhum Singh, I. L. R. 11 All. 47*, followed. *Hanuman Kamat* v. *Hanuman Mandur, I. L. R. 19 Calc. 123, Tulsiram* v. *Murlidhar, I. L. R. 26 Bom. 750*, distinguished. RAJAGOPALAN *v.* KASIVASI SOMASUNDARA THAMBIRAN (1907) **I. L. R. 30 Mad. 316**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 119—*concld.*

——— ss. 122, 123.

See GIFT . . **I. L. R. 20 All. 392**

——— *Gift of immoveable property—Acceptance of the gift—Registration of the deed subsequent to acceptance—Remand—Examination of witness on commission—Practice.* A gift of immoveable property duly made and accepted is not invalid merely because the registration of the deed of gift took place after the death of the donor. *Nand Kishore Lal* v. *Suraj Prasad, I. L. R. 20 All. 392*, followed. On registration the deed of gift would operate as from the date of execution. On remand by the High Court for the determination of a certain issue the District Court sent down the case to the first Court in order that the evidence might be taken then. The evidence of the plaintiff was taken on commission. *Held*, that the defendant was in no wise aggrieved by the procedure followed. KHASHABA BIN MANSING *v.* CHANDRABHAGABAI (1908) **I. L. R. 32 Bom. 441**

——— s. 123.

See ASSIGNMENT . **10 C. W. N. 717 ; 755**

See ATTACHMENT—SUBJECTS OF ATTACHMENT—ANNUITY OR PENSION. **I. L. R. 6 All. 634**

See GIFT . . **I. L. R. 19 Mad. 439**

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 123—*concld.*

See HINDU LAW—GIFT—REQUISITES FOR GIFT . . **I. L. R. 25 All. 358**

See HINDU LAW—MAINTENANCE. **10 C. W. N. 1074**

See MAHOMEDAN LAW—GIFT. **I. L. R. 24 Mad. 513**

1. ——— *Hindu law—Gift—Delivery of possession—Immoveable and moveable property.* Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property, that law has been abrogated by s. 123 of the Transfer of Property Act. The first paragraph of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Semble:* The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer. DHARMODAS DAS *v.* NISTARINI DASI . . **I. L. R. 14 Calc. 446**

BAI RAMBAI *v.* BAI MANI **I. L. R. 23 Bom. 234**

2. ——— *Registration Act (II of 1887), s. 35—Gift, if must be registered by donor—Death of donor—Admission of execution by representative—Gift to wife—Admission by wife.* It is not necessary for the validity of a deed of gift that it should be registered by the donor himself. Where a Hindu executed a deed of gift in favour of his wife and died and the deed was subsequently registered at the instance of the widow :—*Held*, that it was a valid deed of gift within the provisions of s. 123 of the Transfer of Property Act. The widow being entitled in the circumstances of the case to letters of administration to the estate of the donor was *primâ facie* qualified to admit execution of the document as his "representative" within the meaning of s. 35 of the Registration Act, the fact that she herself was the donee under the document being immaterial. *Nand Kishore Lal* v. *Suraj Prasad, I. L. R. 20 All. 392*, and *Pokran* v. *Kunhammed, I. L. R. 23 Mad. 580*, referred to. BHABATOSH BANERJEE *v.* SHAIKH SOLEMAN (1906) **I. L. R. 33 Calc. 584 s.c. 10 C. W. N. 717**

3. ——— *Gift—Registered deed of gift unaccompanied by delivery of possession.* A registered deed of gift, unaccompanied by delivery of possession, is valid by virtue of the provisions of s. 123 of the Transfer of Property Act. *Dharmodas Dass* v. *Nistarini Dasi, I. L. R. 14 Calc. 446 ; Bai Rambai* v. *Bai Mani, I.L. R. 23 Bom. 234* and *Puhl Chand* v. *Lakkhu, I. L. R. 25 All. 358*, followed. BALBHADRA *v.* BHOWANI (1907) . . . . **I. L. R. 34 Calc. 853**

——— ss. 123 and 129.

See HINDU LAW—GIFT—REQUISITES FOR GIFT . . **I. L. R. 16 Calc. 446**
I. L. R. 20 Calc. 464
I. L. R. 23 Bom. 234

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— ss. 123, 129—*concld.*

See MAHOMEDAN LAW—GIFT. **I. L. R. 31 Calc. 319**

See REDEMPTION **I. L. R. 28 Bom. 153**

——— s. 127.

See GIFT . . **I. L. R. 20 Mad. 147**

——— s. 130.

See ACTIONABLE CLAIM. **I. L. R. 30 Mad. 235**
I. L. R. 34 Calc. 289

See ASSIGNMENT OF DEBT. **I. L. R. 30 Mad. 75**

——— s. 131.

See LAND REGISTRATION ACT, S. 78. **I. L. R. 23 Calc. 87**

1. ——— *Transfer of debts—Notice of transfer—Assignment of mortgagee—Mortgagor, liability of, to assignee of mortgagee when no notice of assignee given.* An Assignment is perfectly valid, though the notice referred to in s. 131 of the Transfer of Property Act has been given, though the title of the assignee as against third parties not complete until such notice has been given, the object of such notice being the protection of the assignee. S. 131 of the Transfer of Property Act makes no alteration in the law as it obtained in England previous to the passing of that Act and as laid down in the cases cited in the note to *Ryall* v. *Rowles, 2 W. & T. L. C. 777*, the first portion of the section merely fixing the time when the section comes into operation and the latter providing for the protection of the debtor if he deals with the debt before that time. Where, therefore, an assignee of a mortgagee brought a suit on the mortgage against the mortgagor and the mortgagee and no notice of the assignment had been given to the mortgagor under s. 131 of the Transfer of Property Act :—*Held*, that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it. LALA JUGDEO SAHAI *v.* BRIJ BEHARI LAL **I. L. R. 12 Calc. 505**

2. ——— *Decree—Debt.* A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act. A "debt" under that section means an actionable claim, and not a claim which has already passed into a decree. AFZAL *v.* RAM KUMAR BHUDRA . . **I. L. R. 12 Calc. 610**

3. ——— *Transfer of debt—Notice to debtor. Held*, that an assignment by endorsement of a registered bond hypothecating certain crops was not void by reason that notice thereof was not proved to have been given to the obligor, inasmuch as the effects of s. 131 of the Transfer of Property Act was merely to suspend the operation of the assignment up to the time

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 131—*concld.*

when such notice was received; that in this case the assignment would come into operation against the obligor when he became aware of the suit; and the obligor when he became aware of it by the institution of the suit; and that, if he had prior notice and sold the property to *bonâ fide* transferees for value without notice either of the charge created by the bond or the assignment, such transferees would be protected from liability. *Lala Jugdeo Sahai v. Brij Behari Lal, I. L. R., 12 Calc. 505*, referred to. KALKA PRASAD *v.* CHANDAN SINGH . . . . **I. L. R. 10 All. 20**

4. ——— **and s. 135**—*Notice—Assignment of actionable claim—Rights of transferee for value.* *A* sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued for exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff. *Held*, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage. SUBBAMMAL *v.* VENKATARAMA **I. L. R. 10 Mad. 289**

5. ——— *"Debt"—Transfer of a debt—Assignment of decree—Notice of assignment—Civil Procedure Code (Act XIV of 1882), s. 232.* A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act so as to make a transfer thereof void without express notice. When a decree is assigned, a notice given under s. 232 of the Civil Procedure Code is sufficient. *Afzal* v. *Ram Kumar Bhudra, I. L. R. 12 Calc. 610*, followed. DAGDU *v.* VANJI . . . **I. L. R. 24 Bom. 502**

——— s. 132.

See RES JUDICATA—JUDGMENTS ON PRELIMINARY POINTS. **I. L. R. 12 Mad. 500**

——— *Assignment of debt—Notice to debtor of assignment—Service of the summons in suit for debt—Stat. 37 Vict., c. 60, s. 132.* Under s. 132 of the Transfer of Property Act (IV of 1882), the assignee of a debt is under no obligation to give notice of the assignment to the debtor. All that is required is that the debtor shall become aware of it, and it is sufficient if he becomes aware of it on being served with a writ in a suit by the assignee. *Lala Jugdeo Sahai* v. *Brij Behari Lal, I. L. R. 12 Calc. 505; Subbammal* v. *Venkatarama, I. L. R. 10 Mad. 289;* and *Kalka Prasad* v. *Chandan Singh, I. L. R. 10 All. 20*, followed. RAGHO *v.* NARAIN . . . . **I. L. R. 21 Bom. 60**

——— s. 135.

See LIMITATION ACT, 1877, SCH. II, ART. 120 . . **I. L. R. 15 Mad. 382**

See N.-W. PROVINCES RENT ACT (XII OF 1881), SS. 42, 95 AND 206. **I. L. R. 24 All. 517**

TRANSFER OF PROPERTY ACT (IV OF 1882)—*contd.*

——— s. 135—*contd.*

1. ——— *Transferee of a claim for smaller value—Recovery of full amount of debt.* It is not the object of s. 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor. GRISH CHANDRA *v.* KASHISAURI DEBI . . . . **I. L. R. 13 Calc. 145**

2. ——— *Right of suit—Suit to set aside a document—Actionable claim.* The co-sharers of a Hindu family, one of whom was a minor, owned certain immoveable property in Munshigunge near Dacca. In 1873 a perpetual lease of this property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882 the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to, and for possession of, his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to *A* for R600. *Held*, that *A's* purchase was an actionable claim within the meaning of s. 135 of the Transfer of Property Act. RAJANIKANTH NAG RAI CHOWDHURI *v.* HARI MOHAN GUHA . . **I. L. R. 12 Calc. 470**

3. ——— **and s. 52**—*Sale of immoveable property by person out of possession—Actionable claim.* A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. *A* and *B*, being owners of an 8 annas share of certain immoveable property, sold it under a kobala to *C* and *D*. At the time of the sale *X* and *Y* were in adverse possession of the share. *Held*, that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of Ch. VIII of the Act, specially those of s. 135, were inapplicable. *Semble:* S. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. MUDUN MOHUN DUT *v.* FUTTARUNNISSA . . **I. L. R. 13 Calc. 297**

4. ——— *Transfer of a claim for smaller value—Transferee not entitled to recover more than price paid for claim.* S. 135 (*d*) of the Transfer of Property Act (IV of 1882) means that if a creditor or party having an actionable claim against another has put into Court and has proceeded to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, the mischief or danger of any trafficking or speculation in litigation disappears, and the defendant can suffer no prejudice by any arrangement between the plaintiff and a third person as to who is to enjoy the fruits of the decree, nor is there any probability

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——— **s. 135**—*contd.*

that the process of the Court will be misused. On the other hand, if one who has an actionable claim against another chooses to sell it for less than its actual value, the person who buys embarks more or less in a speculation which can be defeated by payment to him of the price paid for it with interest and incidental expenses. The debtor's right to discharge himself by such payment is not forfeited by his putting the assignee to proof of his case in Court, nor did the Legislature intend that the position of the assignee should be better after suit and decree than before. *Girish Chandra* v. *Kashisauri Debi, I. L. R. 13 Calc. 145*, dissented from. *Chedambara Chetty* v. *Renga K. M. V. Puchaiya Naickar, L. R. 1 I. A. 241 : 13 B. L. R. 509*, and *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee, L. R. 4 I. A. 23 : I. L. R. 2 Calc. 233*, referred to. The assignee, under an instrument dated the 18th December 1885, and in consideration of R5,000 of a share of R10,000 out of R20,000 claimed by his assignors as unpaid dower-debt joined with the assignors in instituting a suit for recovery of the dower-debt on the 22nd December of the same year. *Held*, that the assignee's proceedings were of the nature contemplated by s. 135 of the Transfer of Property Act (IV of 1882), and that he was not entitled to a decree for anything in excess of R5,000, the price paid by him for the R10,000 share of the debt. JANI BEGAM *v.* JAHANGIR KHAN. . . **I. L. R. 9 All. 476**

5. ——— *Actionable claim—Transfer of a claim for amount less than its value—Recovery of full amount of debt.* S. 135 of the Transfer of Property Act does not protect a defendant from payment of the full amount payable under a claim transferred for a sum less than that recoverable under the claim, where the money is recovered by suit after a contest as to the liability of the defendant. *Grish Chandra* v. *Kashisauri Debi, I. L. R. 13 Calc. 145*, followed. KHOSHDEB BISWAS *v.* SATAR MONDOL **I. L. R. 15 Calc. 436**

6. ——— **and ss. 136, 137**—*Apportionment.* *A* sued as assignee of a bond (payable in 1872), hypothecating land in the mofussil. *B*, *A's* assignor, was a vakil practising in the High Court. *B* had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for R3,000 between the same parties after the 1st July 1882 for R4,500. *B* had previously purchased the two bonds at a sale in execution of the decree of the Subordinate Judge's Court at N for R5 each. *A's* assignment from *B* purported to be made to *A* in payment of certain debts owed to him by *B*. No interest has been paid on the bond, and no tender had been made to plaintiff. *Held*, on the evidence, that there was no consideration for the bond sued on or that it had failed. *Per Curiam :* The true construction of s. 136 of the Transfer of Property Act appears to be that the officers mentioned in it habitually exercising their functions in a particular Court are precluded from buying any actionable claim cognizable by the Court. In the absence of evidence showing that *B* practised as a pleader regularly in the Subordinate Court at N, the Court declined to hold that the assignment to him was inoperative altogether. There was, however, the Court held, no doubt that the assignments to him and by him were governed by s. 135, and that, under s. 137, the person to whom a debt is transferred takes it subject to the liabilities to which the transfer was subject at the date of the transfer. Upon the facts of the case *B* was clearly not entitled to recover more than R4,500, whatever might be due on the document. As he was the purchaser of an actionable claim, s. 135 of the Transfer of Property Act applied to him, and he could not recover more than the price he paid and the interest due thereon. There is no foundation for the suggestion that, where two actionable bonds are brought together for R4,500 and only R950 are recovered upon one of them, the assignee is precluded from recovering the difference, but that he must submit to a loss arising from an apportionment. RATHNASAMI *v.* SUBRAMANYA . . . **I. L. R. 11 Mad. 56**

7. ——— *Transfer of actionable claim.* The first paragraph of s. 135 of the Transfer of Property Act has no application to a case in which the debtors deny the existence of the claim altogether, and where the purchaser of the claim has to obtain judgment affirming the claim before any satisfaction is made or tendered. Cl. (*d*) of that section is not limited to cases where the judgment of a Court affirming the claim has been delivered, or where the claim is made clear by evidence, before the sale of the claim. *Grish Chandra* v. *Kashisauri Debi, I. L. R. 13 Calc. 145 ; Khoshdeb Biswas* v. *Satar Mondol, I. L. R. 15 Calc. 436 ;* and *Subbammal* v. *Venkatarama, I. L. R. 10 Mad. 289*, followed. *Jani Begam* v. *Jahangir Khan, I. L. R. 9 All. 476*, dissented from. RAJENDRA NARAIN BAGCHI *v.* WATSON & Co. **I. L. R. 18 Calc. 510**

8. ——— *Assignment for value of a debt—Decree to which the assignee is entitled.* In a suit against a debtor an assignee for value of the debt is precluded by the Transfer of Property Act, s. 135, from recovering more than the price paid by him for the assignment with interest thereon and the incidental expenses of the sale. *Jani Begam* v. *Jahangir Khan, I. L. R. 9 All. 476*, approved. NILKANTA *v.* KRISHNASAMI **I. L. R. 13 Mad. 225**

9. ——— *Transfer of actionable claim—Adjudication on claim.* In a suit upon a hypothecation-bond brought by an assignee for value from the obligee, it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised

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——— s. 135—*contd.*

in it as against an attaching creditor of the obligors. *Held*, that there had been no adjudication on the claim to exclude the rule in the Transfer of Property Act, s. 135, and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree. RAMACHANDRA *v.* VENKATARAMA **I. L. R. 13 Mad. 516**

10. ——— *Actionable claim—Transfer of claim for an amount less than its value—Suit by transferee to enforce claim—Defendant not entitled to plead that terms of transfer were unconscionable.* A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806, his heirs, who were out of possession, executed a deed of assignment to a third person, transferring to him the rights acquired by the mortgagee under that order. At the time of the execution of the deed no step had been taken by the mortgagee or his heirs to bring a suit for declaration of thei title and for possession of the property. A suit for that purpose was brought by the assignee, the defendants being the conditional vendors, and also the assignors under the deed above-mentioned. The latter made no defence, but admitted the justice of the claim, and a decree was passed in favour of the plaintiff against them as well as against the other defendants. *Held*, that the answering defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has in actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor. *Held*, also, that the answering defendants were entitled to the benefit contained in the first paragraph of s. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off theplaintiff's hands by paying to him the price and incidental expenses of the sale with the interest on that price from the day that the plaintiff paid it to the date of its repayment to him. *Jani Begam* v. *Jahangir Khan, I. L. R. 9 All. 476*, followed. *Grish Chandra* v. *Kashisauri Debi, I. L. R. 13 Calc. 145*, and *Khoshdeb Biswas* v. *Satar Mondol, I. L. R. 15 Calc. 436*, dissented from. HAKIM-UN-NISSA *v.* DEONARAIN . **I. L. R. 13 All. 102**

11. ——— *Actionable claim—Mortgage-bond hypothecating immoveable property.* *Per* PETHERAM, *C.J.*, NORRIS, O'KINEALY, and GHOSE, *JJ.* (PRINSEP, *J.*, dissenting).—The right to recover a loan secured by a mortgage of immoveable property is an "actionable claim" within the proviso of s. 135 of the Transfer of Property Act. *Per* PETHERAM, *C.J.*, NORRIS and GHOSE, *JJ.*—Where an actionable claim has been assigned, the debtor may be discharged from all liability by payment to the buyer of the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it; provided that such payment is made at any time before a judgment of a competent Court has been delivered affirming the claim, or before the claim has been made clear by evidence and is ready for judgment; but if such payment is not made before the period mentioned, the assignee is entitled to judgment for the whole debt. *Per* PRINSEP, *J.*—The provisions of s. 135, cl. (*d*), refer to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. *Jani Begam* v. *Jahangir Khan, I. L. R. 9 All. 476*, and *Nilakanta* v. *Krishnasami, I. L. R. 13 Mad. 225*, approved of. *Rajendra Narain Bagchi* v. *Watson & Co., I. L. R. 18 Calc. 510*, referred to. *Per* O'KINEALY, *J.*—Cl. (*d*) of s. 135 refers to circumstances arising before the transfer of the actionable claim, and cls. (*a*), (*b*) and (*c*) refer to circumstances coming into existence at the time of the transfer. MUCHIRAM BARIK *v.* ISHAN CHUNDER CHUCKERBUTTY **I. L. R. 21 Calc. 568**

12. ——— *Mortgage—Actionable claim—Assignment of mortgage—Liability of mortgagor—Steps to be taken by mortgagor to obtain benefit of s. 135.* A mortgage is an actionable claim under s. 135 of the Transfer of Property Act. In order to obtain the benefit of that section, the mortgagor must pay "the price and incidental expenses, etc., with interest" into Court either or before the action. *Muchiram Barik* v. *Ishan Chunder Chuckerbutti, I. L. R. 21 Calc. 568*, followed. Where a mortgagor some months after suit was brought tendered the amount due, on the assignment of the mortgage to the assignee, and the tender was refused and no actual payment was made into Court:—*Held* (by PETHERAM, *C.J.*, NORRIS and O'KINEALY, *JJ.*, affirming the judgment of HILL, *J.*), that, under the circumstances, the mortgagor was not entitled to the benefit of s. 135. RUSSICK LALL PAL *v.* ROMANATH SEN **I. L. R. 21 Calc. 792**

13. ——— *Assignment of mortgagee's rights under his mortgage—Actionable claim.* An assignment of a mortgagee's rights under a mortgage is not an assignment of an "actionable claim" within the meaning of s. 135 of the Transfer of Property Act (IV of 1882). MOTI RAM *v.* JETH MAL . **I. L. R. 16 All. 313**

14. ——— *Actionable claim—Rights of usufructuary mortgagee whose mortgagor has failed to put him in possession of the mortgaged property—Assignment of mortgagee's rights.* The transfer by a usufructuary mortgagee, whose mortgagor has failed to give him possession of the mortgaged property of his rights as such mortgagee against his mortgagor, is a transfer of an actionable claim within the meaning of s. 135 of the Transfer of Property Act (IV of 1882). RANI *v.* AJUDHIA PRASAD . . **I. L. R. 16 All 315**

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——— s. 135—*contd.*

15. ——— *Assignment of an actionable claim—Suit by the assignee—Recovery of the full amount of debt.* *V* owed a sum of R483 to *G*, who assigned the debt to the plaintiff for R200. The plaintiff sued *V* to recover the whole amount. *Held*, that, under s. 135 of the Transfer of Property Act (IV of 1882), the plaintiff was entitled to recover the whole amount of the debt. VISHNU MAHADEV SONAR *v.* DAGADU
I. L. R. 19 Bom. 290

16. ——— *Actionable claim—Mortgage—Transfer of a claim for an amount less than its value—Recovery of amount actually paid with interest and incidental expenses.* Where the debtor without denying the claim offers to pay the purchaser the actual price paid by him with interest and expenses of the sale and merely disputes the amount of these itmes :—*Held*, that such a case does not come under the exception in cl. (*d*) of s. 135 of the Transfer of Property Act and the first paragraph of that section applies. *Held*, also, that it is not necessary to deposit the money in Court in order to gain the benefit of s. 135 of the Transfer of Property Act. DEBENDRA NATH MULLICK *v.* PULIN BEHARY MULLICK
I. L. R. 23 Calc. 713

17. ——— *Actionable claim—Tender.* When the plaintiff, as an assignee of an actionable claim, brought a suit for its enforcement without having previously given a notice to the defendants of his purchase, and on the suit being called on for hearing the latter prayed to be discharged from liability by paying the price paid by the plaintiff in purchasing the same with costs and all incidental expenses and asked for a month's time to pay the money :—*Held*, that the plaintiff was entitled to a decree for the full amount of his claim, and not simply the amount at which he purchased the bond in question with costs and incidental expenses, inasmuch as there was neither any payment before judgment was delivered nor was any tender of payment made at the time. PUNDIT CHARAN SIRKAR *v.* GANGADHAR DAS . . . . **2 C. W. N. 147**

18. ——— *Actionable claim—Assignment of simple mortgage before due date.* The term "actionable cliam," as used in s. 135 of Act IV of 1882, means a claim in respect of which a cause of action has already matured, and which subject to procedure, may be enforced by suit. *Held*, that the assignment for value of a simple mortgage before the due date of the mortgage is not a sale of an actionable claim within the meaning of s. 135 of Act IV of 1882. *Rani* v. *Ajudhia Prasad, I. L. R. 16 All. 315*, referred to and explained. SHIB LALL *v.* AZMAT-ULLAH
I. L. R. 18 All. 265

19. ——— *Mortgage—Actionable claim—Transfer of Property Act, s. 84—Transfer of a claim for an amount less than its value—Recovery of amount actually paid with interest and incidental expenses.* A debtor claiming the benefit of s. 135 of the Transfer of Property Act (IV of 1882) is discharged of his liability if he pays or offers to pay at any time before final judgment the amount actually paid with interest and incidental expenses. *Muchiram Barik* v. *Ishan Chandra Chuckerbutti, I. L. R. 21 Calc. 568*, followed. The amount of interest is governed by s. 84 of the Transfer of Property Act. DEBENDRA NATH MULLICK *v.* PULIN BEHARY MULLICK
I. L. R. 24 Calc. 763

20. ——— and s. 139—*Insolvent Act (Stat. 11 & 12 Vict., c. 21), s. 86—Purchaser of scheduled debts—Right of purchaser to be paid full amount of such debt.* An insolvent, having filed his schedule in April 1881, obtained his personal discharge in September 1881, and on the same day judgment was entered up against him for the amount of his scheduled debts under s. 86 of the Insolvent Act (11 & 12 Vict., c. 21). The schedule contained the names of thirteen creditors. The insolvent afterwards settled with four of them. The remaining nine, whose aggregate claims amounted to R1,180-7-0, sold their claims. Certain assets belonging to the insolvent's estate having subsequently come into the hands of the Official Assignee, the purchasers claimed to be paid the full amount of the scheduled debts which they had bought. It appeared that the debts in question were debts incurred on certain promissory notes passed by the insolvent. The insolvent contended that under s. 135 of the Transfer of Property Act (IV of 1882) the purchasers were only entitled to the amount which they had actually paid for the debts they had bought. *Held*, that they were entitled to be paid the full amount of the scheduled debts. If the debts at the time of purchase were to be regarded as debts in respect of promissory notes, s. 139 of the Transfer of Property Act applied, and if the claim was under the judgment entered up against the insolvent, then clause (*d*) of s. 135 applied. *In the matter of* RUNCHOD KHUSHAL . **I. L. R. 21 Bom. 572**

21. ——— *Assignment of mortgage by mortgagee—Suit by assignee—Payment into Court by defendants (representatives of mortgagor) of price paid to the assignor (mortgagee) without admitting the mortgage or assignment—Interest—Payment in grain—Damdupat.* In a suit by the assignee of a mortgage to recover the amount due on it, the defendants (who were representatives of the mortgagor), without admitting the mortgage, or that anything was due under it, paid into Court the amount which the plaintiff had paid for the assignment with interest and expenses, but said that they did not admit the assignment to the plaintiff or the assignor's right to the mortgage, but that they were willing that the amount should be paid to the plaintiffs if he proved that he was the person entitled to recover the mortgage-debt. *Held*, that the plaintiff was

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——— s. 135—*contd.*

entitled to recover the whole amount legally due on the mortgage, and that s. 135 of the Transfer of Property Act did not apply. Payment into Court under such circumstances was only a conditional tender, and such a conditional tender is not a payment under the section. ANANDRAO BABAJI BARVE *v.* DURGABAI

I. L. R. 22 Bom. 761

22. ——— *Actionable claim—Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree.* *A*, as guardian of the widow and legatee of the depositor, claimed a sum of money in the hands of a Bank, to which *B* asserted an adverse claim. Pending an application by *A* for a succession certificate, *B* sued the Bank and the widow for the money and *A* was joined as a defendant. A decree was passed in 1889, by which it was ordered that the Bank should pay the money to *B* on his giving security to pay it over to *A* on his obtaining the succession certificate. *B* furnished security and received the money in 1892. *A* meanwhile obtained the succession certificate, and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued *B* for the money. *Held*, that the suit was not barred by limitation, and that the plaintiff was entitled to a decree; but that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within Transfer of Property Act, s. 135 (*d*), since, on the true construction of the decree of 1889, all that had been decided was who should hold the money pending the settlement of the rights of the rival claimants. SURYANARAYANA SASTRI *v.* RAMAMURTI PANTULU

I. L. R. 21 Mad. 253

23. ——— *Actionable claim—Person claiming the benefit of s. 135 not obliged to pay before judgment the amount paid by the assignee.* *Held*, that a person who is entitled to claim the benefit of s. 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. *Rani* v. *Ajudhia Prasad, I. L. R. 16 All., 315; Muchiram Barik* v. *Ishan Chander Chuckerbutti, I. L. R. 21 Calc. 568; Jani Begam* v. *Jahangir Khan, I. L. R. 9 All. 476; Hakimunnissa* v *Deonaraln, I. L. R. 13 All. 102;* and *Nilakanta* v *Krishnasami, I. L. R. 13 Mad. 225.* PHUL CHAND *v.* CHHOTE LAL

I. L. R. 20 All. 327

24. ——— *Actionable claim—Sale of Mortgagor's interest in mortgaged property.* The sale by a mortgagor of his interest in the property mortgaged is not the sale of an actionable claim within the meaning of s. 135 of the Transfer of Property Act, 1882. TOTA RAM *v.* LALA

I. L. R. 20 All. 468

25. ——— *Sale of actionable claim—Mortgagee by assignment—Assignee of prior lien.* The assignee of a mortgagee obtained a decree for the principal and interest due under the mortgage, subject to a prior lien of the appellant. The appellant's prior lien had also been acquired by assignment, the consideration for which was proved to have been R575 though it purported to have been a much larger sum. On the appellant contending that s. 135 of the Transfer of Property Act did not apply so as to prevent his claiming a lien for the larger sum:—*Held*, that the appellant was only entitled to a lien for the price paid by him for the assignment. RAMA SASTRI *v* NARASIMHA AYYAR . . **I. L. R. 22 Mad. 301**

26. ——— *"Judgment of a competent Court"—"Actionable claim"—Suit by assignee of a foreign judgment—Consideration smaller than amount of judgment-debt—Decree for whole amount.* The assignee of a judgment for R12,297 passed against the defendant by the Supreme Court of Mauritius sued in a Court in British India to recover the amount of the judgment with interest. Defendant, amongst other defences, contended that the transfer was not supported by consideration; and the Subordinate Judge, finding as a fact that only R5,500 had been paid therefor, held that the foreign judgment was an actionable claim within the meaning of s. 135 of the Transfer of Property Act and decreed in plaintiff's favour for that amount only, with interest. On appeals being preferred to the High Court:—*Held*, that the plaintiff was entitled to recover the whole amount of the judgment. *Semble:* The word "judgment" in cl. (*d*) of s. 135 of the Transfer of Property Act includes a foreign judgment. VYTHILINGA PADAYACHI *v* SITHARAM AYYAR

I. L. R. 23 Mad. 449

27. ——— **s. 135 (b)**—*Exception not applicable, where debt not the whole consideration—Will, construction of—"Labham," meaning of—Probate and Administration Act (V of 1881), ss. 128, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of, to resort to general assets.* The word "Labham" is generi: and covers different kind of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator. The exception in paragraph (*b*) of s. 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies the legatee is entitled to resort to the general assets on failure of the source intended will not

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TRANSFER OF PROPERTY ACT (IV OF 1882)—*concld.*

——— s. 135—*concld.*

apply where there are directions to the contrary by the testator. Under the English law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins* v. *Smith, 1 Drew. & Sm. 204*, approved and followed. *Lord Londesborough* v. *Somerville, 19 Beav. 295*, approved and followed. The same is the law in India and the absence of a distinct provision in ss. 128, 130 and 131 of the Probate and Administration Act with respect to interest on such legacies does not imply an intention to disallow interest in such cases. CHINNAM RAJAMANNAR *v.* TADIKONDA RAMACHENDRA RAO (1905) **I. L. R. 29 Mad. 155**

1. ——— **s. 136**—*Purchase of elephant with authority to recover the same from a stranger.* The owner of certain land, in consideration of a sum of money, transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had brought an actionable claim within the meaning of s. 136 of the Transfer of Property Act, 1882. *Held*, that the section was not applicable. RAMAKRISHNA *v.* KURIKAL . **I. L. R. 11 Mad. 445**

2. ——— *Purchase of actionable claim by officer of Court—Jurisdiction, meaning of term.* S. 136 of the Transfer of Property Act, 1882, provides that no officer connected with a Court of Justice can buy an actionable claim falling under the jurisdiction of the Court in which such officer exercises his functions. The plaintiff, an officer in a District Court, having purchased the rights of the mortgagee in a bond, sued to recover R2,225 due upon it in the Court of the District Munsif. *Held*, that, as the claim did not fall under the immediate jurisdiction of the District Court, s. 136 was not applicable. SINGARACHARLU *v.* SIVABAI **I. L. R. 11 Mad. 498**

TRANSFER OF PROPERTY AMENDMENT ACT (III OF 1885).

——— s. 3.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER.
I. L. R. 19 Calc. 623

TRANSFER OF TENURE.

——— recognition of, by landlord—

See LANDLORD AND TENANT.
I. L. R. 34 Calc. 902

TRANSFER OF TITLE.

See SALE CERTIFICATE.
I. L. R. 35 Calc. 614

TRANSLATION.

See COPYRIGHT . **I. L. R. 14 Bom. 586**
I. L. R. 19 Bom. 557

TRANSPORTATION.

See SENTENCE—TRANSPORTATION.

——— absence by reason of—

See LIMITATION ACT, 1877, s. 7.
1 B. L. R. S. N. 25

TRANS-SHIPMENT PERMIT.

See SEA CUSTOMS ACT, s. 128.
I. L. R. 4 Bom. 447

TREASON.

See WAGING WAR AGAINST THE QUEEN.
7 B. L. R. 63

TREASURE TROVE.

See TREASURE TROVE ACT.

1. ——— **Beng. Reg. V of 1817**—*Hidden treasure—Duty of finder of hidden treasure—Rights of finder, zamindar, and Government.* Some persons, while digging a field in certain zamindari found an earthen pot containing money. The finder and the zamindar both claimed to be entitled to the treasure, but the provisions of Regulation V of 1817, with regard to the finding of hidden treasure, were not complied with by them, and on this ground the Judge *held* they were not entitled to it. The Government claimed the money on the ground that the provisions of the Regulation had not been complied with, and it was made over to the Collector, an appeal to the High Court being dismissed. *In re* UMA CHARAN BANERJEE **7 B. L. R. Ap. 3**

S.C. OMA CHURN BANERJEE *v.* COLLECTOR OF HOOGHLY . . . . . **15 W. R. 525**

2. ——— **ss. 6 and 2**—*Valuable property—Ornament.* The owner of the house where an ornament has been found concealed may, under s. 6, Regulation V of 1817, retain possession of it as a "valuable property" under s. 2 if no one else has substantiated any claim thereto. PREM MOYEE BEWAH *v.* NOBIN CHUNDER CHOWDHRY **4 W. R. Mis. 8**

3. ——— **Mad. Reg. XI of 1832**—*Right to idols discovered—Right of owner of property—Right of trespasser—Omission to give notice to authorities.* Certain idols and vessels of copper were discovered accidentally by one Shaik Mira and his brother, while digging for stones, in a masonry building underneath the ground in a rather elevated part of the bed of the tank of Anandur which belongs to the zamindari of Shivaganga. No intimation of the discovery was given by the finders to any public authority, but the Subordinate Magistrate, being informed of it by the police, proceeded to the spot and recovered the idols on the third or fourth day after they were found. They were then sent by the Magistracy to the Court of the Principal Sudder

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TREASURE TROVE—*concld.*

Ameen to Madura to be dealt with under the provisions of Regulation XI of 1832. Proclamation inviting claimants was made and petitions asking for possession of the idols were presented by three parties—first, by the Rani of Shivaganga, on the ground that she was trustee of the devastanams on her estate, on which the idols had been found; second, by the Stanikam of a temple in the village of Anandur and third, by the finder. The Principal Sudder Ameen adjudged the idols to be the property of the Rani, and directed that they should be delivered to her. The finder appealed to the Civil Court, which reversed the decision of the Principal Sudder Ameen, and directed delivery to the appellant. Against this order the Rani appealed to the High Court on the grounds—first, that Regulation XI of 1832 only applies to cases in which the ownership of the property is undiscovered, and that, in the present case, the Rani was presumably the owner of the property found; second, that a trespasser could not benefit by the finding. *Held*, that the Rani had no title to what had been hidden in former times in the soil now belonging to her; that it had been found that these idols were hidden in a stone chamber specially appropriated to that purpose, and that she could not therefore claim a title as owner. As to the objection that the finder, being a trespasser, could not benefit:—*Held*, that it was unnecessary to consider this objection unless the Rani had some right or title to the treasure, the same as she had in the soil of the tank; that she had not such right, and therefore that the contention as to the right to the property found lay between the finder and the State, which had made no claim. An objection, not before taken, was alleged to be argued at the hearing, *viz.*, that the formalities prescribed by the Regulation had not been complied with. *Held*, that, though immediate notice had not been given by the finder, the property was within three or four days of its discovery in the hands of the authorities, who might be said therefore to have supplied the necessary notice. KATTAMA NATCHIAR *v.* MUHAMMAD MIRA RAVUTAN **7 Mad. 150**

TREASURE TROVE ACT (VI OF 1878).

See TREASURE TROVE.

_____ *Right of a talukhdar in Gujarat to treasure trove—Rights of Government—Criminal Procedure Code, 1882, ss. 523 and 524—Property placed at the disposal of Government.* A bag containing R248-2-0 and a gold ring was found buried in a field under circumstances which created suspicion of the commission of an offence. The District Magistrate called for claimants to come forward under s. 523 of the Code of Criminal Procedure (Act X of 1882). Thereupon the plaintiff put in his claim, alleging that, as talukhdar and owner of the soil in which the property was found, he was entitled to the property. His claim was rejected, and an order was passed under s. 524 of the Code placing the property at the disposal of Government. The talukhdar then sued the Secretary of State for India in Council to recover the property in dispute. The Joint Judge awarded the claim. *Held*, reversing the decree of the lower Court, that, in the absence of any evidence to prove the talukhdar's right to treasure trove either by a grant or prescription, the property belonged to Government, the Indian Treasure Trove Act (VI of 1878) being inapplicable, as no notice was given by the finder, nor were any proceedings taken under it. SECRETARY OF STATE FOR INDIA *v.* VAKTSANGJI MEGHRAJJI **I. L. R. 19 Bom. 668**

TREASURE TROVE ACT (VI OF 1878) —*concld.*

_____ **s. 3**—*Property not hidden is not treasure trove and belongs to the owner of the land, on which it is found.* S. 3 of the Treasure Trove Act defines treasure trove as anything of value hidden in the soil or in anything affixed thereto. Property not hidden is not treasure trove and is not governed by the provisions of the Act. Unclaimed articles not found hidden are the property of the person on whose land they are found, unless they are found in a public place, in which case they belong to the finder. Under the English law the possession of land carries with it possession of everything which is attached to or under that land and in the absence of a better title the right to possess it also, except in the case of articles found in a public place. This is also the law in India. In England, where the article is hidden, the fact of its being so hidden is taken to show that the owner did not intend to abandon it, and when it is subsequently found hidden, and the owner is not forthcoming, the law gives it as *bonum vacuum* to the Crown. HAMPI SRI VIRU PAKSHA SWAMI TEMPLE *v.* LAMBANI GOLYA (1908) **I. L. R. 31 Mad. 397**

TREATY.

See NATIVE STATE.
I. L. R. 35 Calc. 478

1. _____ **Tenure of territory in Bombay.** The nature and results of Governor Aungier's Convention stated, and the origin of "pension and tax" in Bombay traced. Treaty of the 23rd June 1661 between Charles II and the King of Portugal considered. The treaty in 1664-65 by Mr. Humphry Cook with the Viceroy of Goa was entered into without authorization by the Crown of England or the Crown of Portugal, was not ratified by either, was expressly repudiated by the former, and never was of any force. *Doe d. De Silveira* v. *Texeira, 2 Mor. Dig. 250*, observed upon. NAOROJI BERAMJI *v.* ROGERS . . . **4 Bom. O. C. 1**

2. _____ **Cession of Bombay and Salsette to Portuguese.** The treaty made between Sultan Bahadur of Gujrat and the King of Portugal on the cession of Bassein and its dependencies (including Bombay and Salsette) to the Portuguese referred to. SECRETARY OF STATE FOR INDIA *v.* BOMBAY LANDING AND SHIPPING COMPANY **5 Bom. O. C. 23**

See LOPES *v.* LOPES . . **5 Bom. O. C. 172**

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TREATY—*concld.*

3 ——— **Money settled upon members of Royal Family of Oudh and their heirs**—*Perpetual pensions by payments arranged between sovereign powers—Construction of the word "issue," as used in a treaty between them, and in subsequent correspondence.* An arrangement between two sovereign powers, *viz.*, the King of Oudh and the East India Company, whereby members of the Royal Family of Oudh had secured to them and to their issue pensions in perpetuity, although a settlement of pensions in perpetuity could not, under the Mahomedan law, be validly made by a private individual, took effect as a contract or treaty between the powers. *Held*, on the construction of a treaty made in 1838 between the King of Oudh and the East India Company, that it was the intention of the King thereby to provide pensions for certain members of the Royal Family in perpetuity; that if any of the pensioners should die without issue, his or her pension should revert to the King; that the words "heirs" and "issue" were used as convertible or equivalent terms; and that they meant persons who would be heirs according to Mahomedan law. *Held*, also, that the King intended in 1842 to provide for the ancestress of the plaintiffs an additional pension of the same kind as the pension which he had provided for her in 1838; and that, according to the letter written by the King in that year to the Government of India, after her death, if she should have left issue, the additional pension was to be payable to such of her issue as should be also her heirs, according to the rules of the Mahomedan Law of Inheritance. MARIAM BEGUM *v.* MIRZA . WAZIR BEGUM *v.* MIRZA
I. L. R. 17 Calc. 234
L. R. 16 I. A. 175

TREES.

See BHAGDARI AND NARWADARI ACT, s. 3.
I. L. R. 31 Bom. 183

See BOMBAY REVENUE JURISDICTION ACT, s. 4 . I. L. R. 18 Bom. 319

See INJUNCTION—SPECIAL CASES—CUTTING TREES.

See LAND ACQUISITION ACT (I OF 1894), ss.. 3 (*a*), 23 (*2*).
I. L. R. 30 Mad. 151

See LANDLORD AND TENANT.
. I. L. R. 29 All. 484
I. L. R. 30 All. 134

See LANDLORD AND TENANT—PROPERTY IN TREES AND WOOD ON LAND.

See LIMITATION ACT, 1877, s. 28 (1871, s. 29) . . I. L. R. 3 All. 435

See LIMITATION ACT, SCH. II, ART. 144—IMMOVEABLE PROPERTY 2 Agra 300
4 N. W. 167
I. L. R. 16 Bom. 353
I. L. R. 19 Bom. 207

See OWNERSHIP, PRESUMPTION OF.
22 W. R. 405
I. L. R. 16 Bom. 547

TREES—*contd.*

See PARTITION—MISCELLANEOUS CASES.
I. L. R. 23 All. 291

See POSSESSION—EVIDENCE OF POSSESSION . . I. L. R. 24 All. 294

See PRESCRIPTION—EASEMENTS—TREES.
I. L. R. 19 Bom. 420.

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—MOVEABLE PROPERTY.
3 Mad. 237
24 W. R. 394
I. L. R. 3 All. 168
I. L. R. 5 All. 564

——— **document giving right to cut and enjoy**—

See REGISTRATION ACT, 1877, s. 17, cl. (*d*) . . I. L. R. 20 Mad. 58

——— **liability for cutting**—

See MASTER AND SERVANT.
I. L. R. 23 Calc. 922

——— **order to cut down**—

See NUISANCE—UNDER CRIMINAL PROCEDURE CODES 5 B. L. R. 131

——— **removal of, suit for**—

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS—N.-W. PROVINCES . . I. L. R. 23 All. 486
2 Agra, Part II, 183 : I. L. R. 8 All. 446
I. L. R. 9 All. 35
I. L. R. 20 All. 519

See LIMITATION ACT, 1877, SCH. II, ART. 32 . . I. L. R 8 All. 446
I. L. R. 10 All. 634
I. L. R. 20 All. 519
I. L. R. 24 Calc. 160

——— **restriction as to felling**—

See MADRAS RENT RECOVERY ACT, s. 11
I. L. R. 15 Mad. 47

——— **right to cut**—

See FOREST ACT, SS. 75 AND 76.
I. L. R. 18 Bom. 670
I. L. R. 23 Bom. 518

See GRANT—CONSTRUCTION OF GRANTS.
I. L. R. 23 Bom. 518

See PRESCRIPTION—EASEMENTS—TREES.
I. L. R. 19 Bom. 420

——— **value of**—

See LAND ACQUISITION ACT, s. 23.
13 C. W. N. 487

1. ——— **Standing timber**—*Mango tree—Custom of a locality—Registration Act (XX of 1866), s. 3.* By the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses. A mango tree, which is primarily a fruit tree, might not always come within the term "standing timber" used in the definition of immoveable property in s. 3 of the Indian Registration Act (XX of 1866). But

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TREES—*concld.*

it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses. KRISHNARAO *v.* BABAJI
I. L. R. 24 Bom. 31

2. ——— **Tree-pottah**—*Right to land on which trees stand—Tree-pottahdars, rights of. Held, per* DAVIES and MOORE, *JJ.*, affirming the judgment of BENSON, *J.* (SUBRAMANIA AYYAR, *J.*, *diss.*), that persons holding a pottah for palmyra trees in Tinnevelly are not *ipso facto* entitled to an ordinary raiyatwari pottah for the land on which the trees stand. *Per* SUBRAMANIA AYYAR, *J.*—Land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government, subject to his liability to pay any assessment or assessments which the Government may from time to time be entitled to impose and subject also to all other lawful incidents attaching to a holding of that description. The rights of a tree-pottahdar and the nature of the revenue levied on such pottahdars considered. THEIVU PANDITHAN *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 21 Mad. 433

TRESPASS.

COL.

1. GENERAL CASES . . . 12654
2. HOUSE-TRESPASS . . . 12658

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, 1888, s. 2 I. L. R. 21 Calc. 528

See CIVIL PROCEDURE CODE, 1882, s. 244—QUESTIONS IN EXECUTION OF DECREE.
3 B. L. R. A. C. 413
12 B. L. R. 208 note

See CIVIL PROCEDURE CODE, 1882, s. 424.
I. L. R. 24 Calc. 584

See CONVERSION I. L. R. 22 Mad. 197

See COURT OF WARDS.
12 C. W. N. 1065

See CRIMINAL TRESPASS.

See DAMAGES—SUITS FOR DAMAGES—TORTS . . 8 Bom. A. C. 177
7 N. W. 47
25 W. R. 548
I. L. R. 13 All. 98
I. L. R. 10 All. 198
I. L. R. 36 Calc. 433

See DEBTOR AND CREDITOR.
2 Ind. Jur. O. S. 7

See EXECHTION OF DECREE—LIABILITY FOR WRONGFUL EXECUTION.
3 B. L. R. A. C. 413
12 B. L. R. 208 note

See INJUNCTION—UNDER CIVIL PROCEDURE CODE, 1882,
I. L. R. 22 All. 449

See LIMITATION . 9 C. W. N. 111

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 139, 144
I. L. R. 31 Mad. 163

TRESPASS—*contd.*

See MADRAS FOREST ACT, S. 21.
I. L. R. 12 Mad. 226

See MADRAS POLICE ACT, S. 21.
I. L. R. 17 Mad. 37

See MASTER AND SERVANT.
2 B. L. R. A. C. 227
2 B. L. R. O. C. 140

See MISJOINDER OF PARTIES.
I. L. R. 19 Mad. 335

See RAILWAYS ACT, 1871, S. 2.
I. L. R. 1 Bom. 25

See RECORDER OF MOULMEIN.
6 W. R. Civ. Ref. 4

See RECORDER OF RANGOON.
I. L. R. 20 Calc. 689

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY.
I. L. R. 19 All. 153
I. L. R. 25 Bom. 248
9 C. W. N. 477

See RIOTING . I. L. R. 6 Mad. 245
10 C. L. R. 278
W. R. 1864, Cr. 21

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS—TRESPASS.

See TORT . . 12 C. W. N. 973
I. L. R. 36 Calc. 433
13 C. W. N. 485

See WRONGFUL DISTRAINT.
5 W. R., Act. X, 67
3 B. L. R. A. C. 261

——— **by cattle**—

See CATTLE TRESPASS, AND CATTLE TRESPASS ACTS.

See NUISANCE—UNDER CRIMINAL PROCEDURE CODES . 2 B. L. R. A. Cr. 45
9. B. L. R. Ap. 36

——— **on burial ground**—

See RELIGION, OFFENCES RELATING TO.
I. L. R. 10 Mad. 126
I. L. R. 18 All. 395

——— **on immoveable property**—

See LIMITATION . I. L. R. 36 Calc. 141

1. GENEPAL CASES.

1. ——— **Landlord and tenant**—*Damage to reversionary interests—Right of landlord to sue for damage—English law, non-applicability of.* Many of the tenures in India are in the nature of a partnership, in which he to whom the land belongs participates with the cultivators in the crop. Therefore the law of England, that a landlord who has parted with this possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interests, does not apply to landlords in India. VENKATACHALAM CHETTI *v.* ANDIAPPAN AMBALAM
I. L. R. 2 Mad. 232

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TRESPASS—*contd.*

1. GENERAL CASES.—*contd.*

2. ——— Wrongful distraint of crops —*Distraint without notice—Penal Code, s. 79—Resistance to wrongful distraint.* A zamindar was *held* to be justified in exercising his right of private distraint of crops, if he had served the defaulters with written notices under Act X of 1859, s. 116; and, in such a case, raiyats, who knowingly resisted the distraint, were held to be not protected by the Penal Code, s. 79. But if the zamindar's people enter upon crops with intention of distraining without notice, the raiyat owners are justified in considering such action as trespass. QUEEN *v.* KANHAI SHAHU . . . **23 W. R. Cr. 40**

3. ——— Land taken by Government without formality prescribed by Beng. Reg. I of 1825—*Right of owner to maintain suit against Government for rent.* Lands were occupied by the Government for the purpose of making an embankment without the observance of the formality required by Regulation I of of 1825. *Held*, that the owner of the land was entitled to maintain a suit against Government for the rent of the land during the time he was kept out of possession. JOYNARAIN BOSE *v.* COLLECTOR OF 24-PERGANAS **Marsh. 56**

COLLECTOR OF 24-PERGANAS *v.* JOYNARAIN BOSE . . **W. R. F. B. 18 : 1 Hay 122**

4. ——— Suit to prevent trespass—*Suit to close doors—Cause of action—Possibility of injury.* No suit can lie to close doors opened by a person in his own wall, on the ground of a possibility of his committing trespass on the land of the plaintiff, or of his having actually committed such trespass. It will only lie when the opening of the doors is in itself such an irremediable injury that the plaintiff would not be sufficiently compensated by money damages. GIBBON *v.* ABDUR RAHMAN KHAN . . **3 B. L. R. A. C. 411**

5. ——— Sale for arrears of rent—*Sale under defective notice—Reversal of sale for irregularity.* *A*, a zamindar, sold the right of *B*, his pantidar, for arrears of rent under Regulation VIII of 1819. This sale was subsequently set aside at the suit of *B* for irregularity. *A* then sued *B* for the arrears under Act X of 1859, and *B* pleaded limitation. *Held*, that *A* was not guilty of a trespass in bringing the property to sale under a defective notice, and *A* could not have sued for arrears pending the proceedings to set aside the sale. SWARNAMAYI *v.* SHASHI MUKHI BARMANI **2 B. L. R. P. C. 10**

S.C. SURNOMOYEE *v.* SHOOSHEE MOKHEE BURMONIA . . . . **12 Moo. I. A. 244**
11 W. R. P. C. 5

6. ——— *Suit for arrears of rent for a period during which zamindar had been in possession as purchaser at a sale for arrears of rent afterwards set aside.* In a suit by a zamindar against his patnidars for arrears of patni rent for the years 1294, 1295, and part of 1296, it appeared

TRESPASS—*contd.*

1 GENERAL CASES—*contd.*

that the patnidars had been out of possession during a portion of that period when the zamindar himself had been in possession, having purchased the tenure at the sale held in proceedings instituted by him under the Regulation. It appeared, however, that the sale had been set aside owing to the proceedings having been instituted against the predecessor of the patnidars who was then dead, and thereupon the zamindar gave notice to the patnidars to retake possession, which they accordingly did. During the time he was in possession the zamindar himself collected some of the rent. The lower Court dismissed the claim for rent for the period during which the plaintiff was so in possession on the ground that he was a wrong-doer and trespasser, and that consequently the defendants could not be held liable for rent during that period. *Held*, that this was no reason for refusing the plaintiff a decree for such arrears, as upon the authority of the decision in *Surno Moyee* v. *Shooshee Mokhee Burmonia*, *2 B. L. R. P. C. 10 : 12 Moo. I. A. 244*, the plaintiff could not be treated as a trespasser, and that he was entitled to recover the actual arrears outstanding for the period in question, but not the interest thereon. DHUNPUT SINGH *v.* SARASWATI MISRAIN **I. L. R. 16 Calc. 267**

7. ——— Trespass on burial ground—*Penal Code, s. 297—Trespass by co-owner.* *A*, *B*, *C*, and *D* were co-owners of a plot of land in which they were accustomed to bury their dead. *A* and *B* opened a saw-pit close to the graves of *D's* relatives, but did not disturbed any of the graves. *Held*, that they were wrongly convicted under s. 297 of the Penal Code. *In re* MUHAMMAD HAMIN KHAN . . . . **I. L. R. 3 Mad. 178**

8. ——— Liability for trespass by defendants not actually committing it —*Committee under Act XX of 1863.* *Held*, in a suit under Act XX of 1863, that where the evidence showed that certain acts of trespass by one of the defendants were for the benefit and on behalf of the members of the committee, and were afterwards adopted and taken advantage of by them when they had acquired a full knowledge of those acts, the defandants for whose benefit the acts were done were liable for the trespass. VENKATASA NAIKER *v.* SRINIVASSA CHARIYAR **4 Mad. 410**

9. ——— Court of Wards, powers of—*Mal-administration—Court of Wards Act (Bengal Act IX of 1879)—"Proprietor"—Infant beneficiary, residuary legatee, when "proprietor"—Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1882), s. 424—Notice of suit, whether necessary, where Public Officers are sued in individual capacity or injunction sought—Jurisdiction—Immoveable property—Acquisition by executrix—Trespass under order of higher official.* Thirteen years having elapsed since the death of the testator, and the

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TRESPASS—*contd.*

1. GENERAL CASES—*concld.*

administration by the executrix of his estate, which consisted of immoveable property in Eastern Bengal and Assam, not being complete, and there being a suggestion of mal-administration, the Court of Wards of Eastern Bengal and Assam declared the infant beneficiary a minor under the Act, declared its determination to take the estate under its charge as the property of the minor, and directed that possession be taken of the property on its behalf. Subsequent to this declaration the executrix purchased a house in Calcutta for the estate and out of the assets of the estate. The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection, however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of her protest. On a suit being instituted without notice under s. 424 of the Code of Civil Procedure by the executrix against the officers in their private individual capacity as trespassers, for a declaration of her title and for an injunction :—*Held*, that the Court of Wards can only take possession of the estate of a minor, if he can be said to be its "proprietor" within the meaning of the Court of Wards Act. The residuary legatee does not become "proprietor" until, after administration has been completed, and the residue ascertained and made over to him. The Court of Wards has no power under its Act to override the wishes of testators and proprietors generally. The Court of Wards has no power to determine whether there had been mal-administration by the executrix, and on its own determination to take possession of the property vested in the executrix. Mal-administration by the executrix was no ground for taking possession by the Court of Wards. In the circumstances of the case, possession of the estate really remained with the plaintiff and there was a continuing trespass against which the plaintiff was entitled to relief by way of injunction. S. 424 of the Code of Civil Procedure has no application where public officers are sued not in an admitted official capacity but as individual trespassers, nor so far as a suit seeks for relief by way of injunction. The High Court may entertain an action in respect of immoveable property, provided a portion of such property is within the jurisdiction. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to the portion of the property within those limits. An acquisition of property for the estate, by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate. A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser. GANODA SUNDARY CHAUDHURANI *v.* NALINI RANJAN RAHA (1908)
I. L. R. 36 Calc. 28

TRESPASS—*contd.*

2. HOUSE-TRESPASS.

1. ——— **Breaking open chest in house by inmate of house**—*Penal Code, s. 457.* *T*, being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under s. 457 of the Penal Code. *Held*, that he could not properly be convicted under that section. QUEEN *v.* TASUDUK HOSSEIN . . . . . **6 N. W. 301**

2. ——— **Breaking open door in execution of decree**—*Penal Code, s. 456.* Where the accused persons, execution-creditors, in company with an authorized bailiff, broke open complainant's door before sunrise with intent to distrain his property for which they were convicted on a charge of lurking house-trespass by night or house-breaking by night :—*Held*, that, as they were not guilty of the offence of criminal trespass, there being no finding of any such intent as is required to constitute that offence, and that as criminal trespass is an essential ingredient of either of the offences with which they were charged, the conviction must be quashed. *In the matter of* JOTHARAM DAVAY . . **I. L. R. 2 Mad. 30**

3. ——— **Cattle yard**—*Building used for custody of property—Penal Code, ss. 442, 457.* The Court inclined to hold that a cattle-yard which was originally walled on four sides, and in one side of which, fallen out of repair, there was a gap stopped with a thorn, was a building used as a place for the custody of property, within the meaning of s. 442 of the Penal Code. QUEEN *v.* DULLEE . . . . . **6 N. W. 307**

4. ——— **Entry into house with forged warrant of arrest**—*Penal Code, s. 452.* Where *A* goes with a forged warrant of arrest into a house, and takes away one of the inmates against his will under the authority of such warrant, he is guilty of house-trespass, by putting such person in fear of wrongful restraint, under s. 452 of the Penal Code. QUEEN *v.* NUNDMOHUN SIRKAR
12 W. R Cr. 33

5. ——— **Right of wife to enter husband's house**—*Wife excommunicated from caste.* Excommunication from caste *per se* does not deprive a Hindu wife of her right of joint enjoyment of her husband's house, so as to make her a trespasser if she enters the house to claim maintenance. QUEEN *v.* MARIMUTTU . **I. L. R. 4 Mad. 243**

6. ——— **Entering lock-up with intent to convey food to prisoner**—*Penal Code, s. 442.* Where a person entered into a havalat with intent to convey or attempt to convey food to a prisoner under trial, such act on his part did not amount to house-trespass within the meaning of s. 442 of the Penal Code. EMPRESS *v.* LALAI
I. L. R. 2 All. 301

7. ——— **Search for arms by Magistrate, whether executive or judicial act**—*Bond —fides Protection of Judicial Officers A (XVIII of 1850), s. 1—Statutory powers of Executive*

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TRESPASS—*contd.*

2. HOUSE-TRESPASS—*contd.*

Officers, how to be exercised—Indian Arms Act (XI of 1878), s. 25—Provision "having first recorded grounds of his belief," whether mandatory or directory—Criminal Procedure Code (Act V of 1898), ss. 94, 96, 105, 106, 165—Search-warrant—Magistrate as "Court"—Search by police officer—Police Act (V of 1861), s. 4—Powers of District Magistrate—Letters Patent of 1865, s. 20—Extraordinary Original Civil Jurisdiction of High Court. For some time previous to the 27th April 1907, there had been a considerable tension of feeling between the Hindus and Mahomedans at Jamalpur, in the District of Mymensingh. On the 27th April a Mahomedan was shot by a Hindu, and a serious conflict was narrowly averted by the Sub-divisional Officer and the District Superintendent of Police. On the arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in certain cutcheries belonging to Hindu zamindars. In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries. Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open and search made. On an action instituted against the District Magistrate for trespass, it was found as a fact that he had acted with perfect *bonâ fides*:—*Held* (BRETT, *J.* dissenting), that according to the principles of equity, justice and good conscience, the search constituted an actionable trespass unless warranted by some Statute, and in the circumstances of the case, the search was warranted by no Statute. When Executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act which created them. The search being a general search for arms, was not warranted by s. 25 of the Arms Act of 1878, which required that before making the search, the Magistrate should first record the grounds of his belief, in terms of the section which was not done. The words "having first recorded the grounds of his belief" in s. 25 are mandatory. The search was not warranted by s. 105 of the Criminal Procedure Code, as, in the circumstances of the case, the Magistrate was not acting as a "Court." The search was not warranted by s. 165 of the Criminal Procedure Code: that section does not apply to a Magistrate. *Semble:* A general search for arms would be governed rather by the provisions of the Arms Act, than by the provisions of the Code of Criminal Procedure. The search must be taken to have been conducted by the Magistrate in his *executive* and not in his *judicial* capacity, and hence he was not protected by Act XVIII of 1850. *Per* HARINGTON and BRETT, *JJ.*—The issue of a search-warrant by a competent Magistrate is a judicial act. *Hope* v. *Evered, L. R. 17 Q. B. D. 338, Mahomed Jackariah & Co.* v. *Ahmed Mahomed, I. L. R. 15 Calc. 109,* and *In re Lakhmidas Naranji, 5 Bom. L. R. 980,* referred to. CLARKE *v.* BROJENDRA KISHORE ROY CHOWDHRY (1909)

I. L. R. 36 Calc. 433

But see the Privy Council judgment in the same case, on appeal, reported in

I. L. R. 39 Calc. 953

TRESPASSER.

See CO-SHARERS—ENJOYMENT OF JOINT PROPERTY—ERECTION ON BUILDINGS.
I. L. R. 18 All. 361

See EJECTMENT **I. L. R. 33 Bom. 499**

See MESNE PROFITS—RIGHT TO AND LIABILITY FOR.
I. L. R. 24 All. 376
I. L. R. 19 Mad. 145

MODE OF ASSESSMENT AND CALCULATION . **I. L. R. 23 All. 252**

See POSSESSION—NATURE OF POSSESSION
I. L. R. 15 Bom. 238

See TITLE—EVIDENCE AND PROOF OF TITLE . . **I. L. R. 19 Bom. 828**

See TRESPASS **I. L. R. 36 Calc. 28 ; 433**

——— **dispossession by—**

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
7 N. W. 228 ; 257 ; 259 ; 318
I. L. R. 19 All. 34

See TRANSFER OF PROPERTY ACT, s. 68.
I. L. R. 19 All. 191

——— **effect of settlement with—**

See SERVICE TENURE.
I. L. R. 18 Bom. 22

——— **suit against—**

See DECREE—FORM OF DECREE—TRESPASSER . . . **4 C. W. N. 105**

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
I. L. R. 1 All. 448
I. L. R. 16 All. 325
I. L. R. 19 All. 452
I. L. R. 20 All. 520

See LANDLORD AND TENANT—EJECTMENT—GENERALLY . **I. L. R. 19 Bom. 138**

See MESNE PROFITS—MODE OF ASSESSMENT AND CALCULATION.
I. L. R. 1 All. 518
I. L. R. 20 All. 208

See ONUS OF PROOF—EJECTMENT.
I. L. R. 19 Bom. 803

See RIGHT OF SUIT—CHARITIES AND TRUSTS . . **I. L. R. 18 Bom. 721**

See WRONGFUL POSSESSION.
I. L. R. 4 Calc. 566

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TRESPASSER—*concld.*

——— **suit by—**

See SPECIFIC RELIEF ACT, s. 9.
I. L. R. 15 Bom., 685

——— **Mandatory injunction**—*Removal of encroachment.* A mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him. NAVROJI MANEKJI WADIA *a.* DASTUR KHARSEDJI MANCHERJI (1904) . . **I. L. R. 28 Bom. 20**

TRIAL.

See JURY, TRIAL BY.

See CRIMINAL PROCEDURE CODE, 1898, s. 350 (*a*) . . **I. L. R. 32 Mad. 218**

——— **commencement of—**

See WITNESS—CRIMINAL CASES—SUMMONING WITNESSES.
I. L. R. 25 Calc. 863

——— **difference in the modes of—**

See CRIMINAL PROCEDURE CODE, 1898, s. 269 . . **I. L. R. 33 Bom. 423**

TRIBUTARY MAHALS OF ORISSA.

——— *Jurisdiction—Mohurbhunj—Execution—Decree of Court in British India—Transmission of decree for execution by Court at Mohurbhunj—Civil Procedure Code (Act XIV of 1882), ss. 229A, 229B.* There being no notification to that effect in the Gazette under ss. 229A and 229B, Civil Procedure Code, a Civil Court in British India has no jurisdiction to order its decree to be sent for execution by the Court at Mohurbhunj. *Kasturchand Gajur* v. *Parshe Mahar, I. L. R. 12 Bom. 230*, referred to. The Tributary Mahals of Orissa, of which Mohurbhunj is one, do not form part of British India. KHATOO SAHOO *v.* RATAN MAHANTI (1902)
I. L. R. 29 Calc. 400
s. c. 6 C. W. N. 573

TROVER.

See HUNDI—LIABILITY ON.
I. L. R. 18 Bom. 570

See SMALL CAUSE COURT, PRESIDENCY TOWNS—JURISDICTION—TROVER.
I. L. R. 12 Bom. 573

——— **suit in—**

See HUSBAND AND WIFE.
I. L. R. 1 Calc. 285

1. ———**Right of stoppage in transitu**—*Contract for goods free on board—Insolvency.* Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was

TROVER—*contd.*

duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, *held* by the Privy Council (reversing the decision of the Supreme Court at Bombay), that trover would not lie for the goods, for that on their delivery on board the vessel they were no longer *in transitu* so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill the receipts of the mate were not essential to the transaction between the seller and purchaser. FRAMJEE COWASJEE *v.* THOMPSON
3 Moo. I. A. 422

2. ——— **Conversion**—*Assignment of goods in certain warehouses on advances—Seizure of goods—Advance and assignment not simultaneous—Incomplete assignment.* A bill of sale and assignment of goods as described as being in certain warehouses belonging to *A* was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of *A*, who had seized the goods, it appeared in evidence that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards: whereupon the Judges of the Supreme Court held that there had been no valid transfer and consequently no conversion, and gave an interlocutory judgment in accordance with such view. *Held*, by the Judicial Committee on appeal from that decision, and from an order refusing a new trial, that the decision was not justified by the evidence, and must be reversed and a new trial granted. MUTTYLOLL SEAL *v.* O'DOWDA
4 Moo. I. A. 382

3. ——— **Suit to recover notes lost by gambling**—*Act XXI of 1848—Illegal consideration—Bonâ fide holder for value—Trust for specific purpose.* The plaintiff, the manager of the Oriental Bank, placed in the hands of *D*, a broker, thirteen Government Currency notes for R1,000 each on *D's* representation that there was some company's paper at a certain place which he could procure at a more reasonable rate than in the Calcutta market, if the money were given him to purchase it. If the Company's paper was not procurable, the notes were to be returned to the plaintiff. *D* did not go to the place stipulated to purchase the Company's paper, but, meeting the defendant and others, he went into a house hired for gambling, and lost at cards and paid away to the defendant some of the notes he had received from the plaintiff. The plaintiff now sued the defendant to recover the notes so entrusted to *D*, on the allegation that they had been entrusted by him to *D* for a specific purpose, and that the defendant was not a *bonâ fide* holder for value. He (the plaintiff) stated in evidence

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TROVER—*concld.*

"that if the paper had been bought, he would either have taken the papers at the most favourable market price for the bank, or have sold them and given *D* the profit." *Held*, that the plaintiff was entitled to recover. The defendant was not a *bonâ fide* holder for value. *Per* PAUL, *J.*, in the Court below, and *per* NORMAN, *J.*, on appeal.—The notes were especially entrusted to *D* for the purchase of the Company's paper. *Per* PHEAR, *J.*—Upon the case put forward by the plaintiff, the transaction was a short loan, and not a bailment, and did not bear the character of a trust. But upon the evidence the notes were the property of the bank, and remained so in *D's* hands, and therefore the plaintiff was entitled to recover on behalf of the bank. BULDEO NARAIN *v.* SCRYMGEOUR . . . . . **6 B. L. R. 581**

TRUST.

See ADMINISTRATION . **9 C. W. N. 239**

See CIVIL PROCEDURE CODE, 1882, S. 539.

See DEED—CONSTRUCTION.
I. L. R. 20 Bom. 310

See ECCLESIASTICAL TRUST.
2 Ind. Jur. O. S. 12

See ENGLISH LAW—TRUST, DECLARATION OF . . . . . **4 Mad. 460**

See EXPRESS TRUST.
I. L. R. 31 Bom. 418

See HINDU LAW—ENDOWMENT—ALIENATION OF ENDOWED PROPERTY.
I. L. R. 8 Mad. 266

See HINDU LAW—ENDOWMENT—CREATION OF ENDOWMENT.
1 Ind. Jur. N. S. 14
14 B. L. R. Ap. 175
I. L. R. 4 Calc. 56
I. L. R. 9 Bom. 169
I. L. R. 12 Bom. 247
I. L. R. 10 All. 18
I. L. R. 25 Calc. 112

See HINDU LAW—PARTITION—AGREEMENTS NOT TO PARTITION, ETC.
I. L. R. 6 Calc. 106
I. L. R. 12 Mad. 287

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—PERPETUITIES, TRUSTS, BEQUESTS TO A CLASS AND REMOTENESS.

See JURISDICTION—SUIT FOR LAND—TRUSTS.

See LIMITATION ACT, 1877, S. 10.

See LIMITATION ACT, 1877, SCH. II, ART. 113 (1871, ART. 113)
I. L. R. 2 Calc. 323

See MAHOMEDAN LAW . **9 C. W. N. 625**

See MAHOMEDAN LAW—ENDOWMENT.

See MORTGAGE . . **9 C. W. N. 914**

TRUST—*contd.*

See RELIGIOUS ENDOWMENT.
I. L. R. 30 All. 111

See RES JUDICATA—ESTOPPEL BY JUDGMENT . . **I. L. R. 19 All. 277**
L. R. 24 I. A. 10

See RIGHT OF SUIT—CHARITIES AND TRUSTS.

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—TRUSTS.

See TRUST DEED.

See TRUST PROPERTY.

See TRUSTEE.

See TRUSTEES ACTS.

See TRUSTS ACT.

See WILL—CONSTRUCTION.
I. L. R. 4 Calc. 420
I. L. R. 9 Mad. 325
1 Ind. Jur. O. S. 86
I. L. R. 15 Mad. 424
I. L. R. 31 Mad. 283

See WILL—CONSTRUCTION—CHARITABLE GIFT . . . **6 C. W. N. 321**

——— **breach of—**

See EXECUTOR . **I. L. R. 26 Bom. 301**

——— **constructive—**

See CIVIL PROCEDURE CODE, 1882, SS. 30, 539 . . **10 C. W. N. 866**
I. L. R. 33 Calc. 905

See DEBUTTER **10 C. W. N. 738; 1000**

See ESTOPPEL . . **10 C. W. N. 747**

——— **declaration of—**

See STAMP ACT, 1879, SCH. I, ART. 36.
I. L. R. 12 Mad. 89

——— **deed of—**

See LIMITATION ACT, 1877, S. 10.
I. L. R. 20 Bom. 511

See STAMP ACT, 1879, SCH. I, ART. 54.
I. L. R. 20 Bom. 210

——— **disavowal of—**

See LIMITATION ACT, 1877, SCH. II, ART. 144 (1871, ART. 145)—ADVERSE POSSESSION . . **I. L. R. 1 All. 403**

——— **for benefit of creditors—**

See BILL OF EXCHANGE.
I. L. R. 3 Calc. 174

See DEBTOR AND CREDITOR.
11 Moo. I. A. 317
3 Agra 104, 321
1 Bom. 233
8 Bom. A. C. 245
I. L. R. 7 Bom. 101
I. L. R. 16 Bom. 1
I. L. R. 19 Bom. 12
I. L. R. 20 Mad. 91
I. L. R. 25 Calc. 642

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TRUST—*concld.*

——— for benefit of creditors—*concld.*

See INSOLVENCY ACT (11 AND 12 VICT., C. 21)—

S. 9 . . I. L. R. 26 Bom. 476

SS. 9 AND 24. I. L. R. 26 Bom. 765

——— for specific purpose—

See LIMITATION ACT, XV OF 1877, S. 10 (1871, S. 10).

I. L. R. 4 Calc. 455 ; 897
12 C. L. R. 370
I. L. R. 6 Mad. 402
I. L. R. 14 Bom. 476
I. L. R. 32 Bom. 394

See TROVER . . 6 B. L. R. 581

See WILL . I. L. R. 32 Bom. 214

——— giving power to sell land in mofussil—

See JURISDICTION—SUITS FOR LAND—TRUSTS.

——— instrument of—

See STAMP ACT, 1879, SCH. I, ART. 50.
I. L. R. 15 Mad. 386

——— notice of—

See LIMITATION ACT, 1877, SCH. II, ART. 1834 (1871, ART. 134).
I. L. R. 1 Bom. 269

——— precatory trust—

See WILL—CONSTRUCTION.

I. L. R. 2 All. 55
I. L. R. 4 All. 500
L. R. 9 I. A. 70
I. L. R. 15 Mad. 448

——— revocation of—

See ONUS OF PROOF—TRUST, REVOCATION OF . . . . 10 B. L. R. 19
14 Moo. I. A. 289

——— scheme of management for—

See ENDOWMENT. I. L. R. 21 Calc. 556

——— suit relating to—

See RIGHT OF SUIT—CHARITIES AND TRUSTS.

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—TRUSTS.

——— suit to set aside—

See LIMITATION ACT, SCH. II, 1877, ART. 120 . . I. L. R. 20 Bom. 511

——— to perform Muktad ceremonies—

See MUKTAD CEREMONIES.
I. L. R. 33 Bom. 122

1. ——— **Creation of trust**—*Owner of property constituting himself trustee—Father opening an account in name of his son.* In order that the owner of the fund may constitute himself a trustee, of it, he must either expressly declare himself a trustee, or must use language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee. From the single circumstance that an account has been opened by a father in his books in the name of his son, in which money is credited to the son, no presumption can be raised in India that the father intends to create a trust, in favour of his son, of the sums appearing in the account. ASHABAI *v.* TYEB HAJI RAHIMTULLA
I. L. R. 9 Bom. 115

TRUST—*contd.*

2. ——— *Subsequent disposition by settlor—Disposition out of income. Held*, that where a trust has been once perfectly created although there may have been no transmutation of possession, it cannot be defeated by any subsequent act of the settlor, and apparent dispositions of portions of the property afterwards made by him to particular members of a family, the individuals constituting which have, as a class, a beneficial interest in the whole, must be regarded not as gifts to them for creations of new trusts in their favour which he had no power to make, but as the acts of a trustee, and available only to the extent of the shares to which such persons may be entitled. But this applies only to dispositions out of the principal of the fund, and not to payments made out of its income to particular members of the family for their maintenance, or other expenses, as there may be circumstances which would render itinequitable to take an account of the latter, so as to charge such persons with what they may have received beyond their respective shares. JAMSETJI JIJIBHAI *v.* SONABAI . . 2 Bom. 130 : 2nd Ed. 133

3. ——— *Invalid declaration of trust—Intended transfer of property—Incomplete gift—Evidence of interested parties.* The plaintiff, *H*, was the daughter of one *K*, deceased. *K* some two years before his death in 1866 contemplated conferring a bounty to the extent of R5,000 on each of his daughters, *M* and *H*. For *M* he bought a house at Zanzibar and settled it on her by a formal deed of settlement with various limitations. For *H*, too, he at first intended to buy a house ; but finding houses in Bombay were too dear, he purchased a Government promissory note of the nominal of R5,000. The note was purchased in his own name, and a separate account of it opened in his books, headed "The account of one promissory note bearing 5 per cent. interest." This account he debited with all expenses over and above the R5,000 incurred in and about the purchase of the note, such as for premium, carriage hire, etc., charging, moreover, 9 per cent. interest on these items of debit (which interest he carried as a gain to his general interest account) and he credited the account with the interest collected on the note from time to time, allowing interest at 6 per cent. on these items of credit. He kept also a separate

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TRUST—*contd.*

account of the proceeds of the note, headed, "The account of interest on one promissory note for R5,000." The plaintiff stated that on the day when the note was bought her father *K* brought it and showed it to her, saying, "This is your note; take it when you want it;" and that she left it in his custody, saying, "I will take the note when my sons grow up and do business." Corroborative evidence—which, however, differ in details from, and was in some respects inconsistent with, the evidence of the plaintiff—was given by the plaintiff's son and husband, as well as by a fourth witness not interested in the case. No interest was even paid to the plaintiff by *K* himself, although he lived for two years after the purchase of the note; but after *K's* death his son recognized some claim in the plaintiff to the income of the sum of R5,000 set apart by *K*, and he paid her sums, equivalent to the proceeds of the note, with more or less regularity down to the date of his death. The note itself, however, he sold without communicating with the plaintiff, and appropriated to himself the sum realized by the sale, although he continued the account of interest on the note, and even headed that account in *H's* name. Later still, after the death of *K's* son, his grandsons, the defendants, made similar payments for some time, but irregularly, and finally they refused to pay anything further. The plaintiff sued for the note or its value, and for arrears of interest accrued due thereupon, asserting that the evidence established a declaration of trust in respect of the note. *Held*, that the evidence was insufficient to establish a valid declaration of trust, for while *K's* books of account might very well be held to corroborate the testimony of a trust which was itself of a satisfactory description, they were insufficient of themselves to establish such a trust; while the oral testimony—which, if taken together and accepted as reliable, might well suffice to establish the acknowledgment of a trust—contained such discrepancies and was so generally misty and uncertain in character that it ought not to be accepted unless corroborated by undisputed facts in the case incapable of being explained except on the hypothesis advanced by the plaintiff. *Per* SARGENT, *C J.*,—The equitable doctrine of the transfer of ownership by acknowledgment of trust, when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties speaking as to conversations which took place seventeen years ago without the corroboration derived from other evidence pointing irresistibly in the same direction would be to introduce a most dangerous mode of appreciating evidence in this country, and would offer a direct encouragement to perjury. The suit dismissed, but without costs, *K's* intention that *H* should have the benefit of the R5,000—to which, however, he had failed to give effect—being clear.
HIRBAI *v.* JAN MAHOMED KHALAKDINA
I. L. R. 7 Bom. 229

TRUST—*contd.*

4. ——— *Gift—Requisites to complete gift—Donor constituting himself trustee for donee—Enforcement of trust by representative of donee—Trustee, liability of.* The plaintiffs, *M* and *R*, were Parsis, and were married in the year 1851. The defendant was the widow of *B M*, who was the father of the plaintiff *R*. The plaintiffs sued to recover from the defendant certain Government promissory notes which they alleged had been presented by *B* to *M* at her marriage for her sole and separate use. They alleged that the said notes, then of a nominal value of R1,500, were endorsed in the name of the said *B*, and had been deposited by him for safe custody with *M's* grandfather *J*; that the said *B* during his life used from time to time to receive the same notes from *J* and draw the interest thereon for *M*; that *B* died in 1864, and that after his death the defendant, who was his widow and executrix, used to draw the interest for *M*; that in 1869 she obtained possession of the said notes, and had ever since continued in possession thereof, informing the plaintiffs that she was duly keeping them and collecting the interest for *M*; that the plaintiffs had been living with the defendant until shortly before the present suit, and having then separated from her, had called upon her to hand over the notes and the accumulated interest, which she refused to do. The defendant denied that her husband *B* had ever presented *M* with Government notes for her separate use. She alleged that the notes which had been deposited by *B* with *J* were her own separate property, and not *M's*; that she and her husband had dealt from time to time with them, and that no interest was ever paid to the plaintiffs, or either of them, or for their benefit. She further stated that some of the notes which had been deposited with *J* had been disposed of by *B* in his lifetime with her consent; that in 1869 she obtained the remaining notes from *J* and sold them, and applied the proceeds to her own benefit. At the hearing it was proved that, on the occasion of the plaintiff's marriage, presents were made to *M* both by her own family and by that of the bridegroom *R*. Two accounts were then opened in the books of the firm of *J N & Co.*, of which *M's* grandfather *J* was a partner, one of which showed her acquisitions from her own family and the other her acquisitions from the family of her husband. The latter account contained an entry (under date August 1854) to the effect that *B*, the father-in-law of *M*, had bought two Government notes for R1,500 in *M's* name, and had obtained the interest on them, which was duly credited to her. Other documents were produced, proved to be in the handwriting of *B* and *J*, in which the said Government notes were alluded to as the property of *M*, and as having been purchased with her moneys. In 1864 *B* died without having endorsed the notes over to *M* or to any one in her behalf, and they remained in his name in the hands of *J* until 1869, when the defendant got possession of them. *Held*, that *B* was liable to answer for the notes as a trustee

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TRUST—*contd.*

and after *B* the defendant as his executrix and representative. In the documents put in evidence, *B* alluded to the notes as *M's* property. His placing them, as he did, with *M's* grandfather was itself an acknowledgment, according to the practice of the class to which he belonged, that the benefit was to be hers and her children's. He thus sufficiently admitted an obligation as trustee. The legal ownership was his, but he had acknowledged with sufficient clearness an obligation to hold and use the ownership for the benefit of another. Such a purpose clearly manifested constitutes a trust, and burdened with a trust the property passed from *B* to the defendant as his representative, and could be enforced against her. *Held*, further, that, having regard to the general practice among Parsis, the conduct of *B* in relation to the notes showed that it was his intention that the property should be enjoyed in sole and separate use by *M* and her children. MERBAI *v.* PEROZEBAI . **I. L. R. 5 Bom. 268**

5. ——— *Parol trust—Trustee—Executor de son tort—Donatio mortis causâ—Appeal as to costs—Limitation.* One *T C* in anticipation of death handed over his property to the defendant, his brother, and verbally directed him to pay certain specified debts and to apply the surplus for the necessities and support of his family. *Held*, that a good trust was created at any rate so far as the debts were concerned. The defendant claimed to have paid to *S*, the widow of one *L*, the deceased brother of *T C*, and himself, the sum of R7,273-1 alleged to have been owing by *T C* to *L*. In a suit by the son of *T C* for an account the Assistant Registrar found (*inter alia*) in his report that R1,975 had been paid to *S* by the defendant, and that the balance R5,298-1 had been taken over by the defendant by arrangement with *S* (the first payment being time barred). *Held*, that a good trust in favour of *S* for the whole debt due to her was created in respect of the moneys which reached the defendant's hands applicable under the terms of the mandate to him for the payment of her claim; that no question arose as to limitation; and that it was unnecessary to consider whether the defendant, if acting as an executor *de son tort*, had power to pay it though barred. *Held*, also, that the trust was not in the nature of a testamentary disposition, though it was created in anticipation of death, and could not after the death of *T C* be recalled by his representatives. *Peckham* v. *Taylor, 31 Beav. 250*, followed. *Quære:* Whether as to the application of the surplus after payment of the specified debts the defendant was in the position of an executor *de son tort*, and that practically it may in some cases be difficult to avoid the application to Hindus of the principles upon which executorship *de son tort* rests. *Jogendra Narain Deb Roykut* v. *Temple, 2 Ind. Jur. N. S. 234*, referred to. *Semble:* That even upon the findings of the lower Court the order as to costs would have to be altered materially in favour of the defendant. SUDDASOOK KOOTARY *v.* RAMCHUNDER . **I. L. R. 17 Calc. 620**

TRUST—*contd.*

6. ——— *Trust created for specific purpose—Surplus after performance of trust.* Where a trust had been created for specific purposes, *viz.*, the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate:—*Held*, that a decree having been made against the trustee personally, the corpus of the trust estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *Held*, also, that in a suit in which all the parties interested were not before the Court there could be no decision as to the extent of the trusts nor as to whether any surplus profits of the trust estate would, or would not, after the performance of the trusts, belong to the trustee personally. BISHEN CHAND BASAWAT *v.* NADIR HOSSEIN . **I. L. R. 15 Calc. 329 L. R. 15 I. A. 1**

7. ——— *Improvements of estate—Rights of tenant for life and remainderman as to sums expended.* A testator conveyed his property which consisted of extensive coffee estates to trustees upon trust as to part thereof for certain persons for life and then upon trust for their children absolutely. A suit having been filed for the administration of the trusts of the will, a receiver was appointed. On the application of the receiver, and with the consent of all parties, the Court sanctioned the extension of the estate. This was done by raising a loan on pledge of the profits of the estate, out of which, when realized, the loan was paid off. By the will, the trustees were empowered to raise money for the purpose of managing the estate at their absolute discretion, either by using the profits or by pledging or selling the corpus. The tenants for life claimed that the loan might be declared a charge on the estate. *Held*, that the extension was within the powers of the trustees, but that, as between the life-tenants and the remaindermen, the former were entitled to have the sums expended on the improvements charged on the corpus, they keeping down the interest. OUCHTERLONY *v.* OUCHTERLONY **I. L. R. 11 Mad. 360**

8. ——— *Application by trustees to raise money by mortgage of trust-property—Sanction of Court.* A testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. The income of the property was more than was required for the purposes of the trust, and the trustees had a surplus of R19,000 in their hands. They were obliged to pull down a certain chawl which stood upon the land for the purpose of rebuilding upon it, and they proposed, with a view to improve the property, to erect a larger and more substantial building than the former one. They expended the surplus R19,000 which was on their hands, but found that to complete the work a further sum of R20,000

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TRUST—*contd.*

was necessary. This they proposed to raise by mortgaging the trust-property. They calculated that the whole mortgage-debt would be paid off out of the surplus rents of the trust-property within three years. They filed this suit, praying that the Court would sanction the proposed mortgage. The Court, however, refused its sanction, and dismissed the suit. DINSHAW NOWROJI BODE *v.* NOWROJI NASARWANJI BODE . . . **I. L. R. 20 Bom. 46**

9. ——— Suit for declaration of trust—*Possession of trust property—Breach of duty.* In a suit for declaration of trust with reference to lands, it must be shown that the party against whom the trust is prayed must have obtained a more or less rightful possession of the lands, but impressed with the obligation of a trust that in a suit such as last mentioned, it must be shown that some duty *primâ facie* fell on the defendants, of which they were committing a breach. MUZHUR HOSSAIN *v.* DINOBUNDO SEN **Bourke O. C. 8 : Cor. 94**

10. ——— Recognition of trust—*Deed of gift, validity of—Oudh Estates Act (I of 1869), s. 8.* A talukhdar, deceased before annexation, had provided by will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny, a sanad granted to her as talukhdar, with full power of alienation, and her name was afterwards entered in the list prepared under s. 8 of the Oudh Estates Acts, 1869. But certain of her acts were not explicable except on the understanding that she was abiding by the will. *Held*, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life. RAMANUND KUAR *v.* RAGHUNATH KUAR. ANUNT BAHADUR SINGH *v.* RAGHUNATH KUAR . **I. L. L. 8 Calc. 769 : 11 C. L. R. 149 L. R. 9 I. A. 41**

11. ——— Cessation of trust—*Cessation of performance by congregation of particular form of worship—Commencement of different form of worship.* If the congregation of a church as a body cease to follow the observances of a particular form of worship, and in preference for forty years follow those of a different from of worship, there would be no one left for whom and by whom the original form of worship can be continued, the objects of the original trust cease to exist, and the church funds and property become impressed with a trust for the performance of the later form of worship. MELLUS *v.* VICAR APOSTOLIC OF MALABAR . **I. L. R. 2 Mad. 295**

12. ——— Suit to enforce trust—*Suit for enforcing religious or charitable trusts—Right of suit—Pleading—Security for costs.* The representatives of a testator, who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, may institute proceedings to have abuses in the trust rectified, there being no officer in this country who has such power of enforcing the due administration of religious or charitable trusts by information at the relation of some private individual, as is possessed by the Attorney General in England. A suit for this purpose should not be admitted unless the plaintiff gives sufficient security for costs. In order that a decree for an account may be made in favour of the plaintiff in such a suit, he must allege substantially in his plaint that which must be a distinct breach of trust ; it is not sufficient for him to make out a case of mere suspicion, or to rely on particular passages in the defendant's written statement. BROJOMOHUN DOSS *v.* HURROLOLL DOSS **I. L. R. 5 Calc. 700**

13. ——— Religious and charitable trust—*Mortgage of trust property—Right of trustee to impeach acts of his predecessor in office—Endowment for charitable purposes.* Property granted for religious and charitable purposes is inalienable, except under special circumstances. No person, other than the duly authorized trustee, can alienate by sale or mortgage the property of a religious trust. When a trustee does any act in breach or repudiation of the trust, such act is not binding on his successor in the trust. On the death of *D*, the hereditary trustee of a devasthan (or religious endowment), disputes arose between *G* and *C* as to the succession. *G* claimed to succeed as *D's* adopted son. *C* denied the adoption and claimed as *D's* heir and nearest kinsman. *C* obtained a decree against the widow of *D* for possession of the savasthan property and took possession in 1874. *G*, in the same year, obtained a decree against *D's* widow, awarding him possession and management of the property. He sought to execute this decree, but was successfully resisted by *C*, who had already got possession under his decree. Pending this litigation, the widow of *D*, the deceased trustee, who was *de facto* manager, mortgaged two villages forming part of the devasthan property. To pay off this mortgage, *G* mortgaged the villages to the plaintiff in 1875. The mortgagee sought to take possession of the villages, but he was resisted by *C*. Thereupon *G* filed a suit, *in formâ pauperis*, against *C* to recover possession and management of the whole devasthan property. Pending the inquiry into *G's* pauperism, both *G* and *C* referred their disputes to arbitration, and an award was made in 1881, by which the mortgaged villages and some other property belonging to the devasthan were assigned to *G* and his heirs in perpetuity. In 1884 the plaintiff sued to enforce his mortgage lien by sale of the mortgaged villages. *Held*, that the villages being trust property, it lay upon the mortgagee to prove circumstances justifying a charge on such property. *Held*, also, that, even assuming that the mortgage-money was actually applied to the purposes of the endowment, the mortgage could not be enforced against the property, as the mortgagor was not a duly authorized trustee. *Held*, further, that the award made between *C* and *G* was not binding on *C's* successor in the trust,

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as *C* professed to act in the matter not as a trustee but as full owner of the devasthan property and in repudiation of the trust. GANESH DHARNIDHAR MAHARAJDEV *v.* KESHAVRAV GOVIND KULGAVKAR . . . **I. L. R. 15 Bom. 625**

14. ——— **Assignment of religious trust**—*Delegation of trust—Appointment by trustee of an agent for nine years.* A person holding land on trust to supply a temple with rice, etc., out of the income of the land placed the defendant in possession of it under a lease and subsequently in 1888 demised it to the plaintiff for nine years under an instrument which provided that the plaintiff should collect the income, pay part of it to the executant of the instrument, and with the rest perform the trusts above-mentioned. In a suit for rent the defendant denied the plaintiff's title, questioning the validity of the instrument of 1888. *Held*, that the instrument was valid, as it merely appointed the plaintiff an agent, and did not amount to an assignment of the trust. KRISHNAMACHARLU *v.* RANGACHARLU **I. L. R. 16 Mad. 73**

15. ——— **Charitable trust**—*Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustees—Limitation Act (XV of 1877), s. 10, and Sch. II, Art. 120—Fraud—Accounts—Discretion of Court to order accounts—Jurisdiction of High Court where charity established by will is outside the jurisdiction—Advocate-General, right of—Decree in prior suit brought by trustees of charity—Civil Procedure Code, 1882, s. 43.* One *B R*, a Jain, died in February 1863, leaving a will. His widow *P* (defendant No. 1) obtained letters of administration with the will annexed. The testator died possessed (*inter alia*) of a half share of certain property in Bombay known as the "Bhimpura property." The remaining half share belonged to two other persons, *viz.*, *H D* and *M T*. By his will the testator directed that a moiety of the rental of his half share should be spent on the sadharm (charitable or religious) endowment of a temple at Jackho in Cutch, and the other moiety thereof in establishing two sadavarats, one at Jackho and the other in Palitana. He also set apart a sum of R1,26,000, of which R1,01,000 were to be expended in building a temple at Jackho, and the balance of R25,000 in erecting a market near the temple at Jackho, or, if that was impossible, it was to be spent in Palitana. The plaint complained that of the R1,26,000 about R60,000 had been spent in buying a property in Bombay, called the "school property," for the purpose of establishing a school there, and about R50,000 had been expended in erecting a temple at Jackho, but that nothing had been done with the balance, nor had a market been established at Jackho. All that had been done there was to erect three shops which cost about R2,000. The plaintiff further stated that in 1868 *P* (defendant No. 1) had made over the "school property" and the "Bhimpura property" to three trustees on trusts not strictly in accordance with

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the testator's will as above set forth. Under this deed the trustees were to apply one moiety of the net rents (1) in sadavarat or alms-giving at Jackho and Palitana; (2) in feasting the caste people in Bombay and Jackho annually; (3) in the worship called satarbhadi at the derasar (temple) in Bombay and Jackho; and (4) in entertaining and clothing the gorib (poor) in Bombay and Jackho. Of the remaining moiety of the rents (5) one-half was to go to sadharm (charities) of the derasar (temple) at Jackho; and (6) the other half to charities at such places as the trustees should think fit. In the following year, *viz.*, on the 17th April 1869, *P* (defendant No. 1) and the owners of the other moiety of the "Bhimpura property" conveyed the whole of that property to trustees, who were to apply a moiety of the rents (which was to be considered as rent from *P's* share of the property) (1) in sadavarat and alms-giving at Jackho and Palitana; (2) in feasting the caste people in Bombay and Jackho annually on the anniversary of *B R's* death; (3) in the worship of the derasar called satarbhadi, and in the entertainment and clothing of the gorib (poor) in Bombay and Jackho. The deed also directed the application of the rents of the other moiety of the "Bhimpura property" part of which was to go to a temple at Tera in Cutch and part to another temple at Jackho. This later deed, it will be observed, omitted altogether trusts (5) and (6) of the earlier one of 1868 in favour of sadharm for the temple of Jackho and for sadharm generally. The trustees appointed by the two deeds were not the same, though some of the trustees of the first were also the trustees of the second. The second deed did not recite or in any way refer to the first. At the date of suit all the trustees named in the deeds were dead except the second defendant. By subsequent deeds, however, new trustees had been appointed and they were all parties to the present suit. Defendants Nos. 2, 3, 4, 5, 6, and 7 were trustees of the Bhimpura property, and defendants Nos. 8, 9, 10, and 11 of the school property. The plaint filed on the 10th March 1892, at the relation of two members of the Jain community of Cutch, prayed that the charitable trusts of the testator's will might be carried out, and sought for accounts against the widow of the testator and the trustees of both the deeds, and for a scheme, etc. *Held*, that the High Court of Bombay had jurisdiction to make a decree declaring the trusts upon which the trustees of the deed of October 1868 held the property comprised in that deed and for rectifying the deed in accordance with such declaration, but that the Court could not go further in settling a scheme. *Semble:* When money is bequeathed for the purpose of founding a charity outside the jurisdiction, the Court hands the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be established to settle the scheme. *Held*, also, that the suit was not barred by limitation. It was not one for rectification of the deed of 1868, but rather one against *P* (defendant No. 1) and her

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assigns, the trustees of the deed of 1868 and 1869, for the purpose of following the trust property in their hands and having it applied to the proper purposes of the trust, and therefore came within s. 10 of the Limitation Act (XV of 1877). Charges of fraud and dishonesty made against trustees of a charity must be established at the hearing of the case, and cannot be allowed to be reserved and proved subsequently in the course of taking accounts. Where the trust-deed of a charity, executed subsequently to the death of a testator under whose will the charity was established, does not strictly conform to the provisions of the will, it is not the practice of the Court, when the discrepancy has been made by mistake, to visit the past consequences of the mistake upon the trustees. The plaintiff in this suit demanded an account from *P* of the Bhimpura property from the testator's death to the execution of the deed of the 13th October 1868, and of the school house property from the date of its purchase to the same time, and also an account against the trustees of the deed of 17th April 1869, of the income of the Bhimpura property, and of its application. *Held*, that accounts ought not to be required from *P*. She had made over the property in question to trustees in 1868. There was no evidence that she had ever used any of the income for her own purposes, and the presumption was that she had faithfully discharged her duty. The account was probably barred by Art. 120 of the Limitation Act (XV of 1877). The trustees of the deed of 1869 had paid over the income received by them to the trustees of the earlier deed of 1868, who were entitled to receive it and therefore no account would be decreed against them. The plaintiff further prayed for an account against the representatives of *R B*, who had been trustee of the deed of 1868, from the date of its execution to his death in 1889. Under a decree passed in a previous suit (No. 113 of 1889), dated the 10th August 1893, brought by the trustees, they had received from *R B's* estate the balance which in that suit they had claimed to be due from him to the charity. In that suit the trustees had not asked for an account against him. *Held*, that the Advocate-General as plaintiff in the present suit was barred by the decree in that suit under s. 43 of the Civil Procedure Code (Act XIV of 1882). The trustees, having then omitted to ask for an account, could not sue again. The Advocate-General represented the same interests as they did, and was therefore equally bound. Even, however, if that were not the case, the Court in the exercise of its discretion would not direct the account asked for. ADVOCATE-GENERAL OF BOMBAY *v.* BAI PUNJABAI

I. L. R. 18 Bom. 551

16. ——— **Transfer of property on trust**—*Transfer of property by convict sentenced to transportation.* *B*, having been sentenced to transportation for life, presented a petition in the Revenue Court, in which, stating that he owned a certain zamindari estate, that he had been so sentenced and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue registers, and that of *P* be recorded in its stead. *Held*, that the transfer of the property by *B* to *P* was in the nature of a trust. *Durga Prasad* v. *Asa Ram*, *I. L. R. 2 All. 361*, referred to. HAIT RAM *v.* DURGA PRASAD

I. L. R. 5 All. 609

17. ——— **Property held on trust**—*Assignment by trustees—Limitation.* In 1870 the purchasers and recorded proprietors of a four-biswas share of a certain village caused a statement to be recorded in the village record-of-rights to the effect that *B* claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of revenue due on such share. In 1843 *M* purchased such share and became its recorded proprietor. In 1877 *K*, the son of *B*, sued the representative of *M* for possession of a moiety of such share, alleging, with reference to the statement recorded in the record-of-rights, that such moiety had vested in *M's* assignors in trust to surrender it to *B* or his heirs on payment of a moiety of the sum they had paid on account of revenue, and paying into Court a moiety of such sum. *Held*, that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M* having purchased without notice of the trust and for valuable consideration. KAMAL SINGH *v.* BATUL FATIMA

I. L. R. 2 All. 460

18. ——— *Holder of missing person's estate—Possession.* The possession by the widow, or some other member of the family, of a missing person's estate may, in the absence of an indication of its being adverse, be considered to be that of a trustee until the expiry of the term fixed for his return. NARAIN SAHAI *v.* POSOO

2 Agra 78

19. ——— *Absconding shareholder—Custom for his share to be considered as held in trust for a certain time—Failure to reclaim share.* The plaintiffs sued to recover a share in a village on the allegation that it had been taken by the other shareholders of the village in trust for their father, according to custom, on his absconding from the village by reason of his inability to pay his quotum of Government revenue. The only evidence of the custom was a provision in a wajib-ul-urz that the share of a person who absconded should be held in trust for him for twelve years only. *Held*, that, as the father of the plaintiffs did not reclaim his share within twelve years, the plaintiffs' right was forfeited. NAHANA *v.* DYA RAM . . **5 N. W. 170**

20. ——— *Wajib-ul-urz—Absconding co-sharer.* Where a clause of the wajib-ul-urz of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before

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such wajib-ul-urz was framed sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such wajib-ul-urz alleging that their property had vested in such co-sharer in trust for them :—*Held*, that, before such co-sharer could be taken to have held their property as a trustee, there must be evidence that he accepted such trust, and this fact could not be taken as proved by the wajib-ul-urz. PIAREY LAL *v.* SALIGA. **I. L. R. 2 All. 394**

21. ——— — *Wajib-ul-urz—Absent shareholders.* *Held*, that a village administration-paper which provides for the surrender to absent shareholders on their return to the village of the lands formally held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust. Where a village administration-paper provided for the surrender to certain absent shareholders on their return to the village of the lands formally held by them, but did not contain any declaration of a trust as existing between such absent shareholders and the occupiers of their lands at the time such administration-paper was framed :—*Held*, that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers. HARBHAI *v.* GUMANI . . **I. L. R. 2 All. 493**

22. ——— *Absent co-sharer—Waijb-ul-urz.* *S* and his brother owned an 8 annas share of a village, and *H* and *D* owned the other 8 annas share, the parties being related to each other by blood. In 1865 (Sambat 1921), at the settlement of the village, the following statement was recorded by the settlement officer in the wajib-ul-urz at the instance of *H* and *D*, with whom the settlement was made, *S* and his brother being absent from the village and having been absent for some ten years : "We, *H* and *D*, are equal sharers of one 8 annas and *S* and (his brother) of the other 8 annas in the village according to descent : ten years ago *S* and (his brother) went away into Orai ; their present residence is not known : they have not left woman, child, or heir of any kind in the village : on that account the entire 16 annas of the village are in possession of us, *H* and *D*. At the time of the preparation of the khewat we made a gift of 4 annas of our own eight annas to *P*, and have given him possession of 4 annas of the 8 annas belonging to *S* and (his brother), keeping the remaining 4 annas in our own possession : when *S* and (his brother) return to the village, we three, who are in possession shall give up the 8 annas share of the aforesaid persons." In March 1880 *S* sued *P* for possession of the 4 annas mentioned in the wajib-ul-urz as having been made over to him by *H* and *D* out of the 8 annas share belonging to *S* and his brother. He based his suit upon the wajib-ul-urz, but did not expressly state that the share in suit had been entrusted to *H* and *D* on the understanding that it should be returned to him when he reclaimed it. The lower Appellate Court dismissed the suit as barred by limitation, on the ground that *P's* possession of the share in suit became adverse in 1866 or 1867, more than twelve years before the institution of the suit, when *S*, having returned to the village, had claimed the share and *P* had refused to surrender it. On second appeal it was contended by *S* that under the terms of the wajib-ul-urz *P's* possession was that of a trustee, and his possession could not be held to be adverse. *Per* SPANKIE, *J.*—That inasmuch as there was no direct evidence that the share in suit had been entrusted by *S* to *H* and *D* on the understanding that it should be returned to him when he reclaimed it, and as such a trust could not be implied from the terms of the wajib-ul-urz, which amounted to nothing more than an acknowledgment of *S's* title and an offer to surrender possession when he returned, and as when he did return in 1866 or 1867 *P* refused to surrender possession, *S* was bound to have sued to recover the share in suit within twelve years from the date of such refusal, and as he had failed to do so, the suit was barred by limitation. *Per* PEARSON, *J.*—That although no mention was made in the wajib-ul-urz of such a trust as was contended for, yet the terms of that document strongly suggested the creation of such a trust. Having regard to the terms of the wajib-ul-urz, and to the fact that *S* and his brother were not strangers to *H* and *D*, nor merely co-shares, but near blood-relations, probably residing together on the same premises and partners in agricultural labours, further inquiry should be made with the view of elucidating the nature of the acquisition of *H* and *D* of the share and of their subsequent possession. SIRDAR SAINEY *v.* PIRAN SINGH . . . . **I. L. R. 3 All. 453**

23. ——— **Retirement and disability of trustees**—*Effect of, on trust.* Where property is assigned to trustees by an insolvent trader for the purpose of having it equally distributed among the creditors, such a trust does not become inoperative by reason of the retirement of two out of three trustees, and of the inability of the third to discharge his duties properly. BAUMGARTNER *v.* STEPHENSON . . . . **3 Agra 321**

24. ——— **Creditor's trust-fund**—*Unclaimed dividends, suit for distribution of.* Where a creditor's trust-deed contained no provision for redistribution of unclaimed dividends, and a suit was brought by the representatives of one of the creditors, party to the deed, for the administration and distribution of funds in the defendant's possession allotted to other creditors by way of dividends, but unclaimed by them for forty years : —*Held*, that the plaintiff was not entitled to such relief. *Wilde v. Banning*, *L. R. 2 Eq. 577*, distinguished. MANICKAVELU MUDALI *v.* ARBUTHNOT & Co. . . . . **I. L. R. 4 Mad. 404**

25. ——— **Resulting trust**—*Intention of party—Implied trust, presumption of.* Suit brought to recover possession of a talukh, upon the alleged ground that the moneys with which the purchase was made were not the moneys of the

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person in whose name the property was bought, but of a lady with whom he was living as her husband, and that there was a resulting trust in her favour. The Privy Council considered that the very principle of a resulting trust was that the property had been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged; but that, if it was the intention of the person to whom the money belonged that there should be no such trust, no such implied trust could arise by implication, and the presumption would then be met by the facts. AMEEROONNISSA KHANUM *v.* ASHRUFFOONNISSA

17 W. R. 259 : 14 Moo. I. A. 433

26. ——— *Statute of Frauds —Stat. 29 Car. II, c. 3.* The plaintiff, who was the widow of *G*, sued the defendant, the executrix of *J*, to recover a sum of R7,394-9-6, part of the purchase-money of a house which had been sold by *J* in his lifetime, and which the plaintiff alleged had been, shortly before his death, conveyed by her husband *G* to *J* in trust to sell and hold the proceeds in trust for *G's* family. The defendant denied the trust, and insisted that *J* had purchased the house from *G* for valuable consideration. Both *J* and *G* were Parsis. *Held*, that, even assuming that no consideration was given by *J* to *G* for the house, the plaintiff was not entitled to succeed. In the absence of consideration, the trust of the house, which was admittedly conveyed by *G* to *J*, would have resulted to *G*, unless, under the provisions of s. 7 of the Statute of Frauds (39 Car. II, c. 3), he (*G*) had declared in writing some other trust which was to supersede the resulting trust in his own favour. No such declaration of trust in writing was proved. If, on the other hand, the trust did result to *G*, he, no doubt, might, as equitable owner of the house, have disposed of his interest by will. If he did so, the plaintiff had not qualified herself to sue as his representative. Probate had not been obtained of the will, and, until the will was proved, it could not be said that *G* had made a particular declaration of trust by it. Nor without probate could the plaintiff take up the position of legal representative of her deceased husband entitled to enforce his rights, and, amongst others, his rights under the supposed resulting trust. Except as executrix or as administratrix, the plaintiff could not recover property or enforce rights equitably vested in her deceased husband. BAI MANECKBAI *v.* BAI MERBAL

I. L. R. 6 Bom. 363

27. ——— **Breach of trust**—*Parties—Defaulting trustees—Breach of trust beneficial to trust-estate.* The Court will not, at the instance of one of two defaulting trustees, declare the liabilities arising from a breach of trust without having all the parties concerned before it. Nor will the Court pass an order which might in any way tend to be construed as an assent to a breach of trust already committed, even though the

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breach may have been beneficial to the trust-estate. BARRY *v.* STEEL . **1 C. L. R. 80**

28. ——— **Revocation of trust**—*Voluntary settlement.* *A*, being at the time unmarried, executed a voluntary settlement by which he created trusts for himself for life, and after his death for his issue and widows (if any), with ultimate trusts over. The deed contained a provision empowering *A* at any time, with the consent of the trustee, to revoke the trusts and to declare any new or other trusts. *A* subsequently married, and after his marriage executed a deed of revocation, declaring that the trust-property should be held for himself absolutely. The trustees refused to hand over the trust-property, and *A* thereupon instituted a suit to have the trust set aside. His wife was a minor, and there was no issue of the marriage. *Held*, that, although there might be cases in which, where no other person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, and as such revocable by the settlor, yet that, in the present case, there being an infant beneficiary, the deed could not be revoked. GOLAM YASSIN *v.* OFFICIAL TRUSTEE OF BENGAL

I. L. R. 8 Calc. 887

29. ——— **Nature of suit**—*Suit for land —Property—Executors—Trust—Limitation Act (XV of 1877), s. 10.* Where property was by will vested in executors, in trust to pay legacies, allowances, debts, and the residue of the income of one-third of the testator's estate to his widow for life, and a suit was brought by her for the administration of her share in the estate, and for a declaration that certain leases granted by the executors to themselves could not stand against her, the beneficiary :—*Held*, that such a suit is not a suit for land, and that s. 10 of the Limitation Act applied. *Saroda Persad Chattopadhya* v. *Brojo Nath Bhuttacherjee, I. L. R. 5 Calc. 910*, distinguished. *Hurro Coomaree Dossee* v. *Tarini Churn Bysack, I. L. R. 8 Calc. 766*, referred to. NISTARINI DASSI *v.* NUNDO LAL BOSE (1902)

I. L. R. 30 Calc. 369

30. ——— **Secret trust**—*Evidence.* A party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed on the terms of the trust. *Jones* v. *Badley, L. R. 3 Ch. A. C. 362*, referred to. KALI CHARAN GHOSAL *v.* RAM CHANDRA MANDAL (1903)

I. L. R. 30 Calc. 783

31. ——— **Trust not completed**—*Trust deed—Trust not completed—No possession of trust property taken by trustees—Deed never acted upon—Gift by deed in future without present gift to support it—Estate in abeyance—Class—Gift to class, who may take.* On the 17th October 1872, one Mulji Jaitha and his son Soondardas Mulji, who lived together as members of a joint Hindu family, executed a

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trust-deed by which they conveyed to the said Soondardas Mulji and three other persons as trustees a large amount of property in trust (ultimately) for the sons of Soonderdas Mulji in equal shares when the youngest of such sons should attain twenty-one years of age or the survivor of the wives of Soondardas Mulji should die, whichever should last happen. At the date of his deed, Sundardas Mulji had only one son, who was then eight years old, but on the 6th *Magsir Sud* 1931 (14th December 1874) a second son (the plaintiff) was born, and he attained his majority on 6th *Magsir Sud* 1952, *i.e.*, the 22nd November 1895, the two widows of Soondardas having previously died. Soondardas Mulji died on the 13th January 1875, leaving a will dated 1st December 1874, *i.e.*, just a fortnight before the plaintiff was born. In this will he declared that in the event of his death his father (Mulji Jaitha) was the owner of the property mentioned in the will, and after his death Dharamsi (testator's son) should succeed, and in case he (testator) should have another son, such son should take an equal share. After Soondardas's death his father Mulji Jaitha remained in sole possession of all the property of which in Soondardas's lifetime the two had been in joint possession, including the properties comprised in the trust-deed and the properties which Soondardas had purported to dispose of by his will. Mulji Jaitha died in August 1889, leaving a will, dated 30th October 1888, whereby, after giving certain legacies, he directed that the remainder of his property should be divided between his two grandsons Dharamsi and Gordhandas (the plaintiff) in equal shares. After Mulji Jaitha's death Dharamsi at first solely managed the estate, including the properties comprised in the trust-deed : but when the plaintiff attained his majority, he was admitted to the joint management and the two brothers continued to manage down to Dharamsi's death on the 28th February 1899. Dharamsi left a will, dated 7th February 1899, in which he claimed for the first time that the properties in the trust-deed were his sole property and also certain of the properties mentioned in the will of his father Soondardas, and he bequeathed the whole of such properties to his son, the defendant Karsandas. The plaintiff thereupon filed this suit, contending that the trust-deed was inoperative, and that he was entitled to a moiety of the estate, and that Dharamsi's will was of no effect. *Held*, that the trust-deed was inoperative and of no effect—(i) inasmuch as, under its provisions, the estate was to be held in abeyance from the date of the deed until the youngest son of Soondardas should attain his majority. There was no gift of income or *corpus* during this interval, and thus there was no estate to support the ultimate gift to the sons of Soondardas ; and (ii) inasmuch as the possession of the properties comprised in the trust-deed was never in fact given to the trustees, and the trust was therefore never perfectly created. *Held*, also, on the evidence, that Soondardas had no property

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of his own to dispose of, and that his will was wholly inoperative. *Held*, therefore, that under the will of Mulji Jaitha, the plaintiff and Dharamsi were entitled in equal shares to all the property left by Mulji Jaitha, including the property comprised in the trust-deed. Where, by a will or deed, there is a gift to a class, the rule is that a member of the class who can take must take unless the Court is satisfied on the will or deed that the testator or settlor intended that the class, and not any individual member thereof should take. GORDHANDAS SOONDARDAS *v.* BAI RAMCOOVER (1901) . **I. L. R. 26 Bom. 449**

32. ——— Trustee of Mission Society, right of, to eject tenant—*Trust, construction of—Gift to Mission Society for establishing Native Christian hamlet—House in hamlet let out to Native Christian tenant—Notice to quit, if to state reasons for eviction—Trust, duration and object of—Trust, perpetual—Beneficiaries, who are—Native Christian community, right of, under trust.* Certain premises were made over to the Baptist Mission Society by the donor, for the purpose of establishing a hamlet of Native Christians of the Baptist community at Monghyr, the donor appointing certain trustees by name for aiding and assisting in the establishment of the same. The Baptist Mission Society built some houses on the land by subscription raised from the members of the Baptist Christian community. The defendant, a Native Christian, had been holding one of the houses on payment of a monthly rent. A notice to quit was served upon the defendant by a trustee of the Baptist Mission Society, and the defendant not having complied therewith a suit was brought by the trustee to eject him. *Held*, that the trust did not come to an end as soon as certain houses had been built and some Native Christians were settled therein as tenants, but was something like a perpetual trust, and the beneficiaries under the trust were the Baptist Mission Society and not the Native Christian community. That the trustees of the Baptist Mission Society, having the power of management of the trusts, had also the power to eject a tenant. *Quære :* Whether the trustees were absolute owners of the premises. *Smith* v. *Anderson*, *L. R. 15 Ch. D. 247*, referred to. That in the notice to quit served on the defendant the plaintiff was not bound to disclose the reasons for defendant being considered unfit for occupying the house in the Mission compound. The rights of the Native Christian community as a body under the trust, as distinguished from those of individual members thereof, indicated. PARMANAND KARAN *v.* BAPTIST MISSION SOCIETY OF LONDON (1904) . . **8 C. W. N. 918**

33. ——— Trustee of charitable trust has no power to appoint a co-trustee in place of a deceased trustee—*Civil Procedure Code (Act XIV of 1882), s. 13 —Decision on a question of law not res judicata when the subject-matter of the subsequent suit is different.* The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of a power

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under the instrument creating a trust or by virtue of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him. A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties, when the subject-matter of the two suits are different. *Quære:* Whether such a decision can be *res judicata* against a party, who could not have prosecuted an appeal against it. *Parthasaradi* v. *China Krishna, I. L. R. 5 Mad. 304; Venku* v. *Mahalinga, I. L. R. 11 Mad. 393; Chamanlal* v. *Bapubhai I. L. R. 22 Bom. 669; Vishnu* v. *Ramling, 1. L. R. 26 Bom. 25, 30,* referred to and followed. GOPU KOLANDAVELU CHETTY *v.* SAMI ROYAR (1905)
I. L. R. 28 Mad. 517

34. ——— Construction of indenture —"*Absolutely,*" *interpretation of—Construction of deeds—Construction of wills—Repugnancy in words.* A deed of indenture contained, among other things, a provision which ran: "upon trust for the use of the said trust absolutely to be expended and used by them for such charitable purposes as they might think fit." On a construction of this provision:—*Held,* that having regard to the words that follow the phrase in the indenture in question, the word "absolutely" cannot be taken as conferring an unfettered and unlimited interest on the persons designed as trustees; and that the words used created a valid trust for charitable purposes in the events, which had happened. The rule that, if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision. ADVOCATE-GENERAL OF BOMBAY *v.* HORMUSJI (1905) . . **I. L. R. 29 Bom. 375**

35. ——— *Deed of trust—Construction—Distinct provisions for devolution of trusteeship and of beneficial interest—Clear language in one—Ambiguity in the other—Construction placed on earlier document—Use in interpreting later document—"Heirs," meaning of.* In construing an instrument, which provided that a certain pension was to devolve on the "heirs" of the original pensioners, it was contended that the term "heirs" must mean "heirs, who are also descendants" because the terms "heirs" and "descendants" were used as convertible terms in describing the descent of certain trusteeships, including the trusteeship of the pension. *Held,* that it could not be assumed, that the donor intended the descent of the trusteeship and the descent of the beneficial interest to be governed by the same rules. The ambiguity of the language used on the one subject cannot control the clear and unambiguous words employed with regard to the other. The construction placed on an earlier document could not be used in construing a letter document executed by the same person, when the later document did not embody or refer

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to the earlier document, and when further they did not form parts of the same transaction and were not even contemporaneous. Nor could the decision on the earlier document afford a precedent for the interpretation of the later document, when the language of the two documents were found to be entirely dissimilar. HAIDAR HUSAIN KHAN *v.* FAGHFUR MIRZA (1905)
9 C. W. N. 817
s.c. L. R. 32 I. A. 135

36. ——— Limitation—*Suit for possession of trust property as manager—Limitation Act (XV of 1877), Sch. II, Arts. 124 and 144.* Where the plaintiff claimed possession of certain trust property as manager by right of inheritance from the founders of the trust, there being no allegation of misappropriation of the trust property, it was *held* that the limitation applicable to such suit was that prescribed by Art. 124 or Art. 144 of the second Schedule to the Indian Limitation Act, 1877, and began to run from the time when the possession of the defendant became adverse to the plaintiff. *Balwant Rao* v. *Puran Mal, I. L. R. 6 All. 1; s.c. L. R. 10 I. A. 90,* referred to. JADUNATH PRASAD *v.* GIRDHAR DAS (1905) . **I. L. R. 27 All. 513**

37. ——— Mahomedan law—Will—*Reference to trust-deed in will for the purpose of confirming it—Testamentary document—Trustee de son tort—Express trustee, Liability to account—Limitation Act (XV of 1877), s. 10.* Under the Mahomedan law possession is as necessary in the case of trusts as in the case of gifts—not necessarily direct possession of the premises, but the best possession of which the property is capable at the time, either actual, symbolical or constructive. Where a trust-deed is referred to in a will with a view of confirming it it is confirmed and becomes part of the will. If express trusts are created by deed or will and some third party takes upon himself the administration of the trust property he becomes a trustee *de son tort* and, as such, is bound to account as if he were the rightful trustee and limitation will not run in his favour under s. 10 of the Limitation Act (XV of 1877). MOOSABHAI *v.* YACOOBBHAI (1905)
I. L. R. 29 Bom. 267

38. ——— Hindu trusts—*Indian Trustees Act (XXVII of 1866), applicability of, to Hindu trusts—Practice.* The Indian Trustees Act is applicable to a trust in which the settlor, the trustees and *cestuis que trustent* are all Hindus, provided such trust does not violate any provision of Hindu Law. NILMONEY DEY SARKAR, *In re* (1905) . . . **I. L. R. 32 Calc. 143**
s.c. 9 C. W. N. 79

39. ——— Administration of, by Court —*New trustees, appointment of—Concurrent sanction of Court.* Where a suit has been instituted for administration of a trust and a decree has been made *that* attracts the Court's jurisdiction, and a trustee cannot afterwards exercise a power of appointment without the concurrent sanction of the Court. In such a case a trustee having a

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power of appointment of the new trustees is not excluded from the right of nomination, but the sanction of the Court is necessary to its choice. *In re Hall, 54 L. J. Ch.* (*A.S.*), distinguished. AMRITA BIBEE *v. v.* KANHIA LAL AGARWALA (1905) **I. L. R. 32 Calc. 448**
s.c. 9 C. W. N. 239

40. ——— **Power of appointing additional trustees or controlling body**—"*Under the trust,*" *meaning of*—Under s. 539 of the Code of Civil Procedure, the Court in sanctioning a scheme, may provide for the appointment of additional or new trustees, though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it. The words "under the trust" in s. 539 of the Code of Civil Procedure have no reference to such original constitution on the rules. The Court of Chancery in England has always exercised such powers, and in the absence of express words restricting the powers of Courts in this country, the Legislature must be presumed to have conferred similar powers upon them by s. 539 of the Code of Civil Procedure. *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev, I. L. R. 15 Bom. 612,* and *Annoji* v. *Narayan, I. L. R. 21 Bom. 556,* followed. A scheme framed by the Court may be liable to variation for good cause shown. *Re Browne's Hospital* v. *Stamford, 60 Law Times 288,* referred to. The directions in a scheme framed under s. 539 of the Code of Civil Procedure may be enforced in execution on application by persons interested. *Damodarbhat* v. *Bhogilal, I. L. R. 24 Bom. 45,* followed. PRAYAG DOSS JI VARU MOHANT *v.* TIRUMALA SRIRANGACHARLAVARU (1905) **I. L. R. 28 Mad. 319**

TRUST DEED.

See MAHOMEDAN LAW—TRUSTS. **I. L. R. 36 Calc. 431**

TRUST PROPERTY.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—TRUST PROPERTY.

See COURT FEES ACT, 1870, s. 19D. **I. L. R. 23 Calc. 980**

See COURT FEES ACT, 1870, SCH. I, ART. 11 . . **6 B. L. R. Ap. 138**
11 B. L. R. Ap. 39
7 B. L. R. 57
14 B. L. R. 184
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See HINDU LAW—PARTITION—PROPERTY LIABLE OR NOT TO PARTITION. **I. L. R. 19 All. 428**

See TRUST.

See TRUSTEE.

See TRUSTS ACT.

——— **Debts incurred by trustee**—*Trustees' right of indemnity—Creditor's right to stand in the place of the trustee.* *A*, the owner of an hotel, on the occasion of her marriage with *B*, appointed *B* trustee by a deed of settlement. The

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trust-deed gave the trustee power to carry on the business of the hotel through managers and assistants, and it was declared that the trustee should be at all times fully indemnified out of the trust estate in respect of all liabilities arising from the execution of the trusts. The plaintiffs brought a suit against *B*, the trustee, for goods supplied to the hotel and claimed *B's* right of indemnity. *Held,* that the plaintiffs were entitled in equity to stand in the place of the trustee, if the trustee had not through his own default lost his right of indemnity. *In the matter of M. A. Shard, I. L. R. 28 Calc. 574,* referred to. BRIDGE *v.* MADDEN (1904) . **I. L. R. 31 Calc. 1084**

TRUSTEE.

See ATTACHMENT. **I. L. R. 35 Calc. 641**

See COSTS—SPECIAL CASES—TRUSTEES. **13 B. L. R. 383**
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——— right of, to sue—

See CERTIFICATE OF ADMINISTRATION—RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.
I. L. R. 20 Mad. 162
I. L. R. 24 I. A. 73

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——— right of, to sue—*concld.*

See DEBTOR AND CREDITOR.
I. L. R. 20 Mad. 91

——— suit against—

See LIMITATION ACT, 1877, s. 10.
7 C. W. N. 353

——— suit by—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—VESTED AND CONTINGENT INTERESTS . I. L. R. 1 Bom. 269

——— suit by, to eject trespasser.

See RIGHT OF SUIT—CHARITIES AND TRUSTS . I. L. R. 18 Bom. 721

——— suit for removal of—

See ACT XX OF 1863, s. 14.
I. L. R. 2 Mad. 197
I. L. R. 19 All. 104

See ENDOWMENT I. L. R. 18 All. 227
I. L. R. 21 Bom. 556
I. L. R. 23 Bom. 659

See LIMITATION ACT, 1877, SCH. II, ART. 134. . . I. L. R. 24 Calc. 418

See RIGHT OF SUIT—CHARITIES AND TRUSTS.

See VALUATION OF SUIT—SUITS.
I. L. R. 19 All. 104

1. ——— **Relinquishment by one trustee**—*Effect of relinquishment.* In a contest, between three trustees or managers of an endowment, each entitled to a third share in the profits of the property, if one of them withdraws from the contest, his share is held to have been relinquished in favour of the remaining partners, and to have merged in the general account to be rendered by the trustees or managers. BUZL RUHIM *v.* LUTAFUT HOSSEIN. KHODEJOONNISSA BIBEE *v.* LUTAFUT HOSSEIN . W. R. 1864, 171

2. ——— **Breach of trustees' duty**—*Mixing trust funds with money of trustees—Commission on trust moneys.* It is a grave breach of duty in trustees, or administrators taking out letters of administration, to estates in this country under powers of attorney from executors or next of kin abroad, to mix the incomes raised by them from trust properties or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities. *In the matter of the petition of* COWIE
I. L. R. 6 Calc. 70 : 7 C. L. R. 19

3. ——— **Appointment of new trustees**—*Probate—Executors—Executors alienating property of their testator's estate before obtaining probate—Title of alienees to such property—Right of holder of property to vote at election of trustee before obtaining probate—Trustee elected by debenture-holders—Meeting of debenture-holders to elect a trustee. Exclusion from meeting of holders of debentures*

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TRUSTEE— *contd.*

obtained from executors before probate— Validity of election of trustee elected at meeting from which such debenture-holders were excluded. In order to secure certain money which it had borrowed by the issue of debentures, the *D* Company on the 23rd November 1883 conveyed certain lands, etc., to three trustees *K*, *G*, and *D* by way of mortgage. With regard to the appointment of new trustees in case any trustee should die, etc., the indenture of mortgage provided that, in certain events, the surviving or continuing trustees might convene a meeting of the debenture-holders for the purpose of nominating a new trustee; and that at such meeting the election of such new trustee should be decided by a majority of votes of the debenture-holders present in person, each party having only one vote, and in case of an equality of votes, then the chairman of the meeting should have a casting vote. *K*, one of the trustees appointed under the deed, died on the 9th February 1886, leaving a will whereby he appointed three executors. At the time of his death *K* was the holder of one moiety of the debentures, *viz.*, 1,400 debentures of the value of R7,00,000. The two remaining trustees, *G* and *D*, called a meeting of the debenture-holders for the 27th February 1886 to elect a trustee. Previously to the meeting and for the purpose of having the large interests of *K's* estate adequately represented, the executors of *K* distributed some of the debentures in their hands belonging to *K's* estate among nominees for the purpose of voting at the meeting; and they also sold some of the debentures. Among the persons to whom debentures were sold were the first three plaintiffs. Pursuant to the notice convening the meeting, the plaintiffs and other persons, to whom debentures belonging to the estate of *K* had been given or sold, presented themselves and claimed to attend the meeting; but none of them, except the three executors (plaintiffs 4, 5, and 6) of *K*, were allowed to attend, and they were admitted only in their capacity as executors. Defendant No. 1 was chairman of the meeting, and he ruled that the three executors had a joint right, in their capacity an executors, to give one vote upon any proposition that might be submitted to the meeting. At the meeting it was proposed that the holders of the debentures, who claimed admission to the meeting, should be permitted to attend. The chairman ruled the motion irrelevant, and would not allow it to be put. The executors therefore withdrew from the meeting. After they had withdrawn, the third defendant, *P*, was elected a trustee. At the date of the meeting the executors had not obtained probate of *K's* will. On behalf of the defendants it was contended that *P's* election was valid; and that the persons to whom the executors had given or sold debentures belonging to *K's* estate had been properly excluded from the meeting of the 27th February, inasmuch as the executors had not at that time obtained probate, and consequently the title of their alienees to the debentures was still incomplete. *Held*, that *P* (defendant No. 3) had not been validly appointed a trustee to the indenture of the 23rd November 1883. Under that indenture, debenture-holders had the right to vote, and the debentures were payable to bearer. The fact that the executors had not at the date of the meeting obtained probate did not affect the rights of those to whom they had given or sold debentures, and such persons had consequently been improperly excluded from the meeting. MATHURADAS LOWJI *v.* GOCULDAS MADHOWJI . **I. L. R. 10 Bom. 468**

TRUSTEE—*contd.*

4. ——— **Breach of trust**—*Liability of passive trustee.* A trustee who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee. BAI JADAV *v.* TRIBHUVANDAS JAGJIVANDAS **9 Bom. 333**

5. ——— **Fiduciary relationship**—*Assignment by married woman.* *L M* died in 1856, having bequeathed certain personal property to *J S*, who then and at the time of the subsequently-mentioned suit was a married woman, and who executed a power-of-attorney, authorizing *O G & Co.* to receive payment of the legacy and to execute a settlement of a portion of the same according to articles contained in the power. This settlement was made, and under it a portion of the legacy was assigned to trustees, who did not execute the deed or undertake the trust, and no other trustee was substituted for them. *O G & Co.* at various times advanced money to *J S*, and in acknowledgment received promissory notes from her for a portion of such advances; and in a suit by *O G & Co.* to recover the amount of these advances, it was held that *O G & Co.*, standing in a fiduciary relation to *J S*, before they could avail themselves of her acts, must show that she did them with a full knowledge of the circumstances of the case and of her own position with regard to it. SMITH *v.* STEWART **Bourke O. C. 292**

6. ——— **Cause of action**—*Adverse possession—Limitation.* When property is placed in the hands of another by way of trust, no cause of action arises to the owner until there has been a demand by the owner for the restoration of the property and a refusal by the trustee to give up the property. The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession. RAKHALDAS MADAK *v.* MADHUSUDAN MADAK **3 B. L. R. A. C. 409 : 12 W. R. 319**

7. ——— **Suit to set aside alienations by trustee**—*Bonâ fide purchasers.* A suit brought by a *cestui que* trust to set aside as fraudulent certain alienations made by the trustee was dismissed by the lower Appellate Court as barred by limitation, merely on the ground that more than twelve years had, at the commencement of the suit elapsed since the execution of such deeds of alienation. *Held*, (i) that this was not sufficient,

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TRUSTEE—*contd.*

and that the Court should have tried whether the purchasers were cognizant at the time of their purchase of a subsisting trust affecting the property, for if so, they would have taken it subject to the trust, and would stand in the shoes of the original trustee, and would not be *bonâ fide* purchasers from trustees entitled to the benefit of the law of limitation ; (ii) that if the trustee had power to make valid grants, the grantees would have a perfectly good title, if they took for valuable consideration without notice of the trust. LUTEEFUN *v.* BEGO JAN. BEGO JAN *v.* CHERAG ALI **5 W. R. 120**

8. ——— Suit for mesne profits where estates had been under care of Court of Wards—*Cause of action—Fiduciary relationship.* Plaintiff, the zamindar of Shivaganga, sued to recover two villages which she alleged formed part of the Shivaganga zamindari. The villages originally belonged to *P*, mother of the present defendant, *B*, the ex-zamindar of Shivaganga. In 1856 they were purchased by the Court of Wards on behalf of *B*, who was then a minor, with part of the rents and profits of the zamindari, and in 1860 were given by him to his mother. In 1864 *B* was ousted by a decree of the Privy Council, and became liable to the present plaintiff for the mesne profits of the zamindari. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-zamindar. Plaintiff now sued *P*, and, she dying, the suit was continued against *B* as her representative. *Held*, that, there being in the decree of the Privy Council nothing directly giving a right to maintain the suit, there was but one ground upon which the suit could be supposed to lie, namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase. *Held*, also, that such relation did not exist. KATTAMA NACHIAR *v.* BOTHAGURUSAMI TEVAR. **6 Mad. 293**

9. ——— Debt incurred by trustee for benefit of trust estate—*Personal decree against trustee—Trustee's right of indemnity—Equitable right of creditor—Liability of trust estate—Non-joinder of c.q.t. if bar to liability of trust estate.* Unless a trustee loses his right of indemnity through neglect or default, he is entitled to be indemnified out of the trust estate for all debts incurred for the benefit of the trust estate, and on failure by him to pay such debts, creditors are entitled to stand in his shoes. *In re Shard, I. L. R. 28 Calc. 574*, referred to. Plaintiffs obtained a personal decree for a certain sum against a trustee, in a suit brought by them against the trustee for balance due for goods supplied to the trust estate, which consisted of a business. The trust settled the net profits on the settlor for life with a reversion to her sons, born or to be born. At the time of the suit, a son of the settlor was alive, but was not made a party to the suit. Subsequently the plaintiffs on proof that the debt incurred from them by the trustee was for the benefit of the

TRUSTEE—*contd.*

trust estate and that there had been no neglect or default by the trustee so as to deprive him of his right of indemnity, moved to obtain an order that on the trustee's failure to pay the decretal amount they were entitled to execute their said decree against the trust estate. Notice of their application was given to the son, who did not appeal. *Held*, that, on default of the trustee's paying the decretal amount, the plaintiffs were entitled to execute their decree against the trust estate. MADDEN *v.* A. J. BRIDGE (1905) . **9 C. W. N. 9**

10. ——— Person not entitled obtaining renewal of a promissory note, trustee for rightful owner—*Misjoinder of parties.* Where on the death of the payee of a promissory note executed by *D*, *C* becomes entitled to the amount, but *A* obtains a renewal from *D* in favour of *B*, a suit will lie by *C* against *D*, *A* and *B* as defendants to recover on the renewed note, as *A* and *B* in obtaining the renewal must be *held* in law to have become trustees for *C*, *A* and *B* are necessary parties and the suit will not be bad for misjoinder. The only person entitled to object *C's* claim will be *D*. RAMAKRISHNA RAJU *v.* KATTA VENKATASWAMY (1905) **I. L. R. 29 Mad. 87**

11. ——— *Consent decree that new trustee be appointed by the Court—Preference to lineal descendants of settlor—Discretion—Appointment of a stranger to the line.* Where a consent decree had been passed directing that the first respondent should retire from the trusteeship, a Mahomedan Shiah religious endowment and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor :—*Held*, that under this decree the Chief Court had a discretion to exercise in the selection of a trustee, that the appellant, as senior in order of the settlor's children had no absolute right to be appointed in the absence of disqualification, and that the Chief Court rightly exercised its discretion in appointing a Shiah resident in the neighbourhood, not a lineal descendant of the settlor, in preference to the appellant, who by reason of her sex, could at best discharge many of her duties only by deputy and as a Babu might take a less zealous interest in carrying on the religious observances of the Shiah school. SHAHOO BANOO *v.* AGA MAHOMED JAFFER BINDANEEM (1906) . **I. L. R. 34 Calc. 118 s.c. L. R. 34 I. A. 46 11 C. W. N. 297**

12. ——— Duties of—*Discretionary power, exercise of—Improvident transaction of trustee not binding on beneficiary of liability of transferee of trust estate—Compromise by trustee when valid—Burden of proof—Decree may direct party benefiting by breach of trust to pay to the trust estate when removal of trustee is not asked for—Following trust property.* It is no answer to a charge of breach of trust that the trustee acted under competent legal advice. A trustee is bound to make as reasonable a bargain in the interests

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TRUSTEE—*concld.*

of the beneficiary as circumstances will permit; and a transaction which circumstances show to be unreasonable or improvidently entered into, will not be upheld by Court. A transferee from the trustee, who has notice of the trust, has notice that the trustee must act reasonably and prudently; and where such transfer is unreasonable or improvident, such a transferee will not be absolved merely because, in his opinion, the transaction was prudent and beneficial to the *cestue que trust*. Where a transaction by the trustee is *primâ facie* improvident, it lies upon the trustee to show, as against the beneficiary, that it is one which the Court can uphold. Where a breach of trust has been committed and a suit is brought by the beneficiary against the trustee and the party who has received money through such transaction to recover such money for the trust estate, it is open to the Court by its decree to direct payment of such money to the trustee by the defendant who has received such payment unless it is established that the beneficiary can get no relief unless he seeks to remove the trustee and procure the appointment of another. Where trust-money has, by a breach of trust, been paid by the trustee, the beneficiary is entitled to follow it as trust-property in the hands of the payee. *National Trustees Company of Australasia* v. *General Finance Company of Australasia*, [*1905*] *A. C. 273*, referred to. *Keating* v. *Keating*, *46 R. R., 178*, followed. *In re Barney*, [*1892*] *2 Ch. 265*, distinguished. *Smith* v. *Patrick*, [*1901*] *A. C. 294*, referred to. *Giyana Sambandha Pandara Sannathi* v. *Kantasami Tambiran*, *I. L. R. 10 Mad. 375, 508*, distinguished. *Strinivasa Ayyangar* v. *Strinivasa Swami*, *I. L. R. 16 Mad. 31, 33*, distinguished. SUBRAMANIAN CHETTIAR *v.* RAJESWARA DORAI (1909) **I. L. R. 32 Mad. 490**

TRUSTEES ACT.

———— (**XXIV of 1841**)—*Application for appointment of new trustees.* Trustees were appointed for a company in 1845, and the partnership was to last twenty years, which expired on December 31st, 1864. The shareholders thereupon appointed *S*, a new trustee, to sell the business, and he sold it to *R*. The old trustees had left the country. In an application, with the consent of all parties, under Act XXIV of 1841, that *S* might sign the deed of transfer, the Court *held* that it was necessary to show that the old trustees had no lien on any other property in the concern before the order asked for could be made. *In the matter of* FORT GLOUCESTER MILLS CO. **Bourke O. C. 260**

———— (**XXVII of 1866**), **s. 3**—*Hindu trusts—Equitable jurisdiction of High Court—Appointment of new trustee—Supreme Court Charter, 1823.* The High Court may exercise the summary powers conferred upon it by the Trustee Act (XXVII of 1866) in the case of Hindu trusts. S. 3 of the Trustee Act, which provides that the power and authority given by the Act to the High Court shall be exercised only "in cases to which English law is applicable," cannot be intended to limit

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———— **s. 3**—*contd.*

the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. The cases referred to in the section must be cases to which English law is in some measure applicable, but in what measure is not indicated in the Act. English law must be regarded as applicable in the sense intended if the principles recognized by the English Equity Courts are applicable. At the date of the grant of the Charter to the Supreme Court of Bombay in the year 1823, English equity had become a system which would deal with a body of quasi-common law in a scientific manner and in obedience to known and uniform rules. When it applied its method to the determination or the constitution of a right, even based on the Hindu or Mahomedan law, it administered English law. In this sense "English law was applicable" at the date of the passing of the Trustee Act of 1866 to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system for rules borrowed from the English Court of Equity. Trusts are recognized in the Hindu as well as in the English system of law. But while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. If the Court is called on to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of trustee and the rights of beneficiaries it is governed by the rules of English equity. There are no others that it can apply. In meeting an exigency, or in taking cognizance of a form of right not directly provided for in the Shastras the Court, in exercising its jurisdiction under s. 41 of the Charter of 1823, may apply Hindu law. But, taking Hindu law as one of its data, it applies "English law" also in the form of equity to all or nearly all the questions that arise. *In re* KAHANDAS NARRANDAS **I. L. R. 5 Bom. 154**

———— **ss. 20 and 32**—*Appointment of person to convey property on behalf of persons out of the jurisdiction and under other disabilities.* Where property has been, by an order of Court, directed to be sold, and where some of the parties interested in such property are either out of the jurisdiction, married women, or minors, and the place of abode of others of them is unknown, the Court will, on petition, under the Trustee Act appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into. But the Court cannot make such an order with

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TRUSTEES ACT—*concld.*

——— **s. 20**—*concld.*

respect to the interest of a party who has not been served, and who has not entered appearance. LACKERSTEEN *v.* ROSTAN . **I. L. R. 7 Calc. 32**

——— **s. 30**—*The Trustees and Mortgagees Act (XXVIII of 1866)—Hindu trusts, if acts applicable to—"Cases in which English law is applicable" in s. 3, meaning of.* The Indian Trustees Act is applicable to a trust which has been created in a form valid under the English law but in which the trustees and the *cestui que trustant* are all Hindus, if such trust does not violate the provisions of Hindu law. *In the matter of* NILMONEY DEY SARKAR (1905) . **I. L. R. 32 Calc. 143**
s.c. 9 C. W. N. 79

——— **s. 35**—*Application for removal of trustee—Ground for removal—Stat. 13 & 14 Vict., c. 60, s. 32.* Where a petition was presented to the High Court praying for the removal, under s. 35, Act XXVII of 1866, of certain trustees of a will, on the grounds, *inter alia*, of misappropriation, waste, and breach of trust, and for the appointment of new ones :—*Held*, that the matters alleged were much too grave to be disposed of on a mere application, and that, as the respondents opposed the appointment of new trustees, the petitioners should institute a regular suit. Act XXVII of 1866, s. 35, is analogous to 13 & 14 Vict., c. 60, s. 32. The Courts in this country ought, in analogy to the rulings of the English Court of Chancery, to refuse jurisdiction under this section on a mere application alleging misconduct or any other cause, when the trustees whom it is sought to remove are willing to act and refer the applicant to a suit. *In the goods of* POWELL . **6 N. W. 54**

TRUSTEES AND MORTGAGEES ACT (XXVII OF 1866).

——— **s. 34**

——— *Non-applicability to Charitable Trusts—Indian Trusts Act (II of 1882), ss. 1 and 2—Statute of Frauds (29 Ch. II, C. 3), s. 7.* The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. S. 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst others sections s. 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events, s. 34 has ceased to have any force. The saving clause in s. 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of Properties dedicated to charity. S. 7 of the Statute of Frauds is wholly repealed, by s. 2 of the Indian Trusts Act. S. 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time ; even if it did, the Indian Evidence Act entirely superseded it. DINSHA MANEKJI PETIT, SIR *v.* JAMSETJI JIJIBHAI, SIR (1908)
I. L. R. 33 Bom. 509

TRUSTEES AND MORTGAGEES ACT (XXVII OF 1866)—*contd.*

——— **s. 43.**

See TRUSTEES ACT, s. 30.
9 C. W. N. 79
I. L. R. 32 Calc. 143

1. ——— **s. 43**—*Administrator-General—Taking opinion of Court on question respecting the administration—Question affecting rights of parties inter se—Refusal of Court to express opinion.* The Administrator-General of Bombay, having taken out letters of administration (having effect throughout the Bombay Presidency) to the estate of one *A B*, deceased, and having a balance in his hands to the credit of the said estate after having fully administered the same, was applied to by *G B*, the brother of the said *A B*, deceased, who had taken out letters of administration in England to the estate of his deceased brother, to hand over to him, the said *G B*, the balance in question,—the said *G B* claiming to be the administrator of the domicile of the deceased, and, as such, to be entitled to all the personal assets of his estate wheresoever situate. Being in doubt as to whether he might safely accede to the request, the Administrator-General of Bombay, by petition under s. 43 of the Trustees and Mortgagees Act, XXVIII of 1866, submitted the question to the High Court for its opinion, advice and direction. *Held*, that the question being one of considerable difficulty and importance, and involving, moreover, in its decision questions which might seriously affect the rights of parties *inter se*, it was not a question such as was contemplated by s. 43 of the Trustees and Mortgagees Act, XXVIII of 1866, nor one upon which the Court ought to give any opinion merely on an *ex parte* petition of this character. *In re the goods of* BRERETON. *In the matter of the* TRUSTEES AND MORTGAGEES ACT, 1866 **I. L. R. 7 Bom. 381**

2. ——— *Powers of Court—Power to sanction lease.* *J S*, a Hindu, died in 1865, possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income, arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of *J S*, still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about R900 per annum, was insufficient to keep up the said charity. She stated that a sum of R12,600 was urgently required for certain purposes connected with the said charity, that she had agreed, in September 1887, with one *R B*, that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years with a proviso for renewal at a rent of R350 per mensem. In October 1887, however, her adopted

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TRUSTEES AND MORTGAGEES ACT (XXVII OF 1866)—*concld.*

——— s.43—*concld.*

son served her with a notice to desist from granting the said lease. She therefore presented this petition to the Court under s. 43 of the Trustees and Mortgagees Powers Act (XXVIII of 1866), praying (*a*) that she might be advised whether she had power to grant the said proposed lease; (*b*) that the said lease might be sanctioned or directed by the Court; and (*c*) that the Court might give such opinion, advice, or direction in the premises as the Court might think fit. *Held*, that under the section the Court had no power to sanction the proposed lease or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, etc. *Held*, also, that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of amount or as to the work to be done, the Court refused to give any opinion. *In re* LAKSHMIBAI.

I. L. R. 12 Bom. 638

TRUSTS ACT (II OF 1882).

——— ss. 1 and 2—*Trustees and Mortgagees Powers Act (XXVIII of 1866) s 34—Non-applicability to Charitable Trusts—Statute of Frauds (29 Ch. II, c. 3), s. 7.* The Trustees and Mortgagees Powers Act (XXVIII of 1866) does not apply to Charitable Trusts. S. 2 of the Indian Trusts Act (II of 1882) expressly repeals amongst other sections s. 34 of the Trustees and Mortgagees Act. The Indian Trusts Act was made applicable to the Bombay Presidency in 1891, and since then, at all events s. 34 had ceased to have any force. The saving clause in s. 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of Trustees of properties dedicated to charity. S. 7 of the Statute of Frauds is wholly repealed by s. 2 of the Indian Trusts Act. S. 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did, the Indian Evidence Act entirely superseded it. DINSHA MANEKJI PETIT, SIR *v.* JAMSETJI JIJIBHAI, SIR (1908)

I. L. R. 33 Bom. 509

——— s. 5, 81—

See WILL. **I. L. R. 32 Mad. 443**

——— *Bequest to legatee with oral directions in testator's lifetime for the disposal of the property—Rule of English law that such legatee is bound by the trusts so declared by testator applies in India under s 5 of the Trusts Act—S. 81 of the Trusts Act does not apply to such cases—*

TRUSTS ACT (II OF 1882)—*contd.*

——— s. 5—*contd.*

Maintainability under s. 187 of Succession Act of a suit by the beneficiary for the benefit conferred in the absence of Probate or Letters of Administration. Under English law, where a testator disposes of property in favour of a legatee, and, at the time of such disposition or at any subsequent period during his lifetime, the testator informs the legatee that the disposition in his favour although apparently for his benefit, was so made in order that he may carry into effect certain wishes of the testator, which are communicated to him, and the legatee expressly or impliedly undertakes to carry out the wishes so expressed to him by the testator, the legatee will be treated as a trustee and will be compelled to carry out the instructions so confided to him. The reason for this rule is that it would be a fraud on the part of the legatee not to give effect to the testator's intentions, and the law will not permit him to benefit by his own fraud. The legislature in enacting s. 5 of the Indian Trusts Act and the provision thereto, intended to make this rule of equity applicable in India. S. 50 of the Indian Succession Act does not apply to such cases. The instructions of the testator are given effect to under the English law, and under s. 5 of the Trusts Act, not as a part of the will, but by fastening on the conscience of the legatee a personal obligation to carry into effect the wishes of the testator, in order to prevent the perpetration of fraud. The title of the beneficiaries is one *dehors* the will and not under the will. *Per* WALLIS, *J.*—The provisions of s. 81 of the Indian Trusts Act do not apply to such cases. *Per* SANKARAN-NAIR, *J.*—S. 81 applies where the testator intending to dispose of the beneficial interest to others leaves the estate to the devisees. This section has reference to the disposal of the beneficial interest by transfer or will. Where such a legatee, to whom the testator has confided his intention, suppresses such secret instructions with the intention of retaining the estate himself and applies for letters of administration as universal legatee, the Court will refuse the grant. *McCormick* v. *Grogan, L. R. 4 E. & I. 82, p. 97*, referred to. *In re Maddock Llewelyn* v. *Washington, [1902] 2 Ch. 220*, referred to. *Per* WALLIS, J.—The beneficiary entitled under the secret trust communicated to and accepted by the legatee claims through the legatee named in the will; and as no right as legatee can be established without a grant of probate or letters of administration under s. 187 of the Indian Succession Act, the beneficiary cannot maintain a suit to recover the benefit intended for him when there is no grant of probate or letters of administration. *Per* SANKARAN-NAIR *J.*—(*contra*).—S. 187 of the Succession Act is no bar to such a suit as the beneficiary does not sue to establish any claim as *legatee*, but to enforce the trust imposed on the legatee, as far as he is concerned. The suit is to enforce an *obligation* against the legatee and not to establish *any right* of the legatee as such. If the legatee is in possession of a substantial portion of the property he is an *executor de son tort* with all the liabilities

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TRUSTS ACT (II OF 1882)—*contd.*

——— **s. 5**—*concld.*

of an executor and universal legatee and he cannot plead want of probate or letters of administration. MANUEL LOUIS KUNHA *v.* JNANA COELHO (1908) **I. L. R. 31 Mad. 187**

——— **s. 6.**

See EXECUTOR . **I. L. R. 26 Bom. 301**

See HINDU LAW—GIFT. **I. L. R. 29 Mad. 412**

——— **s. 6**—*Hindu Law—Ancestral property—Trust by the Father—Will—Legatees.* Certain legacies were devised by the will to relatives of the testator and others. *Held*, that as the Court had held that the appellants were not validly appointed executors, the legatees were not represented by them and no declaration could be made as to the validity or otherwise of the legacies. HARILAL BAPUJI *v.* BAI MANI (1905) **I. L. R. 29 Bom. 351**

——— **s. 20.**

See GUARDIAN AND WARDS ACT. **I. L. R. 33 Calc. 591**

——— **s. 30**—*Executor—Failure to produce fund at appointed time—Advisory duty—Appointment of an agent—Degree of care in the appointment—Want of diligence—Breach of duty—Loss caused to the estate—Liability of executor.* When those entrusted with a fund for the benefit of another cannot produce it at the appointed time, *primâ facie*, they are liable for the loss which thereby accrues. One, who undertakes a duty, is bound to know what his duty requires. Where a testator by his will committed the management of the property to his widow along with two out of the five executors including the widow, it is not open to one of the executors who was not specifically entrusted with the management, to contend for the purpose of avoiding liability as executor that his duties were purely advisory, that he was but one of many that votes of the majority of the executors governed, and that the real management was entrusted to two of the executors in co-operation with the widow. In the appointment of an agent to carry on business it is incumbent on an executor to act with the same degree of care as a man of ordinary prudence would in his own affairs. But where there is want of diligence on the part of the executor both in the selection and supervision of the agent, and the loss sustained by the estate can reasonably be connected with the want of such diligence the loss must fall on the executor. The indemnity clause of s. 30 of the Trusts Act (II of 1882) casts the onus of proof on those, who seek to charge a trustee with loss arising from the default of an agent, when the propriety of employing an agent has been established. But where there is a clear breach of duty in the employment and supervision of the agent the liability of the trustee for breach of trust arises. LAKHMICHAND *v.* JAI KUVARBAI (1905) . . **I. L. R. 29 Bom. 170**

1. ——— **s. 34**—*Application for directions by trustees of charitable institution—Questions of detail and difficulty—Procedure.* The management of the Doveton charities is vested in a committee of management who are empowered under the trust-deed to require the trustees of the funds of the charities to invest the trust-funds in excess of two lakhs of rupees "in the purchase or building of any additional land, building, and premises." Certain buildings, having been erected under these provisions of the trust-deed, were now stated to be in urgent want of repair. The current income of the charities was not sufficient to meet the cost of carrying out the repairs, and the committee of management and the trustees were agreed that a sum of R8,700 in the hands of the latter (in excess of two lakhs of rupees) should be employed in carrying out this work. The trustees now applied to the High Court under the Trusts Act, s. 34, for its opinion on the question whether this should be done. *Held*, that the question was not one with which the Court could deal under the Trusts Act, s. 34. The Court (SUBRAMANIA AYYAR *J.*) was of opinion that the proposed expenditure could, on the Court being satisfied of its necessity be sanctioned, if the matter came before it in the form of a suit in its original jurisdiction ; and that in the exercise of such jurisdiction the Court has power to deal with a case like this hardly admitted of doubt. *In re* MADRAS DOVETON TRUST FUND **I. L. R. 18 Mad. 433**

2. ——— *Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such—Administration suit.* So long as an executor occupies that position, he cannot claim the advantages provided for trustees by s. 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration-suit. TRIMBAK MAHADEV *v.* NARAYAN HARI (1909) . . **I. L. R. 33 Bom. 429**

——— **s. 48**—*No right to recover even where unlawful agreement only partly carried out—Decision not bad, although no distinct issue when parties not taken by surprise.* The rule that a person in *pari delicto* cannot recover is applicable not only where the unlawful agreement had been fully carried out, but also where there has been part performance of a substantial character of such agreement. This is the construction, which ought to be placed on the words "not carried into execution" in s. 84 of the Indian Trusts Act. Where a point on which there is no distinct issue, is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised. MUTHURAMAN CHETTY *v.* KRISHNA PILLAI (1905) **I. L. R. 29 Mad. 72**

——— **s. 49.**

See ACT XX OF 1863. **I. L. R. 17 Mad. 212**

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TRUSTS ACT (II OF 1882)—*contd.*

——— ss. 53, 36.

——— *Trustee—Transactions entered into by trustee for his own benefit—"Unless otherwise provided"—Equity in favour of a person paying off a subsisting charge on property—Appointment of cestui que trust as trustee.* S. 53 of the Indian Trusts Act (II of 1882) strikes at transactions entered into by a trustee for his own profit after he has accepted the trust and while he is performing the duties of the office. It does not render void a mortgage in favour of a person created before he becomes trustee of the property by the deed of trust itself as a condition of the trust imposed by the settlor. The expression "unless otherwise provided" used in s. 36 of the Indian Trusts Act (II of 1882), means, unless otherwise provided by the instrument of trust. Where there is a subsisting charge on certain property paid off by the person in possession, it is equitable that when the plaintiff reclaims the estate, credit should be given to that person for the payment of the mortgage which the plaintiff would have had to meet. *Mahomed Shumsool* v. *Shewukram, L. R. 2 I. A. 17; Lomba Gumaji* v. *Vishwanath Amrit, (1893) P. J. 30;* and *Ranu* v. *Kedu, (1894) P. J. 39,* followed. There is no provision in the Indian Trusts Act (II of 1882) that a *cestue que trust* shall not be appointed a trustee. He is not as such incapacitated from being trustee for himself and others but as a general rule he is not altogether a fit person for the office in consequence of the probability of a conflict between his interest and his duty. ASHIDBAI *v.* ABDULLA (1906) . **I. L. R. 31 Bom. 271**

——— ss. 55, 60, 61.

See APPEAL—DECREES.
I. L. R. 11 All. 131

——— s. 56.

See PARTIES—PARTIES TO SUITS—TRUSTS, SUITS RELATING TO.
I. L. R. 23 Mad. 239

——— ss. 63 and 64—*Trust not established.* A claim made for a share of property by inheritance from a deceased relation who had been in joint possession of it with the defendant was met by the defence that the estate had been jointly held for religious and charitable purposes under a will, the deceased having had no beneficial or heritable interest. The defendant alleged that the original owner of the property had bequeathed the property in trust for these purposes. The claimant alleged a revocation of the will, and denied that there was such a trust. The judgment of the High Court, decreeing the claim, observed that, even assuming that there had been a trust under the will recognized by the deceased and the defendant, the property which had come into their possession had been by them appropriated from the first to their own purposes, and had been so long held by them adversely to the trust title that the defendant could not now allege that there was no beneficial interest transmissible by inheritance. Upon this the Judicial Committee pointed out that no trustee could have actually acquired a title by such an appropriation against the trust: Indian Trusts Act, 1882, ss. 63 and 64. They added that, at the same time, the judgment of the High Court had come to the right conclusion, for the will and the trust alleged had not been established. BITTO KUNWAR *v.* KESHO PRASAD MISR . . **I. L. R. 19 All. 277**
L. R. 24 I. A. 10
1 C. W. N. 265

TRUSTS ACT (II OF 1882)—*contd.*

——— s. 63—*concld.*

——— s. 72.

See ADMINISTRATOR-GENERAL'S ACT (V OF 1902), S. 4, CL. 2.
I. L. R. 29 Bom. 188

——— s. 74.

See APPEAL—DECREES.
I. L. R. 19 All. 131

——— s. 74—*Administrator-General's Act (V of 1902), s. 4, cl. 2—Discharge by Court of an executor—Vesting of property in the continuing executor.* The Court has power to discharge an executor on his own application, if proper case be made out. An executor so discharged remains liable for anything he has done or left undone while an executor—it only relieves him from the duties of his office from the date of the discharge. *Ex parte* AMERCHAND MADHOWJI (1905)
I. L. R. 29 Bom. 188

——— ss. 81, 83.

——— *Trust for a specific purpose—Express trust—Resulting trust—Limitation Act (XV of 1877), s. 10. Per* BATCHELOR, *J. (obiter).*—S. 10 of the Limitation Act does not apply where the object of the original trust being uncertain or undiscoverable, as resulting trust arises by operation of ss. 81 and 83 of the Indian Trusts Act, 1882. Whether the resulting trust flow from the invalidity of the declared trust or from the impossibility of ascertaining the declared trust, it is equally a substituted trust, that is, a trust which is created by the law *faut de mieux,* that is as the best arrangement which the law regards as possible in difficult circumstances. This general rule is affected to this extent only, that where there is a trust covering the whole estate and the bequests do not exhaust the estate, the trustees are expressed trustees of the residue for the heir of the testator. MATHURADAS *v.* VANDRAWANDAS (1906) . **I. L. R. 31 Bom. 222**

——— s. 82.

See HINDU LAW, WILL.
I. L. R. 29 Bom. 306

——— ss. 82, 88.

See BENAMI TRANSACTION—CERTIFIED PURCHASER—CIVIL PROCEDURE CODE, 1882, S. 317 . **I. L. R. 22 All. 434**

——— s. 84—

See CONTRACT ACT (IX of 1872), ss. 2, 20 to 35, 65 . **I. L. R. 33 Bom. 411**

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TRUSTS ACT (II OF 1882)—*concld.*

——— s. 84—*Benami sale to defraud creditors where no creditor defrauded, vendee holds property for the benefit of vendor.* Where a benami sale is effected to defraud creditors, but no creditor is actually defrauded thereby, the transferee, under s. 84 of the Trust Act, holds the property for the benefit of the transferor. A suit for the specific performance of a contract to sell made by the transferee can be successfully resisted by the transferor. S. 84 of the Trust Act embodies the principles recognized by English Courts at the time the Act was passed; and the fact that English Courts subsequently doubted the soundness of these principles will not justify the Courts in India in departing from the rule of law laid down by the section. Judgment of BENSON, *J.*, in *Yaramati Krishnayya* v. *Chundru Papayya, I. L. R. 20 Mad. 326*, not followed. *Lidlingappa* v. *Hirasa, I. L. R. 31 Bom. 405*, distinguished. MUNISAMI MUDALIAR *v.* SUBBARAYAR (1907) . . . . **I. L. R. 31 Mad. 97**

——— s. 88.

See MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION . **I. L. R. 23 Mad. 377**

——— s. 90.

See APPEAL, ABATEMENT OF. **I. L. R. 30 Mad. 67**

——— s. 91.

See TRANSFER OF PROPERTY ACT, S. 40 **I. L. R. 29 Mad. 177**

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER. **I. L. R. 24 Bom. 400**

See VENDOR AND PURCHASER—INVALID SALES . . **I. L. R. 26 Bom. 159**
I. L. R. 18 Mad. 43

——— ss. 91, 95.

See INJUNCTION—SPECIAL CASES—EXECUTION OF DECREE. **I. L. R. 21 Mad. 353**

TURN OF WORSHIP OF IDOL.

See HINDU LAW—SHEBAIT. **I. L. R. 29 Mad. 283**
10 C. W. N. 825

——— right to—

See DAMAGES—SUITS FOR DAMAGES—TORT . . **I. L. R. 3 Calc. 390**

See LIMITATION ACT, 1877, ART. 131 (1871), ART. 131 . **I. L. R. 4 Calc. 683**
I. L. R. 8 Calc. 807
6 B. L. R. 352 : 15 W. R. 29

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UBHAYAPATTOM.

——— *Malabar Law—Ubhayapattom—Agreement in mortgage perpetually void as a clog on the equity of redemption.* An "ubhayapattom" is a kanom mortgage. Where from the terms of an ubhayapattom it is clear that the debt was not intended to be extinguished, a covenant for perpetual renewal by the mortgagor operates as a clog on the equity of redemption and the addition of the words "you shall hold the properties for ever without surrendering them" does not convert such a transaction into an immediate grant of a permanent interest. Such a covenant will be inoperative as a clog on the mortgagor's right of redemption in a mortgage executed before the passing of the Transfer of Property Act and subsequent to 1858, on the principles of equity which formed the basis of judicial decisions during that period. NEELAKANDHAN NAMBUDRIPAD *v.* TIRUNILAI ANANTHA KRISHNA AYYAR (1906) . **I. L. R. 30 Mad. 61**

UGANDA, CONSULAR COURT OF.

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION. **I. L. R. 22 Bom. 54**

ULTRA VIRES.

See CHAUKIDARI CHAKRAN LAND, SETTLEMENT OF . **I. L. R. 32 Calc. 1107**

See CRIMINAL PROCEDURE CODE, S. 21. **8 C. W. N. 862**

See DAMAGES, SUIT FOR. **I. L. R. 34 Calc. 863**

See FOREST ACT (VII OF 1871). **I. L. R. 29 Bom. 480**

See LEASE . **I. L. R. 34 Calc. 1030**

See LETTERS PATENT, 1865, CL. 12. **11 C. W. N. 663**

See RULE 515 A OF THE HIGH COURT. **I. L. R. 34 Calc. 619**

1. ——— *Nullity—Executive Government.* An order, which is entirely *ultra vires*, of the Executive Government is a mere nullity and no suit is necessary to set it aside. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE (1905) **I. L. R. 29 Bom. 480**

2. ——— *Local Self-Government Act (III of 1885), ss. 139 and 78—Bye-law made under—Authority of the District Board to make the bye-law.* Where a bye-law of a District Board made under s. 139 of the Bengal Local Self-Government Act was in these terms :—"Whoever encroaches on any road by cultivating crops or by ploughing it up for cultivation, or by the construction of any building or structure thereon except by the permission of the Chairman of the District Board, shall be liable to a fine not exceeding R50, and to a further fine not exceeding R2 for every day on which the offence is continued :" *Held*, that the bye-law is not *ultra vires* of the District Board which has power under s. 139 read with s. 78 of the Bengal Local Self-Government Act, to make such a bye-law. The building of a part of a house over part of a public road without the permission of the Chairman of the District Board is

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ULTRA VIRES—*concld.*

punishable under the bye-law. RAMAUTAR SAHU *v.* ARRAH MUNICIPAL BOARD (1907) 11 C. W. N. 1099

UMPIRE.

See ARBITRATION—APPOINTMENT OF ARBITRATORS AND UMPIRES.

UNASCERTAINED GOODS.

See CONTRACT . I. L. R. 33 Calc. 547

UNBORN PERSON.

——— gift to—

See MAHOMEDAN LAW. I. L. R. 36 Calc. 431

UNCERTAINTY.

See WILL . I. L. R. 31 Bom. 583

UNCHASTITY.

See DEFAMATION—IMPUTATION ON A WIFE I. L. R. 25 Bom. 151

See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT ADOPT . 51 B. L. R. 362 I. L. R. 5 Mad. 358 I. L. R. 9 Bom. 94

See HINDU LAW—INHERITANCE. I. L. R. 32 Calc. 871 9 C. W. N. 1003

See HINDU LAW—INHERITANCE—DIVESTING OF, EXCLUSION FROM, AND FORFEITURE OF INHERITANCE—UNCHASTITY.

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIDOW. 12 B. L. R. 238 L. R. I. A. Sup. Vol. 203 I. L. R. 1 Bom. 559 I. L. R. 7 Bom. 84 I. L. R. 9 Bom. 108 I. L. R. 15 All. 382 I. L. R. 17 Mad. 392 I. L. R. 27 Bom. 465

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIFE 1 Mad. 372 2 Mad. 337 8 Mad. 144 I. L. R. 19 Mad. 6

See HINDU LAW—STRIDHAN—EFFECT OF UNCHASTITY . I. L. R. 1 All. 46

See HINDU LAW—WIDOW —DISQUALIFICATIONS—UNCHASTITY.

See PARTITION—RIGHT TO PARTITION—WIDOW . I. L. R. 24 Mad. 441

See SLANDER I. L. R. 28 Calc. 452 9 C. W. N. 847

UNCONSCIONABLE BARGAIN.

See CONTRACT ACT (IX OF 1872), S. 16. I. L. R. 32 Bom. 37 ; 208 I. L. R. 31 All. 386

UNCONSCIONABLE BARGAIN—*contd.*

See DISQUALIFIED PROPRIETOR. 10 C. W. N. 849

See INTEREST—MISCELLANEOUS CASES—BOND . . I. L. R. 25 All. 284

See WILL—CONSTRUCTION. 5 C. W. N. 729

1. ——— **Undue influence**—*Circumstances under which relief may be granted by the Court.* A person of the age of some twenty-eight years, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of R500, with interest, which amounted to R37-8-0 per cent. per annum, with six-monthly rests. The bond further contained a stipulation that the borrower should not be empowered to repay the money within three years. And if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate mentioned. *Held*, that, although it could not be said that the execution of this bond was procured by means of undue influence or that the rate of interest was penal, nevertheless the bargain was an unconscionable bargain against which the Court might properly give relief. The High Court affirmed the decree of the lower Appellate Court which gave the plaintiff the principal sum with simple interest at the rate of 24 per centum per annum. *Madho Singh* v. *Kashi Ram, I. L. R. 9 All. 228 ; Kirpa Ram* v. *Sami-ud-din Ahmad Khan, I. L. R. 25 All. 284 ; Kamini Sundari Chaodhrani* v. *Kali Prosunno Ghose, I. L. R. 12 Calc. 225 ; Kunwar Ram Lal* v. *Nil Kanth, L. R. 20 I. A. 112 ;* and *Rajah Mokham Singh* v. *Rjah Rup Singh, L. R. 20 I. A. 127*, referred to. BALKISHAN DAS *v.* MADAN LAL (1907) . . . I. L. R. 29 All. 303

2. ——— *Unconscionable bargain—Parties not on an equal footing—Defendant not aware of the nature of the transaction—Undue influence—Contract voidable.* To render a contract voidable on the ground of undue influence there must be evidence of undue influence as required by s. 16 of the Contract Act. A high rate of interest, which would induce a Court of Equity to give relief against a bargain as being on that account hard and unconscionable, is not by itself sufficient evidence of undue influence. There must be additional circumstances and when there is evidence of such additional circumstances they should be considered in the light of justice and equity. When the parties to the transaction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document, which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, which the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, all these are additional circumstances sufficient to make out a *primâ facie* case of undue in-

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UNCONSCIONABLE BARGAIN—*concld.*

fluence so as to throw the onus on the lenders to disprove it. CHATRING, MOOLCHAND & Co. *v.* WHITCHURCH (1907). . **I. L. R. 32 Bom. 208**

3. ——— **Exorbitant rate of interest**—*Unconscionable transactions—Contract Act (IX of 1872), ss. 16, 19A—Contract induced by undue influence—Money-lender—Undefended suit—Court's right to interfere—Reasonable rate of interest, what is.* Under ss. 16 and 19A of the Indian Contract Act the Court has power to interfere and relieve a defendant against what may appear to the Court to be unconscionable transactions. The circumstances in each case must be looked to in order to decide what would be a reasonable rate of interest to allow. POMA DONGRA *v.* WILLIAM GILLESPIE (1907) **I. L. R. 31 Bom. 348**

4. ——— **Fraud**—*Loan borrowed by a person in urgent need of money—Promise to pay a time-barred debt—Unfair and unconscionable bargains—Undue influence—Coercion—Contract Act (IX of 1872), s. 16.* A Court of Equity will not set aside a contract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions and showing that the defendant, having been victimised by the plaintiff's unfair and improper conduct, was unable to understand what he was doing. GANESH *v.* VISHNU (1907) . **I. L. R. 32 Bom. 37**

UNCOVENANTED SERVICE FAMILY PENSION FUND.

See MUTUAL BENEFIT SOCIETY.
I. L. R. 7 Calc. 1
I. L. R. 22 Bom. 451

——— **entrance certificate of—**

See STAMP ACT, 1879, S. 3, SUB.-S. 15.
I. L. R. 19 Calc. 499

UNDERGROUND RIGHTS.

See LANDLORD AND TENANT.
I. L. R. 33 Calc. 54

See LIFE ESTATE.
13 C. W. N. 611

See MINERAL RIGHTS.

See MINES AND MINERALS.

——— **granted by Digwar—**

See SERVICE TENURE. **12 C. W. N. 193**

UNDER-PROPRIETOR.

——— **right of—**

See OUDH RENT ACT, S. 108.
13 C. N. W. 1093

UNDER-RAIYAT.

See LANDLORD AND TENANT.
13 C. W. N. 595

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO QUIT.
I. L. R. 29 Calc. 231
I. L. R. 34 Calc. 358

See UNDER-TENURE.

——— **deposit by—**

See BENGAL TENANCY ACT, S. 171.
13 C. W. N. 97

——— **ejectment of—**

See BENGAL TENANCY ACT, S. 85
13 C. W. N. 913

1. ——— **"Person whose immoveable property has been sold"**—*Civil Procedure Code (Act XIV of 1882), s. 310A—Sale in execution, deposit to set aside—An under-raiyat under the judgment-debtor—Locus standi.* An under-raiyat can apply under s. 310A, Civil Procedure Code, as being a person whose immoveable property has been sold in execution of a decree for arrears of rent due in respect of the superior holding. *Narain Mandal* v. *Sourindra Mohan Tagore, I. L. R. 32 Calc. 107 ; Paresh Nath Singha* v. *Nabo Gopal Chattopadhya, I. L. R. 29 Calc. 1 ; Binodini* v. *Peary Mohan Haldar, 8 C. W. N. 55 ; Kunja Behary* v. *Sambhu Chandra, 8 C. W. N. 232,* followed in principle. *Abed Mollah* v. *Diljan Mollah, I. L. R. 29 Calc. 459,* dissented from. CHANDRA KUMAR NATH *v.* KAMINI KUMAR GHOSE (1907) . . . **11 C. W. N. 742**

2. ——— **Heritability**—*Under-raiyat—Bengal Tenancy Act (VIII of 1885), s. 49.* The heirs of an under-raiyat under an annual holding do not acquire an interest in his holding by inheritance. The only right which they have, irrespective of custom or local usage, is to remain in possession of the land until the end of the agricultural year for the purpose of either realizing the rent which might accrue during that year or for the purpose of tending and gathering in the crops. *Arip Mondal* v. *Ram Ratan Mondal, 8 C. W. N. 479,* explained. JAMINI SUNDARI DASI *v.* RAJENDRA NATH CHUKERBUTTY (1906) **11 C. W. N. 519**

UNDERTAKING NOT TO SUE.

See ARREST—CIVIL ARREST.
I. L. R. 1 Calc. 78

See WARRANT OF ARREST—CRIMINAL CASES . . **2 B. L. R. A. Cr. 17**

UNDER-TENURE.

See JURISDICTION OF CIVIL COURT—REVENUE COURTS—ORDERS OF REVENUE COURTS.

See SALE FOR ARREARS OF RENT—INCUMBRANCES.

See SALE FOR ARREARS OF RENT—PORTION OF UNDER-TENURE, SALE OF.

See UNDER-RAIYAT.

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UNDER-TENURE—*concld.*

——— avoidance of—

See SALE FOR ARREARS OF RENT—INCUMBRANCES.

——— suit to cancel—

See LIMITATION ACT, 1877, SCH. II, ART. 121 (1871, ART. 119) I. L. R. 4 Calc. 860
I. L. R. 25 Calc. 167

UNDERWRITER.

See INSURANCE—MARINE INSURANCE.
I. L. R. 2 Bom. 550
12 Bom. 23
3 Bom. A. C. 1
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liability of—

See MARINE INSURANCE.
13 C. W. N. 425

UNDISCLOSED PRINCIPAL.

See CONTRACT ACT (IX OF 1872), S. 231
I. L. R. 32 Bom. 356

UNDIVIDED SHARES IN LAND.

See MAHOMEDAN LAW—GIFT.
L. R. 34 I. A. 167

UNDUE INFLUENCE.

See ACQUIESCENCE.
I. L. R. 17 Mad. 275

See BENAMI TRANSACTION.
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See CHAMPERTY . 13 B. L. R. 509
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See CONTRACT—ALTERATION OF CONTRACTS—ALTERATION BY COURT (INEQUITABLE CONTRACTS).
L. R. 4 I. A. 101
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See CONTRACT ACT (IX OF 1872), S. 16.
I. L. R. 32 Bom. 37; 208
I. L. R. 31 All. 386

See DEED—CANCELLATION.
I. L. R. 10 All. 535

See DISQUALIFIED PROPRIETOR.
I. L. R. 28 All. 570

See FIDUCIARY RELATIONSHIP.
I. L. R. 30 Mad. 169

See FRAUD . I. L. R. 28 Bom. 639

See HINDU LAW—ADOPTION—WHO MAY OR MAY NOT ADOPT.
I. L. R. 13 Mad. 214

See LANDLORD AND TENANT.
13 C. W. N. 167

See MAHOMEDAN LAW—ENDOWMENT.
I. L. R. 22 Calc. 324
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UNDUE INFLUENCE—*contd.*

See MAHOMEDAN LAW—GIFT—VALIDITY.
I. L. R. 16 Mad. 43

See ONUS OF PROOF—DECREES AND DEEDS, SUITS TO ENFORCE TO SET ASIDE.
I. L. R. 18 Calc. 545
L. R. 18 I. A. 144
I. L. R. 12 All. 523

See ONUS OF PROOF—PRINCIPAL AND AGENT . . I. L. R. 25 All. 358

See PARDANASHIN WOMEN.
5 C. W. N. 505

See PLEA . I. L. R. 28 Bom. 639

See UNCONSCIONABLE BARGAIN.

See VENDOR AND PURCHASER—INVALID SALES . . Cor. 57
1 B. L. R. A. C. 95
I. L. R. 5 Bom. 450

See WILL—EXECUTION.
I. L. R. 22 Bom. 17
L. R. 24 I. A. 148

See WILL—VALIDITY OF WILL.
I. L. R. 7 Mad. 515

1. ——— **Onus of proof**—*Third party not in confidential relationship.* A third person who stands in no confidential relation to a grantor who is under age is not bound in the first instance to show that undue influence was used in a transaction. The subject of undue influence considered. RAJ COOMAR ROY *v.* ALFUZUDDIN AHMED
8 C. L. R. 419

2. ——— *Gift—Suit—Benami transactions—Pardanashin lady—Suit to set aside deeds as having been executed by person of unsound mind—Alleged influence of daughter over her mother—Gift with imaginary consideration inserted in deed.* In a suit by a son to set aside certain transactions entered into by his mother, a Mahomedan lady, in favour of her daughter, the defendant, by which the daughter acquired possession of most of her mother's property, the plaint alleged that his mother was, at the time the transactions took place, of "unsound mind and entirely under the domination and control" of her daughter. Both Courts in India found that the mother was not of unsound mind; but the first Court treated her as a *pardanashin lady* and as "entirely under the control and domination" of the defendant, who had unscrupulously used her power over her mother to get her mother's property into her own hands, and made a decree that the transactions should be avoided on the ground of undue influence. The Court of appeal reversed the finding with respect to undue influence and dismissed the suit. *Held*, that, assuming the question of undue influence could be set up at all (for it was not raised in the pleadings except with regard to unsoundness of mind, which had been negatived, nor was any issue raised upon it), no case of undue influence had been established by the evidence. The mere relation of daughter to mother in itself suggested nothing in the way of special

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UNDUE INFLUENCE—*contd.*

influence or control; and the evidence was insufficient to establish any general case of domination on the part of the daughter, any subjection of the mother, such as to lead to a presumption against any transaction between the two; and with regard to the actual transactions, there was no evidence whatever of undue influence brought to bear upon them. *Held*, also, that in the evidence and circumstances of the case the transactions in dispute were absolute gifts, and not *benami* transactions, which might have been set aside. ISMAIL MUSAJEE MOOKERDAM *v.* HAFIZ BOO (1906)

I. L. R. 33 Calc. 773
s.c. L. R. 33 I. A. 86
10 C. W. N. 570

3. ——— *Contract Act* (*IX of 1872, as amended by Act VI of 1899*), *ss. 16, 74.* Urgent need of money on the part of the borrower does not of itself place the lender in a position to "dominate his will" within the meaning of s. 16 of the Contract Act (IX of 1872), as amended by s. 2 of Act VI of 1899. *Dhanipal Das* v. *Maneshar Bakhsh Singh, L. R. 33 I. A. 118 : I. L. R. 28 All. 570*, distinguished. SUNDAR KOER *v.* RAI SHAM KRISHEN (1906) . . **I. L. R. 34 Calc. 150**
L. R. 34 I. A. 9

4. ——— *Contract Act* (*IX of 1872*), *ss. 16, 19A—Unconscionable bargain—Parties not on an equal footing—Defendant not aware of the nature of the transaction—Contract voidable.* To render a contract voidable on the ground of undue influence there must be evidence of undue influence as required by s. 16 of the Contract Act. A high rate of interest, which would induce a Court of Equity to give relief against a bargain as being on that account hard and unconscionable is not by itself sufficient evidence of undue influence. There must be additional circumstances and when there is evidence of such additional circumstances they should be considered in the light of justice and equity. When the parties to the transaction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, when the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, all these are additional circumstances sufficient to make out a *primâ facie* case of undue influence so as to throw the onus on the lenders to disprove it. CHATRING, MOOLCHAND & Co. *v.* WHITCHURCH (1907)

I. L. R. 32 Bom. 208

5. ——— **Promise to pay a time-barred debt**—*Undue influence—Urgent need of money—Loan borrowed by a person in urgent need of money—Unfair and unconscionable bargains—Fraud—Coercion—Equity.* The defendant, a karkun in the Government service, being heavily indebted and being very much harassed by his creditors, applied to the plaintiff for a loan

UNDUE INFLUENCE—*contd.*

or a mortgage. The plaintiff agreed to lend provided the defendant executed a *khata* for the payment of R307-4-0 originally due by the latter's father, but which in 1894 had been held to be time-barred in a suit brought by the plaintiff and also for the payment of R25, the costs of that suit. The defendant, accordingly on the 16th September 1895 passed a *khata* for R332-4-0 for the amount due under which the defendant finally passed a promissory note for R600 on the 27th August 1901. Upon this promisssory note the present suit was brought. The Subordinate Judge held that the defendant received from the plaintiff only R28 on the 16th September 1895, of which R10 had been repaid; and passed a decree for R36 (*viz.*, Rs. 18, the amount of principal, and R18 as interest). On appeal, the District Judge, varied the decree by allowing plaintiff's claim to the further extent of R307-4-0; and disallowed the rest of the claim on the ground that it was vitiated by undue influence, which the plaintiff exercised over the defendant. On appeal: *Held*, that the plaintiff's claim ought to be allowed in full. If, according to law, a promise to pay a debt barred under the Statute of Limitation is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor, because the latter has been deprived of the use of the money and the debtor has had the benefit of it. Under s. 16, cl. 1, of the Contract Act (IX of 1872), when two persons enter into a contract, first, there must be a subsisting between them some relation of the kind described in the section, and secondly, the dominating position arising out of that relation must have been used by the party holding that position to secure an *unfair* advantage over the other party. When a man, who is in urgent need of money on account of his poverty and pecuniary difficulties, asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money-lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of cl. 1 of s. 16 of the Contract Act (IX of 1872). There are well-known relations such as those of guardian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like which plainly fall within cl. 1 of the section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health of the party, on whom the undue influence is alleged to have

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been exerted, are of great importance. In short, the test is, confidence reposed by one party and betrayed by the other, which means that there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves. The expression "unfair advantage" in cl. 1 of s. 16 of the Contract Act (IX of 1872) is used as meaning an advantage obtained by unrighteous means. A Court of Equity will not set aside a contract, merely because it flows from moral not legal obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions, and showing that the defendant having been victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. GANESH *v.* VISHNU (1907) . . **I. L. R. 32 Bom. 37**

UNITED PROVINCES COURT OF WARDS ACT (III OF 1899).

——— **ss. 9, 35, 47.**

See NORTH-WESTERN PROVINCES LAND REVENUE ACT (XIX OF 1873), ss. 194 (*g*), 203 . **I. L. R. 29 All. 589**

UNITED PROVINCES LAND REVENUE ACT (III OF 1901).

See CIVIL PROCEDURE CODE, 1882, s. 265. **I. L. R. 28 All. 375**

See CONTRACT ACT, s. 69. **I. L. R. 28 All. 563**

——— **ss. 56 and 86**—*Cess—Rent—Payment recorded in wajib-ul-arz as muhtarifa. Held,* that certain dues recorded as payable to the zamindars by a class of residents in the *abadi* other than agricultural tenants, and described in the village wajib-ul-arz as "*muhtarifa*," were payments to be made by way of rent, and no cesses such as required the general or special sanction of the Local Government for their validation. ABDUL HAI *v.* NATHU (1904) **I. L. R. 27 All. 183**

——— **ss. 110, 111, 223 (k).**

See PARTITION. **I. L. R. 29 All. 604**

——— **ss. 110, 111 and 233 (k)**—*Partition—Suit for recovery of property in Civil Court—Jurisdiction. Held,* that the prohibition contained in s. 233 (*k*) of the United Provinces Land Revenue Act, 1901, applies only to suits with respect to partitions in which the plaintiff has had an opportunity of having his objections considered under s. 11 and has not availed himself of it. KHASAY *v.* JUGLA (1906) . . **I. L. R. 28 All. 432**

——— **ss. 147, 195, 196.**

See PENAL CODE, s. 173. **I. L. R. 31 All. 608**

——— **ss. 147, 227, 228.**

——— *Penal Code (Act XLV of 1860), s. 353—Attachment—Power of Tahsildar to issue warrants of attachment for realization of revenue. Held,* that a Tahsildar has no power under the United Provinces Land Revenue Act, 1901, to issue a warrant of attachment in order to realize arrears of Government revenue, nor is a warrant issued by a Tahsildar validated by general authority to that effect given to him by the Collector of the District. EMPEROR *v.* RADHE LAL (1907) **I. L. R. 29 All. 272**

——— **ss. 183 and 233.**

See CONTRACT ACT (IX OF 1872), s. 69.

——— **s. 223 (k)**

See N.-W. P. LAND REVENUE ACT, 1873, ss. 132, 241 . **I. L. R. 31 All. 41**

——— **s. 233 (k).**

1. ——— *Suit for partition of Dera and site—Civil and Revenue Court—Jurisdiction.* In a suit for partition of a *Dera* standing on agricultural land situate in a *mahal* in which the plaintiffs had a share :—*Held,* that though the suit was in name one for partition of a building, it was really a suit for partition also of the land on which the building stood, and that it was barred by s. 233 (*k*), Land Revenue Act. NARAIN DAS *v.* BHUP NARAIN (1909) **I. L. R. 31 All. 330**

2. ——— *Mode of partition—Suit of Civil Court—Maintainability of.* In an application for partition of revenue paying property the defence was that there had been an imperfect partition in which *khata* No. 28 was left joint and *kuras* Nos. 1 and 3 were given to defendants and *kura* No. 2 to plaintiff and certain defendants. The plaintiff was referred to a civil suit. He brought a suit for declaration of his right to *kura* No. 2, but did not claim any relief in respect of *khata* No. 28. A decree was passed in his favour. Thereupon the Revenue Court ordered that any deficiency in the defendant's share should be made good from *khata* No. 28. Plaintiff brought this suit for a declaration that the defendant could not get any land out of *khata* No. 28. *Held,* that the suit was one relating to partition or union of mahals and could not be regarded as a suit under s. 111 or 112 of the Revenue Act. The dispute related to the mode of partition made by the Revenue Court and a Civil Court had no jurisdiction to entertain it. DEBI SARAN PANDE *v.* RAMJAS (1909) . . **I. L. R. 31 All. 541**

——— **s. 234**—*Lambardar and co-sharer—Remuneration of lambardar—Rules of the Board of Revenue dated 24th February, 1902, Nos. 22 and 23. Held,* that, in the absence of any agreement between the lambardar and co-sharers as to the lambardar's remuneration, the lambardar is entitled to 5 per cent. under Rule 23 of the Board of Revenue

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UNITED PROVINCES LAND REVENUE ACT (III OF 1901)—*concld.*

——— s. 234—*concld.*

Rules, dated February 24th, 1902, and is entitled to the benefit of this rule, although in previous years he may have received nothing. GENDA KUNWAR *v.* PIARI LAL (1906) . . **I. L. R. 28 All. 693**

UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900).

See N.-W. P. AND OUDH MUNICIPALITIES ACT.

——— s. 3.

United Provinces Municipalities Acts. 3 (4)—Definition—"Street." *Held*, that a lane, which, though at one time private property, had been for upwards of thirty years used by the public generally and had been lighted, drained and swept by the Municipality, was a "street" within the meaning of s. 3 of the Municipalities Act, 1900, and was not the less a street because it happened to be a cul-de-sac. MUNICIPAL BOARD OF BULANDSHAHR *v.* DAKKHAN LAL (1907) . . . . **I. L. R. 30 All. 70**

——— ss. 82, 87 (*3*).

Application for permission to build—Implied permission—Power to erect necessary scaffolding. Where application for permission to build has been made to a Municipal Board and the period mentioned in s. 87 (*3*) of the Municipalities Act, 1900, has expired, the applicant is in the same position as if the erection of the building specified in his application had been formally sanctioned by the Board. A sanction, express or implied, to the erection of a specified building necessarily carries with it a right to put up such ordinary scaffolding as would be necessary under ordinary circumstances for the execution of the work. EMPEROR *v.* GOKUL (1907) **I. L. R. 29 All. 737**

UNLAWFUL ASSEMBLY.

See ABSCONDING OFFENDER. **I. L. R. 29 Calc. 417**

See CHARGE—FORM OF CHARGE—SPECIAL CASES—RIOTING. **I. L. R. 21 Calc. 827; 955 I. L. R. 26 Calc. 630 3 C. W. N. 605**

See CHARGE—FORM OF CHARGE—SPECIAL CASES—UNLAWFUL ASSEMBLY.

See CHARGE TO JURY—SPECIAL CASES—RIOTING . **I. L. R. 21 Calc. 955**

See CHARGE TO JURY—SPECIAL CASES—UNLAWFUL ASSEMBLY.

See PENAL CODE, SS. 141 to 145.

See PENAL CODE, S. 186. **I. L. R. 30 Calc. 285**

See PRIVATE DEFENCE, RIGHT OF. **I. L. R. 26 Mad. 249**

UNLAWFUL ASSEMBLY—*contd.*

See RIOTING.

See SECURITY TO KEEP THE PEACE. **I. L. R. 35 Calc. 315**

1. **——— Penal Code, s. 141—*Rioting—Assembly originally lawful.*** An assembly, lawful in its inception, may become unlawful by its acts. If force is used, the higher offence of rioting is committed. QUEEN *v.* KHEMEE SINGH **1 W. R. Cr. 19**

2. **——— *Common object.*** In order to convict of the offence of being members of an unlawful assembly, it must be shown that the accused were actuated by a common object, and that the acts done by them were of such a nature as to make them guilty under s. 141 of the Penal Code. QUEEN *v.* DINOBUNDO RAI . . . . . **9 W. R. Cr. 19**

In the matter of the petition of KOYLASH CHUNDER DASS . . . . . **20 W. R. Cr. 78**

3. **——— Penal Code (Act XLV of 1860), ss. 141 and 147.** A party of persons, consisting of some five *peadas* and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a bund across it to cause the water to flow down a channel on the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M., they proceeded to work at the bund until the afternoon. At about 4 P.M., a body of men, consisting of about 1,200 in all, many of them armed with lathies and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T's* men, some five of whom were more or less severely wounded with the lathies. The occurrence resulted in the conviction of some of *M's* servants for rioting under s. 147 of the Penal Code. *M's* people wholly denied any right on the part of *T* to construct or repair the bund, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M's* people was not an "unlawful assembly," that the interference by *T's* people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so. *Held*, that the prisoners had been rightly convicted. It was further contended that *M's* people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one. *Held*, that they were members of an assembly the common object of which was by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the bund and by demolishing it so far as it was constructed, and that the case came

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UNLAWFUL ASSEMBLY—*contd.*

within s. 141, para. (4). *Queen* v. *Mitto Singh*, *3 W. R. Cr. 41*; *Shunker Singh* v. *Burmah Mahto*, *23 W. R. Cr. 25*; and *Birjoo Singh* v. *Khub Lall*, *19 W. R. Cr. 66*, referred to and commented on. GANOURI LAL DAS v. QUEEN-EMPRESS.
I. L. R. 16 Calc. 206

4. ——— **Penal Code, ss. 141 and 154**—*Owner of land on which unlawful assembly is held—Common object.* *Held*, that the owner or occupier of land on which an unlawful assembly is held cannot be convicted under s. 154 of the Penal Code, unless there is a finding that the riot was premeditated. Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly and to try them together, inasmuch as they do not have "one common object" within the meaning of s. 141 of the Penal Code. QUEEN *v.* SURROOP CHUNDER PAUL . . . . . **12 W. R. Cr. 75**

5. ——— *Affray and unlawful assembly.* There is no ground for the distinction between an unlawful assembly as a premeditated act and an affray as a sudden one; for according to s. 141 of the Penal Code, an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly. *In the matter of the petition of* LOKENATH KAR
18 W. R. Cr. 2

6. ——— *Maintenance of rights—Intention of parties.* No charge of members of an unlawful assembly under s. 141, Penal Code, can be sustained, where the intention of the parties was not to enforce a right or supposed right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised. SHUNKER SINGH *v.* BURMAH MAHTO . . . . **23 W. R. Cr. 25**

7. ——— *Person joining it and staying to prevent mischief to property.* It cannot be said that a person intentionally joins an unlawful assembly or continues in it when it appears from the evidence that he went to the place where the members of the unlawful assembly were gathered, to prevent mischief being done to his own property which he had a right to protect BIRJOO SINGH *v.* KHUB LALL . **19 W. R. Cr. 66**

8. ——— *Raiyats carrying away crops.* Where the defendants, raiyats of a portion of a zamindari sold in execution of a decree of the Civil Court, reaped and carried away their crops despite the purchaser's people, and refused to allow the purchaser's people to seal and mark grain which had been reaped and the rayiats were assembled in such numbers and so armed that nothing could be done against them:—*Held*, by the High Court, that the acts of the defendants did not amount to an offence under s. 141 of the Penal Code. ANONYMOUS . . **4 Mad. Ap. 65**

9. ——— *Interrupting procession as a nuisance.* *Held*, that the act of the defendants in assembling and forcibly interrupting a procession was forbidden by cl. 4 of s. 141 of the Penal Code, although the defendants acted upon the ground that the procession was a nuisance or annoyance to them or their community. ANONYMOUS . . . . . **5 Mad. Ap. 6**

10. ——— **Penal Code, ss. 141, 143**—*Assertion of right.* One of two village factions objected to the other passing in procession over a vacant piece of ground in the main street of the village. An injunction prohibiting the procession was obtained in the Court of the District Munsif on 24th March. On 11th May a procession was formed and approached the ground in question. Forty-six members of the first-named faction were assembled there to prevent the procession by force; the police ordered them to disperse: this order having been neglected, the police prevailed on the other faction to abandon the procession. *Held*, that the persons who did not disperse on being ordered to do so were guilty of the offence of being members of an unlawful assembly. QUEEN-EMPRESS *v.* TIRAKADU . **I. L. R. 14 Mad. 126**

11. ——— **Penal Code, s. 143**—*Dispute as to possession of land—Assembly going with armed men to sow land.* On the trial of certain persons charged with being members of an unlawful assembly it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land; that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with lathies; that they were prepared to use force, if necessary; and that the lathials kept off the opposite party by brandishing their weapons while the land was sowed. *Held*, that the accused were rightly convicted of being members of an unlawful assembly, under s. 143 of the Penal Code. *Shunker Singh* v. *Burmah Mahto*, *23 W. R. Cr. 25*, distinguished. *In the matter of* PEARY MOHUN SIRCAR. PEARY MOHUN SIRCAR *v.* EMPRESS . **I. L. R. 9 Calc. 639**

S.C. *In the matter of* PEARY MOHAN SIRCAR.
13 C. L. R. 80

12. ——— **Penal Code, ss. 143 and 353**—*Using criminal force to public servants in execution of duty—Resistance to search-warrant.* Where the officer in charge of a police station required the officer in charge of another police station to cause a search to be made in a house within the limits of its station, and such officer, on being required, deputed two officers subordinate to him to make the search without delivering to them the order in writing required by s. 379 of Act X of 1872, it was *held* that the persons resisting the search attempted could not be lawfully convicted under ss. 353 and 143 of the Penal Code. QUEEN *v.* NARAIN
7 N. W. 209

13. ——— **Penal Code, s. 147**—*Rioting—Abating nuisance.* *A*, joint owner of a parcel of land, erected on it an edifice without the consent of *B*, another joint owner. A dispute arose, and the Magistrate on inquiry ordered, under s. 530 of the Criminal Procedure Code, 1872, *A* to be put

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UNLAWFUL ASSEMBLY—*contd.*

in possession of the part of the land on which the edifice had been erected. *B* subsequently brought a suit in the Civil Court to establish his title to joint possession of the whole parcel and for a declaration that *A* was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. *B* obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. On the 8th October, the accused, who were the servants of *B*, found the men in the employ of *A* were putting up this erection a nawbat-khana, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of *A*, throwing to the ground one man who was clinging to the bamboos. On the 9th October 1897 these servants were charged before the Magistrate with rioting, and convicted under s. 147, Penal Code. *Held*, *per* JACKSON, *J.*, that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the procedure, was illegal. *Held*, *per* CUNNINGHAM, *J.*, that the accused were merely exercising the remedy of abating a private nuisance and were exercising a legal right of self-defence. EMPRESS *v.* RAJCOOMAR SINGH

I. L. R. 3 Calc. 573

S.C. *In the matter of the petition of* RAJCOOMAR SINGH . . . . . **2 C. L. R. 62**

14. ——— **Penal Code, s. 147 and s. 105, cl. 4**—*Mischief—Right of defence of property—Penal Code, s. 105, cl. 4.* Where land in the possession of *A* encroached on by the servants of *B*, who committed mischief on the land, and the servants of *A* assembled and resisted the encroachments, the High Court declined to interfere with the Magistrate's order convicting the servants of *A* of unlawful assembly, and there was error in law in the order of the Magistrate, who found as a fact that the right of defence of private property had ceased under cl. 4, s. 105, of the Penal Code. QUEEN *v.* RAJ KISTO DOSS

12 W. R. Cr. 43

15. ——— **Penal Code, s. 149**—*Common object.* S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object. QUEEN-EMPRESS *v.* BISHESHAR

I. L. R. 9 All. 645

16. ——— *Encouraging members of unlawful assembly.* Where persons join an unlawful assembly for the purpose of committing an assault, and, instead, of preventing those armed from using their weapons encourage them to do so, they were in the same position as

UNLAWFUL ASSEMBLY—*contd.*

those members of the unlawful assembly who struck the blows. QUEEN *v.* DUSHRUTH ROY

7 W. R. Cr. 58

17. ——— *Riot in which man was killed—Culpable homicide.* In a case of riot in which a man was killed, the whole of the members of the unlawful assembly, as well the victorious as the worsted, were *held* equally guilty of culpable homicide not amounting to murder. QUEEN *v.* MANA SINGH . **7 W. R. Cr. 103**

18. ——— *Constructive murder under s. 34, Penal Code—Effect on others charged under s. 149. Per* FIELD, *J.*—Where a prisoner is constructively guilty of murder under s. 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder. *In the matter of the petition of* JHUBBOO MAHTON. EMPRESS *v.* JHUBBOO MAHTON

I. L. R. 8 Calc. 739

S.C. JHUBBOO MAHTON *v.* EMPRESS

12 C. L. R. 233

19. ——— *Common object.* Where a person was killed by a member of an unlawful assembly, in prosecution of the common object of that assembly, the common object being the abduction of that person's mother:—*Held*, that all those who were members of the assembly at the time such person was killed were guilty of the offence of killing her. *In the matter of* GOLAM ARFIN . . **4 B. L. R. Ap. 47**

S.C. QUEEN *v.* GOLAM ARFIN.

13 W. R. Cr. 33

20. ——— **Penal Code, ss. 149 and 300, except. 2**—*Common object—Murder.* One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land, the title to which was disputed, fired at and killed one of such persons. *Held* by COUCH, *C.J.*, and JACKSON, PHEAR and PONTIFEX, *JJ.* (AINSLIE, *J.*, dissenting), that the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under s. 149 of the Penal Code, but of rioting with a deadly weapon under s. 148 QUEEN *v.* SABED ALI **11 B. L. R. F. B. 347: 20 W. R. Cr. 5**

21. ——— *Common object—Murder.* A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction was wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement, a member of the second faction was killed. *Held* (by NORMAN, *J.*, whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not, under s. 149 of the Penal Code, be made liable for subsequent murder. *Held* (by JACKSON, *J.*) that, he remained a member of the unfawful assembly QUEEN *v.* KABIL CAZEE . **3 B. L. R. A. Cr. 1**

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UNLAWFUL ASSEMBLY—*contd.*

22. ———— *Prosecution of common object.* If a body of men armed with lathies and under the leadership of one who to the knowledge of the rest is armed with a gun, assembled for the purpose of forcibly carrying off another man's property, and if in effecting that purpose any one of the party, taking the gun, shoots and kills a person who is making a lawful resistance, the whole party may properly be convicted of murder under s. 149 of the Penal Code. *Queen* v. *Sabed Ali, 11 B. L. R. 347 : 20 W. R. Cr. 5,* cited. HARI SINGH *v.* EMPRESS **3 C. L. R. 49**

23. ———— *Acts taking place after unlawful assembly is over.* Where, after the object of an unlawful assembly had been accomplished and the opposite party driven away, one of the members entered into an altercation with another and wounded him with a fish-spear, it was *held* that the act was not one done with a view to accomplish the common object of the assembly, or one which the rest knew would be likely to be committed in the prosecution of that object. QUEEN *v.* BINOD **24 W. R. Cr. 66**

24. ———— **Penal Code, ss. 151 and 188**—*Assembly of five or more persons—Lawful command.* Where the object of only three persons was to draw a crowd and their action was such as was calculated to and did draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace :—*Held,* that the gathering constituted an assembly of five or more persons within the meaning of s. 151 of the Penal Code (Act XLV of 1860), and that a refusal to disperse after being lawfully commanded to disperse rendered every member of the gathering liable to conviction under the said section. An order given by an officer superior in rank to an officer in charge of police stations commanding an assembly of five or more persons likely to cause a disturbance of the public peace to disperse is a lawful order within the meaning of s. 480 of the Code of Criminal Procedure (Act X of 1872). EMPESS *v.* TUCKER **I. L. R. 7 Bom. 42**

25. ———— **Penal Code (Act XLV of 1860), ss. 302, 304**—*Good faith—Order of superior officer—Firing on an unlawful assembly.* *A* caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and *B.* Persons having proceeded to reap the crops on behalf of *B,* the servants of *A* went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse ; but they did not do so ; he then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The station-house officer, without attempting to make any arrests and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them. *Held,* that the station-house officer and the constable were not acting in good faith, and that the order to shoot was illegal and did not justify the constable, and that both he and the station-house officer were guilty of murder. QUEEN-EMPRESS *v.* SUBBA NAIK **I. L. R. 21 Mad. 249**

UNLAWFUL ASSEMBLY—*contd.*

26. ———— **Penal Code, ss. 147, 148, 149 and 304**—*Rioting armed with a deadly weapon—Common object of unlawful assembly. Statement of, in charge—Error in charge misleading accused—Criminal Procedure Code, 1882, s. 225.* Before a conviction can properly be maintained for the offence of rioting, it is necessary that there should be a clear finding as to the common object of the unlawful assembly, and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it. Where a Sessions Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge sheet :—*Held,* that, inasmuch as it was impossible to say which of the two common objects had been accepted by the jury, and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not had an opportunity of meeting, the conviction must be set aside. If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under s. 148 of the Penal Code. It is only the actual person who can be charged under that section. SABIR *v.* QUEEN-EMPRESS **I. L. R. 22 Calc. 276**

27. ———— **Penal Code, s. 149**—*Common object—Murder—Prosecution of common object.* Neither of the cases of *Queen* v. *Sabed Ali, 11 B. L. R. F. B. 347 : 20 W. R. Cr. 5,* and *Hari Singh* v. *Empress, 3 C. L. R. 49,* lays down any hard-and-fast rule as to the circumstances under which one member of an unlawful assembly can be deemed guilty of an offence committed by another under the provisions of s. 149 of the Penal Code, and every case must be decided on its own merits. In dealing with such cases, while, on the one hand, it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his associates which he himself neither intended nor knew to be likely to be committed. On the other hand, it is equally necessary for the protection of the peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. Those two cases respectively emphasize the necessity of keeping these considerations in view. Members of an unlawful as-

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UNLAWFUL ASSEMBLY—*contd.*

sembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of s. 149 may be different on different members of the same unlawful assembly. JAHIRUDDIN *v.* QUEEN-EMPRESS
I. L. R. 22 Calc. 306

28. ——— **Common object disbelieved** —*Penal Code (Act XLV of 1860), ss. 379, 141, 147—Theft—Rioting—Common object charged, when disbelieved, finding by Appellate Court of a different, if proper.* If the common object fails and the substantive charge is disbelieved, the accused should be acquitted. It is not proper for an Appellate Court, while disbelieving the alleged common object of an unlawful assembly, to find out a different common object regarding which the accused were never called upon to plead nor tried, and to affirm the conviction. RAHIMUDDI *v.* ASGARALI (1900)
5 C. W. N. 31

29. ——— **Proof of unlawful assembly**—*Hiring and harbouring persons hired for an unlawful assembly, ingredients of offences of —Penal Code (Act XLV of 1860), ss. 141, 150 and 157.* S. 50 of the Penal Code refers to a particular unlawful assembly. Where, therefore, it is found that any person has hired or engaged any other person to join or become a member of a particular unlawful assembly, he is liable for any offence committed by any member of that unlawful assembly, in the same way as if he had been a member of such unlawful assembly or himself had committed such offence. S. 157 of the Penal Code is of wider application. It provides for an occurrence that may happen, and makes the harbouring, receiving or an assembling of persons who are likely to be engaged in any unlawful assembly an offence. There, again, the law contemplates the imminence of an unlawful assembly, and the proof of facts which in law would go to constitute an unlawful assembly. Therefore, where a Magistrate only found that "what the accused had been doing is collecting and harbouring men for the purpose of committing a riot should he find it his interest to do so," and there was no finding that there had been any unlawful assembly, composed of persons said to have been hired by the accused and in the course of which some offence had been committed for which the accused would have been responsible equally with those who were members of that unlawful assembly, or that an unlawful assembly made up of the elements provided for by s. 141 of the Penal Code was in the contemplation of the accused. *Held*, that the accused could not be convicted of having committed offences under ss. 150 and 157 of the Penal Code. RAM LOCHAN SARCAR *v.* QUEEN-EMPRESS (1901)
I. L. R. 29 Calc. 214
s.c. 6 C. W. N. 143

UNLAWFUL ASSEMBLY—*contd.*

30. ——— *Penal Code, s. 143—Possession of land, question of—Onus of proof—Prosecution, duty of, to prove facts—Presumption.* Where some persons were accused and charged with having come upon a piece of land with a large number of people and committed mischief in respect of some indigo crops said to have been raised upon it by the complainant's tenants, and the accused pleaded that they held the land from some time before, and in proof put in a road-cess return, filed by the complainant, showing that the accused were, at the date when the return was filed, in possession of a larger plot of land, of which they claimed the land in dispute to be a part:—*Held*, that the presumption as to the possession of the disputed land was in favour of the accused and that it was for the prosecution to prove that the accused gave up possession of the land of which they had held previous possession, or that they had held some other lands in the same village which were mentioned in the road-cess return, before any conviction could be had of the accused. BIKU KOER *v.* MARSHMAN (1901) . **5 C. W. N. 368**

31. ——— **Lawful assembly becoming unlawful**—*Indian Penal Code (Act XLV of 1860), ss. 141, 146—Rioting—Common object*— A lawful assembly may turn unlawful all on a sudden, and without previous concert among its members. Among the members of a religious procession, those who may be actually found resorting to force and violence with the common object of overawing a police officer in the lawful discharge of his duties would constitute themselves an unlawful assembly. RAGHO SINGH *v.* KING-EMPEROR (1902) . **6 C. W. N. 507**

32. ——— **Defence by accused persons of property in their possession.** Paddy belonging to a society, to which the first accused belonged, was stored in a granary in a street. It was found as a fact that this paddy had been in the possession of the first accused for some time prior to 5th November 1899, and was in his possession on that date. Complainant, on 5th November 1899, attempted, as treasurer of the society, forcibly to take possession of the paddy, with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. On a charge being preferred against the accused for rioting: *Held*, that no offence had been committed. KING-EMPEROR *v.* AYYA ANNASAMY AIYAR (1901)
I. L. R. 25 Mad. 624

33. ——— **Possession of deadly weapons, if necessary to render each member of unlawful assembly liable for offence under s. 144.** *Penal Code, ss. 114, 144.* When one person instigates another to join an unlawful assembly armed with a deadly weapon, and afterwards joins the unlawful assembly himself, he may be punishable under s. 144, Indian Penal Code, read with s. 114, even though he

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UNLAWFUL ASSEMBLY—*contd.*

was not himself armed with a deadly weapon. SRIHARI SHOME *v.* LAL KHAN (1900)
5 C. W. N. 250

34. ——— **Evidence of common object.** Two persons were charged with being members of an unlawful assembly armed with deadly weapons for the purpose of committing dacoity. The facts proved were that a crowd of about 100 persons, including the accused, had assembled together, armed with bill-hooks and sticks; and that the crowd had dispersed at once on seeing the police. On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and, having regard to the weapons with which they were armed, he convicted the accused under s. 144 of the Indian Penal Code. *Held*, that the prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly, as defined by s. 141 of the Indian Penal Code, and that the accused were entitled to be acquitted. QUEEN-EMPRESS *v.* PEELIMUTHU TEVAN (1900)
I. L. R. 24 Mad. 124

35. ——— *Indian Penal Code (Act XLV of 1860), ss. 148, 149, 324—Rioting, armed with deadly weapon—Offence committed in prosecution of common object.* The principal accused, who was unarmed, appeared with a large number of followers before the house of one Jubbar Ali, and ordered three of them, who also were not armed, to enter his house and bring him out. In the scuffle which ensued after they had entered the house, a wound was inflicted on another person, Wahid Ali, by one of them, with a dao picked up in the hut. The person who inflicted the wound was not placed on his trial. Of the others who were placed on their trial, the petitioners were convicted by the Joint Magistrate under s. 148 and s. 324, read with s. 149 of the Indian Penal Code. *Held*, that the conviction under s. 148, Indian Penal Code, was wrong, as each person charged under that section must himself be shown to have been armed. *Sabir* v. *Queen-Empress, I. L. R. 22 Calc. 276*, followed. *Held*, further, that the wound inflicted on Wahid Ali could not be regarded as the natural result of the common enterprise in which the accused were engaged, so that the conviction under s. 324, read with s. 149, was also wrong. HARENDRA CHANDRA SARKAR *v.* EMPEROR (1903)
7 C. W. N. 512

36. ——— **Dispute amongst joint owners**—*Penal Code, s. 143—Unlawful assembly with armed men—Force not actually used—Sentence—Criminal Procedure Code (Act V of 1898), s. 106—Order against one joint owner—Proceeding against the other owner under s. 107, desirable.* Where two parties were entitled to joint possession of a property but one party having been out of possession, their servants (the petitioners) with 30 or 40 other persons went armed with lathies to take forcible possession of the property and succeeded in getting possession without having had to use any force: —*Held*, that the petitioners were rightly convicted of an offence under s. 143, Indian Penal Code, but as the masters of the petitioners had a right to possession and as what the petitioners did, though not warranted by law, did not actually lead to a breach of the peace, the sentence ought not to be too severe. That an order under s. 106, Criminal Procedure Code, directing the petitioners to execute bonds to keep the peace for one year was, in the circumstances, justifiable but as that order would have the practical effect of preventing the petitioners and their masters from taking possession of the property, it was desirable that the other side should also be bound down in a proceeding under s. 107, Criminal Procedure Code. BEPIN BEHARI GUHA *v.* PRANAKUL MAJUMDAR (1906) . . **11 C. W. N. 176**

UNLAWFUL ASSEMBLY—*concld.*

UNLAWFUL COMPULSION.

See COMPOUNDING OFFENCE.
I. L. R. 21 Calc. 103

——— **Unlawful compulsory labour**—*Criminal force—Slavery—Wrongful confinement—Penal Code (Act XLV of 1860), ss. 344, 352, 374.* The accused induced the complainants, who, he alleged, were indebted to him in various sums of money, to consent to live on his premises and to work off their debts. The complainants were to, and did in fact, receive no pay, but were fed by the accused as his servants. He insisted on their working for him, and punished them by beating them if they did not do so. The complainants in addition alleged that they were prevented leaving the accused premises, and that they were locked up at night. On these allegations the accused were convicted by the first Court of offences under ss. 344, 370, and 374 of the Penal Code. On appeal the convictions under the two former sections were quashed, the evidence as to detention being disbelieved, but that under s. 374 was upheld on the ground that by magnifying the complainant's debts to him and never settling their accounts the accused had unfawfully compelled them to go on working for him against their wills. On a rule to show cause why the conviction should not be quashed:—*Held* (by PETHERAM, *C.J.*, and BEVERLEY, *J.*), that the conviction was erroneous and must be set aside. PETHERAM, *C.J.*—A person who insists that another, who has consented to serve him, shall perform his work, does not unlawfully compel such person to labour against his will within the meaning of s. 374 of the Penal Code, because it is a thing which such person has agreed to do; but if he assaults such person for not working to his satisfaction, he commits an offence punishable under s. 352. *Held*, by Norris, *J.*—That upon the facts of the case the complainants never gave their full and free consent to work and labour for the accused, and the accused therefore did unlawfully compel them to labour against their will, and that the conviction under s. 374 was right. MADAN MOHAN BISWAS *v.* QUEEN-EMPRESS
I. L. R. 19 Calc. 572

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UNLAWFUL CONSIDERATION.

See CIVIL PROCEDURE CODE, 1882, s. 257A
I. L. R. 31 Bom. 552

UNLIQUIDATED DAMAGES.

See INSOLVENCY ACT, s. 40.
13 B. L. R. Ap. 2

See INTEREST—MISCELLANEOUS CASES—UNLIQUIDATED DAMAGES.
7 Bom. A C. 89
9 Bom. 7

See SET-OFF—GENERAL CASES.
17 W. R. 113
2 Mad. 296
3 Agra 43; 97
22 W. R. 1
I. L. R. 4 Bom. 407
I. L. R. 11 Calc. 557
I. L. R. 7 All. 284

UNNATURAL OFFENCE.

——— **Penal Code, s. 377**—*Charge—Particulars as to time, place and person—Criminal Procedure Code, 1882, s. 222. Held*, that, where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom, the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, that the conviction was not sustainable. QUEEN-EMPRESS *v.* KHAIRATI . . I. L. R. 6 All. 204

UNPROFESSIONAL CONDUCT.

See ADVOCATE.

See CONTEMPT OF COURT—PENAL CODE, s. 174-7 . . 7 C. W. N. 797

See LEGAL PRACTITIONERS' ACT (XVIII OF 1879), ss. 13, 14.

See MOOKTEAR.

See PLEADER—REMOVAL, SUSPENSION AND DISMISSAL.

1. ——— **Advocate—Arrangement with client without intervention of solicitor**—*Threat—Compensation.* An Advocate of the High Court made an arrangement to do professional work for his client, without the intervention of a Solicitor, at a fee of half the usual charge; and, on another occasion, he wrote to the same client to the effect that he had an offer to work professionally against her (the client) in a case the plaint of which was settled by him for her, and unless she paid him ten gold mohurs (five times the usual fee) for refusing the brief offered he would take up the case against her:—*Held*, that the advocate was guilty of highly unprofessional conduct. S. K. H., AN ADVOCATE, *In re* (1907) . I. L. R. 34 Calc. 729

2. ——— **Pleader, right of, in declining to "act"**—*Legal Practitioners Act (XVIII of 1879, as amended by Act XI of 1896), ss. 13, cl. (f), 14—High Court at what stage of proceedings can interfere.* A pleader is within his rights in declining to accept a brief if he does not wish to do so and is not bound to give his reasons for it. A pleader called upon to show cause why he should not be reported to the High Court for unprofessional conduct under ss. 13 and 14 of the Legal Practitioners' Act need not wait to see the result of the application against him, and is entitled to come at once to the High Court for its intervention. *In re* NABIN CHANDRA DAS GUPTA (1908)
I. L. R. 35 Calc. 317

UNSEAWORTHINESS.

See CONTRACT—CONDITIONS—PRECEDENT.
2 B. L. R. O. C. 127

See DAMAGES—REMOTENESS OF DAMAGES.
6 B. L. R. Ap. 20

See INSURANCE—MARINE INSURANCE.
Cor. 5 : 2 Hyde 107
5 Moo. I. A. 361

UNSETTLED POLLIAM.

——— **Hereditary tenure**—*Evidence of possession or receipt of rent.* There is no long uniform current of decisions at Madras sufficient to show that every polliam, not permanently settled, is necessarily only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it has been held, are matters judicially determinable on legal evidence. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zamindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a polliam and an ordinary zamindari. OOLAGAPPA CHETTY *v.* ARBUTHNOT. COLLECTOR OF TRICHINOPOLY *v.* LEKAMANI. PEDDA AMANI *v.* ZAMINDAR OF MARUNGAPURI
14 B. L. R. 115 : 21 W. R. 358
L. R. 1 I. A. 268 ; 282

S.C. in High Court. ARBUTHNOT *v.* OOLAGAPPA CHETTY . . . . . 5 Mad. 303

And LEKHAMANI *v.* RANGA KRISTNA MUTTA VIRA PUCHAYA NAIKAR . . 6 Mad. 208

UNSOUNDNESS OF MIND.

See INSANITY.

See LUNATIC.

UNSTAMPED DOCUMENTS.

——— **admissibility of, in evidence.**

See APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED IN COURT BELOW—UNSTAMPED DOCUMENTS.

See EVIDENCE—CIVIL CASES—SECONDARY EVIDENCE—UNSTAMPED OR UNREGISTERED DOCUMENTS.

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UPAN CHOWKI TENURE.

See MESNE PROFITS—RIGHT TO AND LIABILITY FOR . 1 B. L. R. A. C. 167

USAGE.

See CUSTOM.

See HINDU LAW—WORSHIP.
I. L. R. 31 Mad. 236
12 C. W. N. 946

See LOCAL USAGE.

See OCCUPANCY HOLDING.
12 C. W. N. 1086

See TRANSFER. . 13 C. W. N. 541

USAGE OF TRADE.

See PRINCIPAL AND AGENT.
I. L. R. 29 Bom. 291

USE AND OCCUPATION.

See LANDLORD AND TENANT—HOLDING OVER AFTER TENANCY . 4 W. R. 24
12 W. R. 289
17 W. R. 494
20 W. R. 400
23 W. R. 61
24 W. R. 412; 441

See LANDLORD AND TENANT—LIABILITY FOR RENT . I. L. R. 16 Bom. 568

See MUNSIF, JURISDICTION OF.
I. L. R. 23 Calc. 425

See PRESIDENCY SMALL CAUSE COURTS ACT (XV of 1882), s. 9.
I. L. R. 31 Bom. 138

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—RENT, SUIT FOR.
I. L. R. 5 Bom. 572
I. L. R. 6 Bom. 79
I. L. R. 17 Calc. 541
I. L. R. 24 Calc. 557
I. L. R. 22 Mad. 149

——— decree for—

See PLAINT—AMENDMENT OF PLAINT.
I. L. R. 22 Calc. 752

See VARIANCE BETWEEN PLEADING AND PROOF—SPECIAL CASES—RENT.
5 N. W. 65
22 W. R. 346
13 B. L. R. 243
I. L. R. 27 Calc. 239

USER.

See EASEMENT. I. L. R. 30 Calc. 1077

See FERRY . . I. L. R. 18 Calc. 652

See FISHERY, RIGHT OF.
I. L. R. 12 Mad. 43

See FORGERY . I. L. R. 35 Calc. 820

See POSSESSION—ADVERSE POSSESSION.
I. L. R. 16 Bom. 338

See PRESCRIPTION.

See RIGHT OF WAY . 6 C. W. N. 197

[Before the Limitation Act of 1871 no precise time had been laid down as sufficient to create a right of suer.]

USER—*contd.*

See MULLICK KARIM BAKSH *v.* HARRIHAR MANDAR . 5 B. L. R. 174 : 13 W. R. 440

KISTO MOHUN MOOKERJEE *v.* JUGGURNATH ROY JOOGEE . . . 11 W. R. 236

HURO SOONDUREE DEBIA *v.* RAM DHUN BHUTTACHARJEE . . . . . 7 W. R. 276

1. ——— **Proof of right of user—"*All along*" *or* "*from before.*"** A user "all along" or "from before" does not necessarily prove a right. Its existence must be proved from a time from which the right would be gained or presumed to have been gained. MOOKTARAM BHUTTACHARJEE *v.* HURRO CHUNDER ROY . . . . 7 W. R. 1

2. ——— **Right to outlet for water—***Easement.* In a suit to close up an outlet of water opened by the defendant, the lower Appellate Court found that the "outlet or such" was used (barabar) all along, and that therefore the defendant had a right of user. *Held*, that an enjoyment for at least twelve years is necessary to create a right by user, and that user by the defendant for that period at least had been found. KARTIK CHANDRA SIRKAR *v.* KARTIK CHANDRA DEY
3 B. L. R. A. C. 166 : 11 W. R. 522

3. ——— **Use for many years.** In a suit for a declaration of the right of user over the water of a tank, which right was denied, the finding of the lower Appellate Court, from the evidence of witnesses adduced by plaintiff, that plaintiff had used the water for many years, was *held* to be sufficient to prove a continuous and uninterrupted user on the part of the plantiff. TOOLSEE DOSS KOBEERAJ *v.* BHYRUB LALL TEWAREE
8 W. R. 311

4. ——— *Prescription—Ancient and uninterrupted right—Easement.* A party claiming the right of user by prescription over the property of another must show not only that the right has existed from ancient days, but also that it has been exercised as of right, and has not been interrupted. MALLIK JAWAD-UL-HUQ *v.* RAM PRASAD DAS . . 3 B. L. R. A. C. 281

HEERALALL KOOER *v.* PURMESSUR KOOER.
15 W. R. 401

5. ——— **Interruption of right of easement.** The mere fact of user for any number of years will not be sufficient to confer a right, if the user be from time to time interrupted by the owner resuming, as occasion may require, the exclusive use of his land. In such a case the user will be treated as permissive merely, and not as the exercise of a right. AUKHOY COOMAR CHUCKERBUTTY *v.* MOLLAH NOBEE NOWAZ . 13 W. R. 449

6. ——— *Wrongful interruption—Acquiescence.* Wrongful interruption does not destroy a right of user where steps are immediately taken to assert the right, but if this is not done for a length of time, acquiescence may safely be presumed. HEERALALL KOOER *v.* PURMESSUR KOOER . . . 15 W. R. 401

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USER—*concld.*

7. ——— Letting house to tenant. Where a right of user of a drain or passage is incidental to a house, that right is not affected by the owner of the house letting the house to a tenant. AMJUDEE BEGUM *v.* AHMED HOSSEIN
6 W. R. 314

8. ——— Long user by tenants of a plot of their landlord's land as a threshing floor—*Conditions of contract of tenancy—Presumption.* On evidence that a tenant has for a great number of years used a particular piece of the zamindar's land along with other tenants as a threshing floor, it is competent to the Court to find, there being no evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy. *Udit Singh* v. *Kashi Ram, I. L. R. 14 All. 185*, distinguished. DALEL *v.* BHAJJU . . **I. L. R. 16 All. 181**

9. ——— License to use land of another, coupled with grant—*Revocation of license—Right of licensee to damages.* A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages if it is revoked contrary to the terms of any express or implied contract. *Wood* v. *Leadbitter, 13 M. & W. 838*, applied. PROSONNA COOMAR SINGHA *v.* RAM COOMAR GHOSE . **I. L. R. 16 Calc. 640**

USUFRUCT.

See EASEMENTS ACT, s. 7.
I. L. R. 29 Bom. 357

See RIPARIAN OWNERS.
I. L. L. 29 Bom. 357

USUFRUCTUARY MORTGAGE.

See AGRA TENANCY ACT (II OF 1910), SS. 20, 21, 31 . **I. L. R. 29 All. 327**

See CIVIL PROCEDURE CODE, 1882, SS. 13, 43 **I. L. R. 31 Bom. 527**

See DECREE—FORM OF DECREE—MORTGAGE . . **I. L. R. 1 All. 524**
I. L. R. 11 Mad. 88

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SS. 12, 13.
I. L. R. 32 Bom. 516

See LANDLORD AND TENANT.
10 C. W. N. 719

See LEASE—ZURI-I-PESHGI LEASE.

See LIMITATION ACT, 1877, S. 19 (1859), S. 1, CL. 15)—ACKNOWLEDGMENT OF OTHER RIGHTS . **13 B. L. R. 177**
1 C. W. N. 513

See MORTGAGE—CONSTRUCTION—BOND AND RENTAL AGREEMENT.
I. L. R. 26 Mad. 662

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I. L. R. 32 Calc. 576

USUFRUCTUARY MORTGAGE—*concld.*

USUFRUCTUARY MORTGAGE—POSSESSION UNDER MORTGAGE—REDEMPTION—RIGHT OF REDEMPTION. . **6 C. W. N. 601**
I. L. R. 28 All. 225
10 C. W. N. 266

See OCCUPANCY HOLDING.
13 C. W. N. 833

See PLEADINGS . **I. L. R. 27 All. 78**

See TRANSFER . **10 C. W. N. 499**

See TRANSFER OF PROPERTY ACT, SS. 92 93 . . **I. L. R. 29 All. 481**

See TRANSFER OF PROPERTY ACT, SS. 99, 67 . **I. L. R. 29 Mad. 424**

——— *Mortgagee not in possession of a portion of the mortgaged property—Acquiescence of mortgagee in part performance—Stipulation for interest—Redemption without payment of interest.* Where a mortgage-deed provides for payment of interest if "there is any defect (*nuqs*) in the mortgaged property and any manner of defect arise in the mortgagee's possession" :—*Held*, that the defect referred to is a defect in the title of the mortgagor whereby the mortgagee should fail to get possession or having got possession should lose it. *Held*, further, that the mortgagee having allowed the mortgagors to retain possession of a part of the mortgaged property and made no claim in respect of the stipulation in the mortgage-deed referred to above his claim for interest is barred by his acquiescence. *Partab Bahadur Singh* v. *Gajadhar Baksh Singh, All. Weekly Notes (1883) 91*, and *Khuda Buksh* v. *Alimunnissa, 6 All. L. J. 54*, referred to. JHUNKU SINGH *v.* CHHOTKAN SINGH (1909)
I. L. R. 31 All. 325

USURY.

See BENGAL REGULATION XV OF 1793.

See DAMDUPAT, RULE OF.

See HINDU LAW—ALIENATION—ALIENATION BY FATHER.
I. L. R. 2 Calc. 213

See HINDU LAW—USURY.

See INTEREST—STIPULATIONS AMOUNTING OR NOT TO PENALTIES.

See MAHOMEDAN LAW—USURY.

USURY LAWS REPEAL ACT (XXVIII OF 1855).

See INTEREST . **I. L. R. 29 All. 33**

UTBUNDI TENURE.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT—MODE OF ACQUISITION.
20 W. R. 32
I. L. R. 17 Calc. 39

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UTBUNDI TENURE—*concld.*

———— *Abandonment—Notice —Landlord and tenant—Sale of landlord's interest—Admission by vendor who is a party—Tenant's right to plead that sale was benami.* An *utbandi* tenant, when he ceases to hold the land, is not bound to give any notice of abandonment to his landlord, in order to avoid liability for rent for future years. AMRITA LAL MUKHERJEE v. GIRIDHAR GHOSE (1907) . . **11 C. W. N. 581**

UT RES MAJIS VALEAT QUAM PAREAT.

See POWER OF ATTORNEY.
13 C. W. N. 1190

UTTERING FALSE COIN.

See COIN . . **I. L. R. 29 All. 141**

See PENAL CODE, ss. 239 to 241, 250, 251, 254.

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VACATION.

———— **closing of Court for—**

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE—TIME FOR APPEALING . . . **1 B. L. R. O. C. 39**
12 W. R. 293
I. L. R. 2 Calc. 128 ; 272

See LIMITATION ACT, 1877, s. 5 (1871, s. 5).

———— **of High Court.**

See CIVIL PROCEDURE CODE, 1882, s. 307.
I. L. R. 20 Bom. 745

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See PENAL CODE, ss. 99, 353.
I. L. R. 28 All. 481

See PENAL CODE, s. 186.
I. L. R. 15 Mad. 93

VAKALATNAMA.

See CONTRACT ACT, s. 25.
I. L. R. 5 Bom. 258

See LIMITATION ACT, 1877, SCH. II, ART. 179—NATURE OF APPLICATION—GENERALLY. **I. L. R. 26 Mad. 197**

See PLEADER—APPOINTMENT AND APPEARANCE.

See PRISONER . . . **1 Bom. 16**

See STAMP ACT, 1869, SCH. II, ART. 32.
I. L. R. 3 Calc. 767

VAKIL.

See CONTEMPT OF COURT—PENAL CODE, s. 174 . . . **7 C. W. N. 797**

See LEGAL PRACTITIONERS' ACT.

See LETTERS PATENT, CLS. 10, 39.
I. L. R. 32 Bom. 106

See PAUPER SUIT—SUITS **15 W. R. 198**

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See PLEADER.

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13 C. W. N. 605

See STAMP ACT, 1879, SCH. II ART. 11.
I. L. R. 8 Mad. 14

See VAKIL AND CLIENT.

———— **appearance of, on Original Side of High Court—**

See PRACTICE—CIVIL CASES—VAKIL AND COUNSEL . **I. L. R. 30 Calc. 986**

See RULES OF HIGH COURT, MADRAS.
I. L. R. 1 Mad. 24

See SUPERINTENDENCE OF HIGH COURT —CIVIL PROCEDURE CODE, 1882, s. 622.
7 C. W. N. 843

———— **compromise by, of suit—**

See COUNSEL . . **6 C. W. N. 82**

———— **in Kumaon or Garhwal, enrolment of—**

See LEGAL PRACTITIONERS' ACT, SS. 6 AND 8 . . **I. L. R. 24 All. 348**

———— **right to appear before Special Tribunal—**

See BARRISTERS . **13 C. W. N. 605**

———— *Vakil's fee— Regulation II of 1827, s. 52—Calculation according to the actual value of the property in suit.*—A vakil's fee should be calculated on the amount of the actual value of the property, the subject-matter of the suit, and not on the amount of the claim as estimated for the purpose of the payment of Court-fees. *Per* JENKINS, *C.J.*—The principle and rule of taxation ought (in our opinion) as far as possible to be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the Court, and this can best be secured by adopting the actual value as the basis of taxation. The real as well as the Court-fee value should be stated on every plaint and memorandum of appeal, and in case of dispute an issue should be raised as to the real value. BAI MEHERBAI *v.* MAGANCHAND (1905)
I. L. R. 29 Bom. 229

VAKIL AND CLIENT.

See ATTORNEY AND CLIENT.
11 B. L. R. 60 note

See CONTRACT ACT, s. 25.
3 Agra 286
3 N. W. 25
I. L. R. 2 Bom. 362
I. L. R. 5 Bom. 258

VALID SANCTION.

———— **requisites of—**

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11 C. W. N. 195

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VALUATION OF APPEAL.

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—VALUATION OF APPEAL.

See APPEAL TO PRIVY COUNCIL.
I. L. R. 33 Calc. 1286

See CIVIL PROCEDURE CODE, 1882, s. 596. **10 C. W. N. 564, 565**

See PRIVY COUNCIL—LEAVE TO APPEAL.
13 C. W. N. 1127

See PRIVY COUNCIL, PRACTICE OF—VALUATION OF APPEAL.

See VALUATION OF SUIT—APPEALS.

VALUATION OF LAND.

See LAND ACQUISITION ACT.

See LAND ACQUISITION ACT, I OF 1894. s. 18. **I. L. R. 33 Bom. 325**

See LAND ACQUISITION ACT, ss. 19, 23.
11 C. W. N. 875

See LAND ACQUISITION ACT, 1894, s. 23.
13 C. W. N. 487 ; 1046

See SUITS VALUATION ACT (VII OF 1887), s. 8. **I. L. R. 33 Bom. 658**

——— **by Special Judge—**

See COMPENSATION
I. L. R. 36 Calc. 967

——— *Compensation, determination of—Land Acquisition Act (I of 1894)—Market value of land—Future utility—Expert opinion.* In estimating the value of land acquired by Government, the futute utility of the land is a consideration which ought to be taken into account ; such future utility, however, must be estimated by prudent business calculations and not by mere speculation. The advantage of expert opinion regarding the value of land (especially in or near large towns) explained. Enquiry cannot be dispensed with. A proper valuation cannot be made simply by visiting the land and picking up orally some casual and untested information, which may be interested or one sided. RAJENDRA NATH BANERJEE *v.* THE SECRETARY OF STATE FOR INDIA (1905) . . **I. L. R. 32 Calc. 343**

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Col.
1. SUITS 12736
2. APPEALS 12771

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I. L. R. 2 Bom. 145 ; 219
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I. L. R. 31 Calc. 301
I. L. R. 34 Calc. 400

See APPEAL TO PRIVY COUNCIL—CASES IN WHICH APPEAL LIES OR NOT—VALUATION OF APPEAL.

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See APPEALLATE COURT—

GENERAL DUTY OF APPELLATE COURT . **I. L. R. 25 All. 174**

INTERFERENCE WITH, AND POWER TO VARY, ORDER OF LOWER COURT.
I. L. R. 30 Calc. 501 ; 516

REJECTION OR ADMISSION OF EVIDENCE ADMITTED OR REJECTED IN COURT BELOW—VALUATION OF SUIT.

BENGAL TENANCY ACT, s. 153.
I. L. R. 35 Calc. 547
12 C. W. N. 448

See CIVIL PROCEDURE CODE, 1882, ss. 54, 283. **I. L. R. 27 All. 411 ; 440**

See CIVIL PROCEDURE CODE, 1882, s. 596. **10 C. W. N. 564 ; 565**

See COSTS—SPECIAL CASES—VALUATION OF SUIT.

See COURT FEE.

See COURT FEES ACT.

See COURT-FEES ACT—

s. 7, CL. IV. (*d*).
I. L. R. 24 Mad. 34

SCH. I, ART. 11.
I. L. R. 24 Mad. 241

See JURISDICTION.
I. L. R. 32 Calc. 734

See JURISDICTION—QUESTION OF JURISDICTION—WRONG EXERCISE OF JURISDICTION . . . **22 W. R. 301**
I. L. R. 8 Bom. 31

See PLAINT—REJECTION OF PLAINT.
I. L. R. 23 All. 423

See RECORDERS ACT, s. 27.
5 B. L. R. 305
8 B. L. R. Ap. 91

See RESTITUTION OF CONJUGAL RIGHTS.
I. L. R. 31 Calc. 849
I. L. R. 34 Calc. 352

See SPECIAL OR SECOND APPEAL—OTHER ERRORS OF LAW OR PROCEDURE—VALUATION OF SUIT.

See SUITS VALUATION ACT (VII OF 1887).

See VALUATION OF SUIT—APPEALS.

1. SUITS.

1. ——— **Question of valuation**—*Procedure.* Whether or not a suit has been properly valued is a preliminary question which ought to be disposed of before the case goes to trial. JOYTARA DASSEE *v.* MAHOMED MOBARUCK
I. L. R. 8 Calc. 975 : 11 C. L. R. 399

2. ——— **Computation of value**—*Stamp duty—Valuation of subject-matter for purpose of determining jurisdiction.*—The valuation

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

of a suit for the purposes of stamp duty, and the valuation of the subject-matter of the suit for the purpose of determining the jurisdiction of the Court in appeal, are two different things. The value of the suit for the purposes of stamp duty is fixed by certain rules which determine an artificial value for those purposes. The value of the subject-matter of a suit on appeal, on which depends the jurisdiction of the several grades of civil suits, is the actual value of the property of litigation. AUKHIL CHUNDER SEN ROY *v.* MOHINY MOHUN DASS . **I. L. R. 5 Calc. 489 : 4 C. L. R. 491**

3. ——— *Valuation for purposes of jurisdiction.* Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, should govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. JAG LAL *v.* HAR NARAIN SINGH . . **I. L. R. 10 All. 524**

4. ——— *Valuation for purposes of jurisdiction—Court Fees Acts.* The valuation of suits for the purpose of jurisdiction is perfectly distinct from their valuation for the fiscal purpose of Court-fees. Therefore Court Fees Acts, which are fiscal enactments, are not to be resorted to for construing enactments which fix the valuation of suits for the purpose of determining jurisdiction. DAYACHAND *v.* HEMCHAND DHARAMCHAND . . **I. L. R. 4 Bom. 515**

5. ——— *Jurisdiction of Munsif Mad. Regs. VI of 1816, s. 11, and III of 1833.* The valuation of the matters of litigation for the purpose of determining the jurisdiction of Munsifs is to be made in the mode prescribed by s. 11, Regulation VI of 1816, and Regulation III of 1833, and not in that prescribed in the Stamp Acts. THIAGARAJA MUDALI *v.* RAMANUJA CHARRY. CHINNASAMI CHETTI *v.* NANJAPPASARY. JUNJLA VENKATARAYADU *v.* JUNJLA KAMAMMAH **6 Mad. 151**

6. ——— *Court Fees Act, 1870, s. 12—Class of suit in which particular suit ranks.* S. 12 of the Court Fees Act, which makes the decision of a Court in which a plaint or memorandum of appeal is filed final on questions relating to valuation for the purpose of determining the amount of any fee chargeable does not affect question as to the class of suits in which a particular suit ranks. ANNAMALAI CHETTI *v.* CLOETE **I. L. R. 4 Mad. 204**

7. ——— *Court Fees Act, 1870, s. 12—Non-payment of sufficient Court-fee.* S. 12 of the Court Fees Act (VII of 1870) applies merely to the valuation of property for the purpose of calculating the Court-fee when there is no question as to the article of the schedule of the

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1. SUITS—*contd.*

Act with reference to which the valuation is to be made, and does not apply to a case in which it is contended that the property has been wrongly valued, but that the relief has been improperly estimated by putting it under a wrong article in the schedule of the Act. It does not contemplate a case on which the Court refuses to hear a suit on the ground that a sufficient Court-fee has not been paid. See *Ajoodhya Pershad Singh* v. *Gunga Prashad, I. L. R. 6 Calc., 249 : 6 C. L. R. 567.* OMRAO MIRZA *v.* JONES **12 C. L. R. 148**

8. ——— *Jurisdiction—Market value of subject-matter, mode of computing—Court Fees Act (VII of 1870), ss. 6 and 12.* For the purpose of determining the question of jurisdiction, the valuation of a suit should be computed according to the market value of the subject-matter of the suit, and not by the special rules applicable to valuation laid down in Act VII of 1870. NANHOON SINGH *v.* TOFANEE SINGH **12 B. L. R. 113 : 20 W. R. 33**

JEEBRAJ SINGH *v.* INDERJEET MAHTOON. **12 B. L. R. 115 note : 18 W. R. 109**

CHUNDER NATH BHUTTACHARJEE *v.* BRINDABAN SHAHA . . . **25 W. R. 39**

KALU BIN BHIWAJI *v.* VISHRAM MAWAJI. **I. L. R. 1 Bom. 543**

BAI MAHKOR *v.* BULAKHI CHAKU. **I. L. R. 1 Bom. 538**

9. ——— *Market value—Valuation for stamp purposes.* Where a Court is satisfied that a market value of the subject of a suit or appeal presented to it is of such an amount as to bring the suit or appeal within its jurisdiction, it is bound to receive it. The Court will generally assume that the value of the property in suit is that arrived at by the computation for the purposes of ascertaining the stamp duty where the Stamp Act prescribes arbitrary principles of calculation; but where it is asserted and shown, to the satisfaction of the Court, that the market value is in excess of the amount computed for such purposes, the Court must take notice of the actual market value. DHUNNOO *v.* DAMODUR DOSS . **2 N. W. 177**

10. ——— *Cases in which revenue cannot be calculated—Market value.* In cases where, for the purpose of the stamp on an appeal, it is impracticable to ascertain accurately what portion of permanent revenue has been assessed on the lands in dispute in a suit, the appellant should furnish to the Registrar a memorandum giving an estimate of the market value and the date on which it has been calculated. If the Registrar consider the estimate clearly insufficient, the Court will issue a commission to ascertain the proper market value. The provisions of Sch. B of Act XXVI of 1867, considered. *Ex parte* MOONEE RANGAPPEN **3 Mad. 352**

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

11. _____ *Dispute as to proper valuation.* On a dispute arising as to the proper valuation of a suit, the Court may, on the application of either party, issue a commission and make an inquiry into the market value or the net profits of the property in dispute. The final decision as to the proper valuation is vested in the Court which hears the suit. UMA SANKAR ROY CHOWDRY *v.* MANSUR ALI KHAN
5 B. L. R. Ap. 6 : 13 W. R. 327

See WAJID ALI KHAN *v.* LALA HANUMAN PRASAD.
4 B. L. R. A. C. 139 : 12 W. R. 484

12. _____ *Costs.* In estimating the value of a suit the costs must not be included in the amount in dispute. NIILMADHAB DAS *v.* BISWAMBHAR DAS
3 B. L. R. P. C. 27: 12 W. R. P. C. 29
13 Moo. I. A. 85

13. _____ *Character of suit —Valuation altering with wording of plaint.* A suit should be valued according to its real character. Where a plaint is so worded as that, taken strictly the valuation would be such that the Court is which the plaint was filed would have no jurisdiction, the mere miswording of the plaint will not oust the Court of its jurisdiction. AJOODHIA LALL *v.* GUMANI LALL . . . **2 C. L. R. 134**

14. _____ *Court Fees Act (VII of 1870), s. 17, Applicability of—"Cumulative reliefs"—Alternative relief.* Where the plaintiff sues in the alternative for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. S. 17 of the Court Fees Act (VII of 1870) does not apply to such a case. That section is applicable only to a case of cumulative relief sought by the plaintiff. *Motigavri* v. *Pranjivandas, I. L. R. 6 Bom. 302,* followed. KASHINATH NARAYAN *v.* GOVINDA BIN PIRAJI
I. L. R. 15 Bom. 82

15. _____ **Incorrect valuation**—*Appellate Court—Ground for dismissal of suit.* The valuation of a suit must be taken from the statement in the plaint, and if, after going into the evidence, it is found that a particular item it improperly claimed, the Court has means of punishing the plaintiff by saddling him with costs or in any other way; but the whole suit should not be dismissed simply because, in the opinion of the lower Appellate Court, it ought to have been valued within the limit of the jurisdiction of the Small Cause Court. MOHEE LALL *v.* KHETARAM MARWARY . . . . **25 W. R. 76**

16. _____ *Designed exaggeration of valuation—Suits Valuation Act (VII of 1877), s. 11—Munsif, jurisdiction of—Code of Civil Procedure (1882), s. 578—Plaint, return of—Provincial Small Cause Courts Act (IX of 1887), s. 15, sub-s. 3.* A suit was brought in the Munsif's Court for money as well as for damages, valued at R1,004. The Munsif gave the plaintiff a decree

VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

for R900, but dismissed the claim for the balance, which was for damages. On appeal the Subordinate Judge was of opinion that the claim had been designedly exaggerated, and he therefore held that the suit was one cognizable by the Small Cause Court, and directed the plaint to be returned to the plaintiff for the purpose of presenting it to the proper Court. *Held,* that, as the suit was tried on its merits by the first Court, and the over-valuation of the suit was not found by the Appellate Court to have prejudicially affected the disposal of the suit on its merits, the objection as to jurisdiction should not have been given effect to, and therefore the Court below was wrong in directing the plaint to be returned. *Mohee Lall* v. *Kheta Ram Marwary, 25 W. R. 76,* followed. *Nanda Kumar Banerjee* v. *Ishan Chandra Banerjee, 1 B. L. R. Ap. 91;* and *Bonomally Nawn* v. *Campbell, 10 B. L. R. 193,* distinguished. HAMIDUNNISSA BIBI *v.* GOPAL CHANDRA MALAKAR . **I. L. R. 24 Calc. 661**
1 C. W. N. 556

17. _____ *Under-valuation, effect of—Suits Valuation Act (VII of 1887), s. 11—Suit for partition.* The plaintiffs instituted a suit for partition in the Munsif's Court and valued it at R350, being the value of their share. Defendant contented that the suit ought to have been valued at R3,000, being the value of the whole 16 annas, and therefore the Munsif had no jurisdiction. The Courts below overruled the objection, holding that, as the value of the share claimed was within the limit of the Munsif's jurisdiction, the suit was brought in the proper Court, and on the merits they found in favour of the plaintiffs. *Held,* that the disposal of the suit or appeal not having been prejudicially affected in the merits by the under-valuation, the defect of jurisdiction, if any, had been cured by s. 11 of the Suits Valuation Act (VII of 1887). DINESH CHUNDER ROY *v.* SARNAMOYI DEBI
1 C. W. N. 136

18. _____ *Pecuniary limits of jurisdiction—Suit filed in superior Court—Suit on mortgage and for interest.* In a suit on a mortgage, in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif, and which was filed in the Court of a Subordinate Judge, it appeared that there had been an adjudication by District Munsif in a previous suit affecting the rights of the parties now in issue, and that the present claim was largely composed of interest. The Subordinate Judge having framed issues relating to the claim for interest and having tried them as preliminary issues, decided that the suit was within the pecuniary limits of the jurisdiction of a District Munsif, and that the claim had been unwarrantably exaggerated with a view to filing the suit in a superior Court, and so avoiding the plea of *res judicata,* and he thereupon returned the plaint to be presented in the proper Court. *Held,* that the procedure

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adopted was wrong, and that the whole suit should have been tried. KOTI PUJARI *v.* MANJAYA **I. L. R. 21 Mad. 271**

19. _____ **Valuation of amended plaint**—*Valuation ascertained at date of filing and at date of amendment.* The proper valuation in the case of an amended plaint is that ascertained at the date of the amendment, and not at the date of the original filing of the plaint. MORO VISHVANATH *v.* GANESH VITHAL . **10 Bom. 444**

20. _____ **Valuation of plaint presented again after return of plaint**—*Return of plaint for want of jurisdiction—Second presentation under Court Fees Act, 1870—Act XXVI of 1867, Plaint presented under.* Where a plaint in a suit was originally presented, when Act XXVI of 1867 was in force, in the Court of the Munsif, and, being above the amount for which that Court had jurisdiction, was returned for presentation to the Subordinate Judge, and when presented there it was admitted and heard and afterwards it was found that under Act VII of 1870, the Court Fees Act which was then in force, the lower standard of valuation necessary would have made it cognizable by the Munsif:—*Held*, that by analogy to the cases which decide that the date of a suit for the purposes of limitation is the date when the plaint was originally presented, the suit must be assumed to have been brought when the plaint was filed in the Munsif's Court, and therefore was properly valued under Act XXVI of 1867. KHELAT CHUNDER GHOSE *v.* NUSSEEBUNNISSA BIBEE . . **16 W. R. 47**

21. _____ **Account, suit for**—*Court Fees Act, 1870, s. 7, cl. (f), and s. 11.*—By s. 7, cl. (*f*), of the Court Fees Act (VII of 1870), the plaintiff in a suit for accounts must state the amount at which he values the relief sought; but he is free to fix it as he thinks proper, subject to the provisions of s. 11, which preclude the execution of the decree in case it exceeds such value until the execution fee has been paid. GOVINDAS *v.* DAYABHAI **I. L. R. 9 Bom. 22**

22. _____ *Subordinate Judge's power to make valuation—Court Fees Act (VII of 1870), s. 7, cl. 4 (f)—Civil Procedure Code (Act XIV of 1882), s. 54, cls. (a) and (b).* The plaintiffs brought a suit for an account, and approximately valued their claim at R16,151-0. The Subordinate Judge was of opinion that the claim was for recovery of money, and should have been valued at R1,000. He therefore called on the plaintiffs to make up the stamp to that required on this valuation; and the plaintiffs refusing, he dismissed their suit under s. 54 (*b*) of the Civil Procedure Code (Act XIV of 1882). *Held*, that in any case the Subordinate Judge was wrong. If the suit was really one for an account, the plaintiffs were entitled to value the relief they sought approximately, as they had done; if it were not one for an account, but for recovery of money, still the Subordinate Judge had no power himself to value the relief sought, but should have called on the plaintiffs to value the relief they sought, and then if he had thought such relief was undervalued, he could have applied s. 54 (*a*) of the Code of Civil Procedure and rejected the suit. BALVANTRAV *v.* BHIMASHANKAR **I. L. R. 13 Bom. 517**

23. _____ *Suit for account and for balance that may be found due—Appeal—Act XIV of 1869, ss. 8 and 26.* The plaintiffs sued for an account of all business done by the defendants as their commission agents from 1854 to 1867, and prayed that whatever was found due might be awarded with interest. The plaintiffs valued the relief sought approximately at R510, and this was the only valuation stated in the plaint. The suit was filed in the Court of a first class Subordinate Judge, who rejected the plaintiff's claim. Against this decision the plaintiffs preferred an appeal to the High Court. *Held*, that, as the approximate amount of the claim was stated in the plaint to be R510, that must be taken to be the value of the subject-matter of the suit for purposes of jurisdiction. The appeal, therefore, lay under ss. 8 and 26 of Act XIV of 1869, not to the High Court, but to the District Court. Under s. 50 of the Code of Civil Procedure (Act XIV of 1882), if a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits, while in a suit for the amount which will be found due on taking unsettled accounts the plaint need only state approximately the amount sued for. As in the former instance the precise amount, so in the latter the approximate amount stated in the plaint must be taken to be the amount, of value of the subject-matter of the suit for purposes of jurisdiction. KHUSHALCHAND MULCHAND *v.* NAGINDAS MOTICHAND . . . **I. L. R. 12 Bom. 675**

24. _____ **Adoption, suit to set aside**—*Suit by reversioner—Jurisdiction.* For the purpose of determining the jurisdiction over a suit by a reversioner to set aside an adoption, the loss which would accrue to the adopted person, should the adoption be declared invalid, is the measure of the value of the subject-matter of the suit. KESHAVA SANABHAGA *v.* LAKSHMINARAYAN **I. L. R. 6 Mad. 192**

25. _____ *Court Fees Act, s. 7—Suits Valuation Act (VII of 1887), ss. 4, 10.* The value, for the purpose of jurisdiction, of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff. *Keshava Sanabhaga* v. *Lakshmi Narayana, I. L. R. 6 Mad.* 192, dissented from. SHEO DENI RAM *v.* TULSHI RAM **I. L. R. 15 All. 378**

26. _____ **Annuity, suit for declaration of right to**—*Act XXVI of 1867—Stamp Act, 1862, Sch. A, cl. 2.* In a suit for a declaration

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

of right to an annuity (varshasan) it was *held* that the stamp for the petition of special appeal should be regulated by the market value of the annuity and that *primâ facie* ten times the amount of the annuity might be assumed to be its market value, as enacted for analogous agreements by s. 2, Sch. A, Act X of 1862. NARSINVACHARYA *v.* SVAMI RAYA CHARYA **5 Bom. A. C. 55**

27. ——— Attachment, suit to set aside—*Suit by trustees' deed given by insolvent for benefit of creditors.* The valuation for stamp duty of a suit brought by the trustees of an assignment by an insolvent trader for the benefit of his creditors to set aside an attachment by an execution-creditor should be calculated on the value of the lien claimed by the judgment-creditor. STEPHENSON *v.* BAUMGARTNER . **3 Agra 104**

28. ——— *Suit under Civil Procedure Code, 1882, s. 283—Stamp—Possession—Court Fees Act, VII of 1870, Sch. II, Art. 17, cl.1.* When a party prefers a claim or makes any objection to the attachment of any property in execution of a decree, but fails to establish it, and brings a suit under s. 283 of the Code of Civil Procedure (Act XIV of 1882) to establish his right to the property attached, his plaint is to be treated as falling under Art. 17, cl. 1, of Sch. II, of the Court Fees Act, VII of 1870, and is chargeable with only a ten-rupee stamp, notwithstanding that the plaintiff may pray in such a suit to be awarded possession. *Parvati* v *Kisan Sing, Judgments for 1881, p. 121,* followed. *Gunpatgir Guru Bholagir* v. *Gunpatgir, I. L. R. 3 Bom. 230,* distinguished. DHONDO SAKHARAM *v.* GOVIND BABAJI **I. L. R. 9 Bom. 20**

29. ——— Attachment, suit to set aside order removing—*Court Fees Act, VII of 1870, ss. 6 and 12, and Sch. II, Art. 17, cl. 1—Valuation by subordinate Court—Suit to re-establish judgment-debtor's right to property on removal of attachment.* Where, on the removal of an attachment at the instance of a third party, the judgment-creditor brought a suit to establish the right of his judgment-debtor to the property from which the attachment had been removed, and to get the summary order to remove the attachment set aside:—*Held,* that the proper stamp on a plaint of that kind was R10 under s. 6 and Sch. II, Art. 171, of the Court Fees Act, VII of 1870. VITAL KRISHNA *v.* BALKRISHNA JANARDAN **I. L. R. 10 Bom. 610**

30. ——— Award, suit to carry out. A suit to carry out an arbitration award need not be valued. KHODA BUKSH *v.* MOWLA BUKSH **14 W. R. 255**

31. ——— Award, application to file—*Civil Procedure Code, 1882, s. 525.* The proper Court-fee upon an application to file an award under s. 525 is the Court-fee prescribed for applications, and not the Court-fee upon a plaint. BIJADHUR BHUGUT *v.* MONOHUR BHUGUT **I. L. R. 10 Calc. 11**

S. C. PALUT BHAGUT *v.* MONOHUR BHAGUT **13 C. L. R. 171**

32. ——— Charge on property, suit to establish—*Madras Civil Courts Act, 1873—Subject-matter of suit.* For the purposes of jurisdiction (Madras Civil Courts Act, 1873) the subject matter of a suit to establish the validity of a charge, upon property is, when the property is in excess of the charge, the amount of the charge, when the charge is in excess of the property, the value of the property. KRISHNAMA CHARYAR *v.* SRINIVASA AYYANGAR . **I. L. R. 4 Mad. 339**

33. ——— Damages, suit for. In determining the jurisdiction of the Court in a suit for damages, the amount claimed, and not that eventually found due, must be taken at the valuation. JOY DOORGA DASSEE *v.* MANICK CHAND BABOO **16 W. R. 248**

34. ——— Declaratory decree, suit for—*Suit to establish right to attached property. Held,* that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. *Second Appeal No. 320 of 1876,* followed. GULZARI LAL *v.* JADAUN RAI . . . . **I. L. L. 2 All. 799**

35. ——— *Suit for declaration that property is liable to sale in execution of decree—Jurisdiction.* In a suit to have it declared that certain property valued at R400 was liable to sale in execution of the plaintiff's decree for R1,500:—*Held,* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of the Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *Gulzari Lal* v. *Jadaun Rai, I. L. R. 2 All. 799,* distinguished. DURGA PRASAD *v.* RACHLA KUAR . . . **I. L. R. 9 All. 140**

36. ——— *Bengal Civil Courts Act (VI of 1871), s. 20—Value of the subject matter in dispute—Civil Procedure Code (Act XIV of 1882), s. 283—Attached property, suit to establish right to.* In suits brought under s. 283 of the Civil Procedure Code to test the question whether a property which has been attached in execution is liable to pay the claim of the creditor, the amount which is to settle the jurisdiction of the Court is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him, and not the value of the property attached, unless the two amounts happen to be identical. *Janki Das* v. *Badri Nath, I. L. R. 2 All. 698; Gulzari Lal* v. *Jadaun Rai, I. L. R.*

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VALUATION OF SUIT—*contd.*

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2 All. 799; Krishnama Chariar v. *Srinivasa Ayyangar, I. L. R. 4 Mad. 339;* and *Dayachand Nemchand* v. *Hemchand Dharamchand, I. L. R. 4 Bom. 515,* followed. MODHUSUDUN KOER *v.* RAKHAL CHUNDER ROY **I. L. R. 15 Calc. 104**

37. ——— *Suit by claimant to attached property—Court Fees Act (VII of 1870) —Civil Procedure Code, 1882, ss. 278 and 283.* Where a claimant whose objection under s. 278 of the Code of Civil Procedure has been disallowed, brings a suit and makes the judgment-creditor, who was trying to execute the decree, the sole defendant to the suit, a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant, is a claim for only one declaration, and for such purposes and in such a suit it is immaterial whether the claim is that the property is the plaintiff's and not liable to attachment or that the property is the plaintiff's as against the defendant's right to attach, and that the order of attachment should be cancelled. But where the person objecting under s. 278 of the Code brings his suit and makes not only the execution-creditor in the attachment proceedings, but also the judgment-debtor in those proceedings, parties to the suit, and asks for a declaration of the plaintiff's title to the property under attachment as against the judgment-debtor, and also asks for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of the judgment-creditor's decree, there are two substantial declarations asked for. MOTI SINGH *v.* KAUNSILLA. **I. L. R. 16 All. 308**

38. ——— *Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887), ss. 19 and 21—Suit claiming property under the Civil Procedure Code, s. 283.* When in a suit under s. 283 of Act XIV of 1882 the claimant objector makes the judgment-debtor or his representative a party as defendant to the suit, the property attached must be regarded as the subject-matter of the suit, and the value of the suit within the meaning of ss. 19 and 21 of Act XII of 1887 must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realized by the sale of property in execution of the decree. *Gulzari Lal* v. *Jadaun Rai, I. L. R. 2 All. 199; Durga Prasad* v. *Rachla Kuar, I. L. R. 9 All. 140; Krishnama Chariar* v. *Srinivasa Ayyangar, I. L. R. 4 Mad. 339;* and *Modhusudun Koer* v. *Rakhal Chunder Roy, I. L. R. 15 Calc. 104,* distinguished. *Mahabir Singh* v. *Behari Lal, I. L. R. 13 All. 230,* and *Madhu Das* v. *Ramji Patak, I. L. R. 16 All. 286,* referred to. DWARKA DAS *v.* KAMESHAR PRASAD **I. L. R. 17 All. 69**

39. ——— *Court Fees Act, s. 12, and Sch. II, Art. 17, cl. 3—Consequential relief —Appeal—Civil Procedure Code, 1859, s. 246.*— S. 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee, but does not prevent a Court of appeal from determining whether or not consequential relief is sought in a suit, so that it may determine under what class of cases the suit falls for the purposes of the Court Fees Act. A suit by a person against whom an order has been made, under s. 246 of Act VIII of 1859, disallowing his claim to the attached property, need not be valued according to the value of the property, but can be brought on a stamp of R10, under Act VII of 1870, Sch. II, Art. 17 (iii). CHUNIA *v.* RAM DIAL . . **I. L. R. 1 All. 360**

40. ——— *Suit to stay butwara proceedings under Beng. Reg. XIX of 1814, after partition by private arrangement.* An allottee, under a private partition, sued to stay subsequent partition proceedings brought under Regulation XIX of 1814 and to have his possession confirmed. The defendants objected to the valuation of the suit and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the revenue authorities. *Held,* that such a suit should be considered to be one for a declaratory decree or for something in the nature of an injunction, and that therefore the plaint should not be stamped according to the value of the entire estate. JOYNATH ROY *v.* LALL BAHADOUR SINGH **I. L. R. 8 Calc. 126 : 10 C. L. R. 146**

41. ——— *Suit for declaration of title to paid offices— Withdrawal of claim to some of the offices—Office still claimed involving the right to the others.* In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them. It was found that the fourth office carried with it the right to the other three. *Held,* that the plaintiffs were not shown to have relinquished their claim on the three offices for the purposes of the suit, but that, even if they had done so, the value of all the four offices must be taken for the purposes of jurisdiction. SUNDARA *v.* SUBBA . . . **I. L. R. 10 Mad. 371**

42. ——— *Suit to obtain a declaration decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Court Fees Act (VII of 1870), Sch. II, Art. 17 (i) and (iii). Held,* that the Court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code praying (*a*) for a declaration of right to certain property, and (*b*) that the said property might be released from attachment in execution of a decree was R10 in respect of each of the reliefs prayed. DILDAR FATIMA *v.* NARAIN DAS . . . **I. L. R. 11 All. 365**

43. ——— *Pecuniary valuation of suit—Court Fees Act, s. 12, Sch. II, Art. 17 (iii).* A suit for two declarations filed in a subordinate Court was valued by the plaintiffs at a sum in

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excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reasons of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit. *Held*, that the plea of *res judicata* failed. *Per* MUTTUSAMI AYYAR, *J.*—For the purposes of jurisdiction, the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared. GANAPATI *v.* CHATHU
I. L. R. 12 Mad. 223

44. ——— *Madras Civil Courts Act (Mad. Act III of 1873), s. 12—Suit for declaration of Membership of a tarwad—Valuation for the purposes of jurisdiction.* The plaintiff, alleging that he was carnavan of the defendant's tarwad, sued in a Subordinate Court for a declaration that he was a member of it, adding no prayer for consequential relief. It appeared that the tarwad property exceeded R26,000 in value, but that the proportionate share of each member, computed as on an equal division, was less than R900. The Subordinate Judge held that the suit was within the jurisdiction of a District Munsif and rejected the plaint. *Held*, that the value of the subject-matter of the suit was the value of the whole tarwad property, and not the value of what the plaintiff's share would be on partition; the order therefore was wrong and should be set aside. *Ganapati* v. *Chathu, I. L. R. 12 Mad. 223*, followed. IBRAYAN KUNHI *v.* KOMAMMUTTI KOYA
I. L. R. 15 Mad. 501

45. ——— *Bengal Tenancy Act, s. 149—Suit by third party claiming rent paid into Court in rent-suit, nature of—Title-suit—Institution-stamp.* A suit by a third person under cl. (3) of s. 149 of the Bengal Tenancy Act is not a title-suit, and need not be stamped as such. *Per* TOTTENHAM, *J.* Such suit is in the nature of a suit for an injunction under the Specific Relief Act or else a declaratory suit. JAGADAMBA DEVI *v.* PROTAP GHOSE . . **I. L. R. 14 Calc. 537**

46. ——— *Suit to establish right by reversal of deeds.* When a plaintiff only sues for declaration of his title to certain lands on reversal of the kobalas said to have been illegally executed by his father, he need not be compelled to value the case at the total of the consideration mentioned in those deeds. SHEO GHOLAM SINGH *v.* BEJOYRAM PROTAB SINGH . **W. R. 1864, 317**

47. ——— *Plaint insufficiently stamped — Court Fees Act (VII of 1870), s. 12.* The law allows a plaintiff in some cases to rectify a mistake as to stamp duty, but this privilege is subjected to qualification, and does not exist where the relief to be granted is altogether distinct from that originally sought. In such case, the plaintiff should not be allowed to put an additional stamp on his plaint. Where a plaintiff sued on a stamp of R10 for a declaration

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of his title to land worth R19,000, in the possession of the defendant, it was *held* that the suit could not be maintained, and that the plaintiff was not entitled to put an additional stamp on the plaint and convert his suit into one for possession. CHOKALINGAPESHANA NAICKER *v.* ACHIYAR
I. L. R. 1 Mad. 40

48. ——— *Court Fees Act (VII of 1870), s. 4, and Sch. II, Art. 17, cls. 3 and 6—Jurisdiction—Bombay Civil Courts Act (XI of 1869), s. 24.* A Subordinate Judge of the 2nd class has no jurisdiction to entertain a suit for the declaration of the plaintiff's title where the property in respect of which the declaration is sought exceeds R5,000 in value. The law may lay down, for purposes of revenue, certain rules for the valuation of suits; but such valuation cannot be accepted as a criterion of the actual amount or value of the claim, upon which the jurisdiction of a Court depends. Whether a suit be merely to obtain a decree, declaratory of the plaintiff's title to, or whether it be to establish his title, coupled with a prayer for possession of, the rights of a deceased person, the inheritance is the object in dispute. The actual value of the estate to which the plaintiff claims to be entitled, and not the value which it may eventually represent to the plaintiff, is the value of the subject-matter. BAI MAHKOR *v.* BULAKHI CHAKEE
I. L. R. 1 Bom. 538

49. ——— *Court Fees Act (VII of 1870), s. 17—Suit by reversioners to declare various alienations by a Hindu widow to be invalid against them.* When reversioners sue to have declared invalid as against them alienations made by a Hindu widow, a Court-fee of R10 must be paid in respect of each of the alienations in question. DAIVACHILAYA PILLAI *v* PONNATHAL . . . . **I. L. R. 18 Mad. 459**

50. ——— *Court Fees Act (VII of 1870), s. 7, cl. 4 (c), Sch. II, Art. 17, cl. (iii)—Suit for a declaration that a decree obtained by defendant against plaintiff was null and void—Decree for declaration without consequential relief.* A suit in which the only prayer is to have a decree set aside as null and void is a suit for a declaratory decree without consequential relief and Art. 17, cl. 3, and not s. 7, cl. 4, of the Court Fees Act (VII of 1870), is applicable to it. SHRIMANT SAGAJIRAO KHANDERAV *v.* SMITH
I. L. R. 20 Bom. 736

51. ——— *Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. (vi)—Civil Procedure Code, s. 539—Prayer for appointment of plaintiff's as trustee.* A prayer in a plaint purporting to be a plaint under s. 539 of the Code of Civil Procedure that the plaintiffs themselves may be appointed trustees is not a prayer for possession requiring to be stamped at the value of the trust property but is a prayer for relief falling within Art. 17, cl. (vi), of the second schedule to Act VII of 1870. *Sonachala* v. *Manika, I. L. R, 8 Mad. 516*;

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Delroos Banoo Begum v. *Asghur Ally Khan, 15 B. L. R. 167 ;* and *Omrao Mirza* v. *Jones, I. L. R. 10 Calc. 599,* referred to and distinguished. THAKURI *v.* BRAHMA NARAIN **I. L. R. 19 All. 60**

52. ——— *Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. (vi)—Suit to remove a trustee of a religious endowment. Semble :* That a suit, under s. 14 of Act XX of 1863, against the superintendent of a religious endowment for misfeasance is a suit which, for the purpose of payment of Court-fees, falls within Art. 17, cl. (vi), of the second schedule of Act VII of 1870. *B. L. R. 167 ; Sonachala* v. *Manika, I. L. R. 8 Mad. 516 ;* and *Omrao Mirza* v. *Jones, I. L. R. 10 Calc. 599,* referred to. MUHAMMAD SIRAJ-UL-HAQ *v.* IMAM-UD-DIN . . **I. L. R. 19 All. 104**

53. ——— *Court Fees Act (VII of 1870), s. 7, cl. 4—Suit for declaration of right and for injunction.* A suit for a declaration of right and for an injunction falls under s. 7, cl. 4, sub-cls. (*c*) and (*d*), of the Court Fees Act (VII of 1870). The valuation of the relief sought in such a suit rests with the plaintiff, and not with the Court. *A* sued *B* and *C* (1) for a declaration of his title to certain property, and (2) for an injunction restraining *C* from paying, and *B* from receiving, an allowance of R2,400 a year out of the income of the property in dispute. *A* valued each of the reliefs sought at R130, and affixed a Court-fee stamp of R20 to the plaint. The Court of first instance rejected the plaint as insufficiently stamped, holding that the claim for the injunction sought should have been valued at ten times the annual allowance paid by *C* to *B*, as provided by s. 7, cl. 2, of Act VII of 1870. On appeal to the High Court :—*Held*, that the suit fell under s. 7, cl. 4, sub-cls. (*c*) and (*d*), of the Court Fees Act, and the plaintiff had a right to put his own valuation on the relief sought. SARDAR-SINGHJI *v.* GANPAT-SINGJI . . . . **I. L. R. 17 Bom. 56**

54. ——— *Declaration sought that certain property was joint ancestral property and not liable to attachment in execution of a certain decree—Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. 3, and s. 7, cl. 4.* The plaintiffs specified in their plaint, as the reliefs sought by them,—(i) That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendant 4, dated 4th December 1883, against the defendant 1. (ii) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the amount of the decree and the value of the property at R6,000. (iii) That any other relief which the Court may think the plaintiffs entitled to may also be granted. *Held*, that the suit should be deemed a suit for one declaratory decree only without consequential relief and that consequently a Court-fee of R10 was sufficient. GOBIND NATH TIWARI *v.* GAJRAJ MATI TAURAYAN **I. L. R. 13 All. 389**

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55. ——— *Suit to compe trustees to account—Court Fees Act, Sch. II, Art. 17 cl. (vi).* The mere fact that the plaintiffs in a suit under s. 539 of the Code of Civil Procedure may ask for an account to be taken from the trustees and that the trustees may be compelled to refund moneys alleged to have been misappropriated by them, does not take the case out of the purview of Art. 17, cl. (vi), of the second schedule to the Court Fees Act, 1870, and render the plaintiff liable to pay an *ad valorem* Court-fee on that part of their plaint. *Thakuri* v. *Brahma Narain, I. L. R. 19 All. 60,* referred to. GIRDHARI LAL *v.* RAM LAL . . . . **I. L. R. 21 All. 200**

56. ——— *Sale in execution of decree—Suit by unsuccessful auction-purchaser for a declaration of right and for possession—Civil Procedure Code, 1882, s. 335—Court Fees Act (VII of 1870), s. 7.* A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the owner in possession of the property. An application made by the auction-purchaser under s. 335 of the Code of Civil Procedure was rejected, and the auction-purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. *Held*, that such a suit was properly stamped with a Court-fee stamp of R10. *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni, I. L. R. 9 Bom. 20.* referred to. PIRYA DAS *v.* VILAYAT KHAN **I. L. R. 22 All. 384**

57. ——— **Deed, suit to set aside**—*Suit for cancellation of bond—Value of subject-matter of suit—Jurisdiction.* The value of the subject-matter of a suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon when the suit is instituted. GULAB RAI *v.* MANGLI LAL **I. L. R. 6 All. 71**

58. ——— *Appeal—Suit for cancellation of a document—Jurisdiction.* The plaintiffs sued for the cancellation of a bond for the payment of R6,000, together with interest thereon at the rate of 4 per cent. per mensem, alleging that they had executed such bond under the impression that it was a bond for the payment of R3,000, together with interest thereon at the rate of 1½ per cent. per mensem, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court R3,000, together with interest at the rate of 1½ per cent. per mensem. *Held*, that the value of the subject-matter in dispute was the difference between R3,000 and R6,000 or thereabouts, and therefore an appeal from the decree of the Court of first instance preferred to the District Judge was cognizable by him. KALI CHARAN RAI *v.* AJUDHIA RAI . . . **I. L. R. 2 All. 148**

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VALUATION OF SUIT—*contd.*

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59. ——— *Deed prejudicing title to immoveable property.* In a suit to annual sale-deed which prejudices the title of the plaintiffs to immoveable property, a stamp calculated on the consideration-money mentioned in the sale-deed is sufficient. THAKOOR PATHUK *v.* RAM SOOMRUN LAL . . . . . **2 N. W. 433**

60. ——— *Suit to set aside sale-deed as being forged.* A suit to set aside a false sale-deed was *held* to be sufficiently valued at the sum mentioned in that sale-deed. THAKOOR PATUCK *v.* RAMSOOMRUN LAL **1 N. W. 17 : Ed. 1873, 16**

61. ——— *Court Fees Act (VII of 1870), ss. 7, 12—Suit to cancel an instrument affecting land—Partial interest of plaintiff in the land—Appeal against an order for payment of additional court-fees.* In a suit in a Subordinate Court by members of a Malabar tarwad to set aside an instrument affecting the whole of the tarwad property, the Subordinate Judge held that Court-fees were leviable, assessed on the value of the property, and accordingly ordered an additional payment to be paid by the plaintiffs. The plaintiffs failed to make the payment, and the Subordinate Judge dismissed the suit. *Held*, that the order was erroneous, since the plaintiffs would not be gainer to the extent of the value of the property if they obtained a decree, the plaint should not be valued according to the value of the whole of the tarward property ; (2) that the High Court was not precluded by the Court Fees Act, s. 12, from revising it, and reversing the order as to valuation of the suit. KANARAN *v.* KOMAPPAN **I. L. R. 14 Mad. 169**

62. ——— *Court Fees Act, Sch. I, cl. 1—Suit for cancellation of an agreement to sell—Ad valorem fee.* The plaintiff had executed an agreement to sell certain property in discharge of mortgages executed on his behalf during his minority. He now brought a suit alleging that the agreement had been extorted from him, and praying for a declaration that the agreement was not binding on him, and for any other relief " which the Court considers to be reasonable." *Held*, that the plaintiff was bound to pay Court-fees upon the value of his interest in the document sought to be invalidated. PARATHAYI *v.* SANKUMANI . . . . . **I. L. R. 15 Mad. 294**

63. ——— *Suit to cancel document on ground of fraud.* The plaintiff executed a document whereby he created a charge of R4,500 upon certain immoveable property. In a suit to cancel the document upon the ground of fraud :—*Held*, that the plaintiff valued his relief at R4,500, and that the District Munsif had no jurisdiction to try the suit. NARAINA PUTTER *v.* AYA PUTTER . . . . . **7 Mad. 372**

64. ——— *Suit for possession of property alienated—Price stated in sale-deed.* In a suit for possession of a share of a undivided estate and to set aside a kobala by which the estate had been illegally alienated, the plaintiff is not bound to value his claim according to the price stated in the kobala. AUGOPURA CHOWDHRY *v.* MEAH BIBEE . . **10 W. R. 207**

65. ——— **Deed, suit to enforce registration of**—*Court Fees Act (VII of 1870), s. 7, cl. 5—Madras Civil Courts Act (Mad. Act III of 1873), ss. 12, 14—Suit to enforce registration—Jurisdiction of Munsif.* Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported to be conveyed was the same in each instrument, and its value was found to be less than R2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The latter instrument was found to have been executed in suppression of the former, and the District Munsif passed a decree directing its registration alone. *Held*, that the documents standing in the relation to each other of operative and superseded document, the valuation of the suit for the purposes of jurisdiction was the value of the interest created by the operative document ; and that the District Munsif had jurisdiction to entertain the suit. RAMAKRISHNAMMA *v.* BHAGAMMA . . . **I. L. R. 13 Mad. 56**

66. ——— **Ejectment, suit for**—*Market value of tenant-right.* Where a landlord claims to eject a tenant, he claims to recover the tenant-rights in the holding, and the stamp duty chargeable on the plaint should be determined with reference to the market value of the right only. AJOODHYA CHOWBEY *v.* DAIBEE SINGH **3 Agra Rev. 5**

67. ——— *Suit to contest claim of occupancy raiyat—Court Fees Act, 1870, s. 7, cl. II, and Sch. II, cl. 5.* In a suit to eject a defendant as being a tenant at will, the Court-fee upon the plaint or memorandum of appeal is 8 annas under Sch. II, cl. 5, of Act VII of 1870. Cl. 11 (*d*) of s. 7 of that Act applies only to suits brought by a tenant to dispute the validity of his landlord's notice to quit. NURJAHAN *v.* MARFEN MUNDUL **11 C. L. R. 91**

68. ——— *Court Fees Act (VII of 1870), s. 7, para. 5—Suits Valuation Act, (VII of 1887), s. 8—Jurisdiction—Suit to eject a tenant at fixed rates.* A suit to eject a tenant at fixed rates is a suit for the possession of land within the meaning of para. 5, s. 7, of the Court Fees Act, 1870, and the valuation of such suit for the purposes of Court-fees and of jurisdiction is the value of the subject-matter of the suit, that is to say, of the tenant right, not of the land itself nor of merely one year's rent. RAM RAJ TEWARI *v.* GIRNANDAN BHAGAT **I. L. R. 15 All. 63**

69. ——— *Suit to have a lease to set aside and buildings erected by lessees demolished—Suit for possession of land and demolition of buildings erected theron—Court Fees Act*

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

—*Bengal Civil Courts Act, ss. 20, 22.* Certain co-sharers of a village sued to have a lease of certain land, the joint undivided property of the co-sharers, which the other co-sharers had granted, set aside, and to have the building erected on such land by the lessees demolished, on the ground that such lease had been granted without their consent. They valued the relief sought at R100. The value of the buildings of which they sought demolition was R3,000. *B* sued *N* claiming *inter alia* possession of certain land and to have certain buildings erected thereon by the defendant demolished. *Held*, with reference to the abovementioned suits, that in estimating their value for the purposes of the Court Fees Act, 1870, or of the Bengal Civil Courts Act, 1871, the value of the buildings which might have to be demolished should not be taken into account. JOGAL KISHORE *v.* TALE SINGH. BINDESHRI CHAUBEY *v.* NANDU

I. L. R. 4 All. 320

70. ——— Emoluments attached to office, suit for—*Court Fees Act, 1870, s. 7, cls. 2, 4—Claims for future emoluments—Jurisdiction—Madras Civil Courts Act, 1873, s. 12—Portion of claim struck out and plaint returned for presentation to inferior Court.* In a suit filed in the Court of a Subordinate Judge, the plaintiff prayed, *inter alia*, for a decree for the payment, annually, of the emoluments attached to a certain office, or their value at a rate stated in the plaint. This portion of the claim he valued, under cl. 2 of s. 7 of the Court Fees Act, at ten times the amount of the value claim for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Munsif. The Subordinate Judge held that this portion of the claim was not actionable, inasmuch as the right to the emoluments was conditional upon services to be rendered, and did not fall under cl. 2 of s. 7 of the Court Fees Act, not being a fixed sum payable periodically, and therefore he held that the plaint was improperly valued, that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court. *Held*, that this order was right. KRISHNAN *v.* REVI VARMA

I. L. R. 8 Mad. 384

71. ——— Interest—*Court Fees Act (VII of 1870), s. 7—Claim for interest from institution of suit until payment—Future mesne profits.* No additional stamp is required on account of the claim for interest from institution of the suit until payment. It stands on the same footing as future mesne profits, which do not fall under s. 7 of the Court Fees Act (VII of 1870). VITHAL HARI ATHAVLE *v.* GOVIND VASUDEO THOSAR

I. L. R. 17 Bom. 41

72. ——— Instalment-bond, suit on. The stamp on a plaint on an instalment bond should be estimated, not on the amount of the whole bond, but on the amount claimed in the suit.

VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

SUTTO BHAMA DOSSEA *v.* JAMEERUDDY KHAN

4 W. R. S. C. C. Ref. 1

73. ——— Khoti estate, suit for recovery of—*Act XXVI of 1867, Sch. B, cl. 11—Amount of assessment. Held*, that a khoti estate is an estate paying revenue to Government upon which an assessment is temporarily settled, and that a suit for its recovery should be assessed at eight times the annual assessment under Act XXVI of 1867, Sch. B, Art. 11, note (*a*), Sp. Rule 1 for the Bombay Presidency. *Ex parte* VITHAL *alias* GOPAL GANESH BIVALKAR

4 Bom. A. C. 148

74. ——— Land, suit for—*Court Fees Act (VII of 1870), s. 7, Art. 5, proviso—Stamp—Construction and applicability of the proviso—Valuation of suits for land in a talukhdari village—Talukhdar's jumma—Remission.—Per* WEST and NANABHAI, *JJ.* The proviso to Art. 5 of s. 7 of the Court Fees Act (VII of 1870) was clearly intended to provide a standard of valuation in the Bombay Presidency, not only for the comparatively rare cases of land forming part but not a definite share of an estate paying revenue to Government, but for all cases of suits for land. The theory being that all land is primarily liable to be rated or taxed for the public revenue, any sum not levied according to the appraisement, made in order to show the proper amount of the land-tax may be regarded as a remission. In the case of a talukhdari village, the proprietor of which had, under a settlement with Government for a period of twenty-two years, agreed to pay a fixed annual jumma, or lump assessment instead of the full survey assessment for the whole village :—*Held*, by a majority of the Full Bench, that the difference in amount between the jumma and the full survey assessment was a remission, and therefore a suit for possession of lands in this village was to be valued according to cl. (*3*) of the proviso to Art. 5 of s. 7 of the Court Fees Act (VII 1870). *Per* BIRDWOOD, *J.*—The remission contemplated by cl. (*3*) of the proviso " is an express remission, and not a mere difference in amount between the actual assessment payable by a talukhdar and the survey assessment." The three clauses of the proviso seem to apply only to lands which have been subjected to a survey settlement as ordinarily understood and legally provided for in the Bombay Presidency ; the first clause being applicable to lands settled for a period not exceeding thirty years, the second to lands settled for a longer period or permanently, and the third to inam lands on which the whole or a part of the survey assessment has been expressly remitted. The talukhdars are not inamdars. They are landholders liable to pay a land-tax, but not under a survey settlement, such as is applicable to lands for which provision seems to have been specially made in the proviso to Art. 5 of s. 7 of the Court Fees Act. No part of the proviso therefore applies to a suit for the possession of lands in a talukhdari village.

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

Such a suit should be valued according to cl. (*d*) of Art. 5 of s. 7 of the Court Fees Act. ALA CHELA *v.* OGHADBHAI THAKERSI **I. L. R. 11 Bom. 541**

BAVAJI MOHANJI *v.* PUNJABHAI HANUBHAI **I. L. R. 11 Bom. 550 note**

75. ——— *Court Fees Act (VII of 1870), s. 7, cl. 5 (c), (e)—Paramba in Malabar, valuation of suit for—Suit for garden land or land paying no revenue.* On its appearing that a Paramba in Malabar is not subject to land-tax, but that a tax is levied on trees of certain kinds which may grow on it :—*Held*, that a paramba must be regarded for the purposes of the Court Fees Act as a garden or as land which pays no revenue, according to the circumstances of each case. AUDATHODAN MOIDIN *v.* PULLAMBATH MAMALLY . . . . **I. L. R. 12 Mad. 301**

76. ——— **Manager, suit to remove—** *Court Fees Act, 1870, s. 7—Suit to eject trustee—Jurisdiction—Specific Relief Act, s. 42.* By an agreement between *S* and *M*, members of the same Hindu family, it was arranged that certain immoveable property dedicated to charitable uses by the family should be managed by *M*, subject to the supervision of *S*, and that *M* should render accounts to *S* and observe certain other conditions. *S* sued *M* in the Court of the District Munsif, and prayed for a decree for the removal of *M* as manager and for the appointing of himself as manager of the property. *M* objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Munsif's Court as fixed by s. 12 of the Madras Civil Courts Act, 1873. *Held*, that *S* was not entitled to sue for the removal of *M* without praying for his ejectment from the property, and that, as the property exceeded in value R2,500, the District Munsif had no jurisdiction. SONACHALA *v.* MANIKA . . **I. L. R. 8 Mad. 516**

77. ——— *Karnavan of Malabar tarwad—Madras Civil Courts Act, 1873, s. 13.* For the purpose of jurisdiction, a suit to remove the karnavan of a Malabar tarwad is not a suit for the recovery of the tarwad properties managed by the karnavan and to be valued as such, but a suit which asks for a relief that is incapable of valuation. NARANJOLI CHIRAKAL KUNHI RAMAN *v.* NARANJOLI CHIRAKAL PUTTALATHU KUNHUNNI NAMBIAR **I. L. R. 4 Mad. 314**

78. ——— *Suit for removal of karnavan—Court Fees Act, 1870, Sch. II, Art. 17, cl. 6.* A suit for the removal of a karnavan of a Malabar tarwad on the ground of misfeasance is incapable of valuation and falls under s. 6, Art. 17, Sch. II of the Court Fees Act, 1870. GOVINDAN NAMBIER *v.* KRISHNAN NAMBIAR **I. L. R. 4 Mad. 146**

79. ——— *Act XX of 1863—Suit to remove managers of endowment from office—Court Fees Act, 1870, Sch. II, Art. 17.* In a suit under Act XX of 1863 to remove the managers of an endowment from office, the subject-matter was *held* to be one which did not admit of valuation and the Court-fee payable on its institution was the fixed fee of R10. VEERASAMI PILLAY *v.* CHOKAPPA MUDALIAR . . **I. L. R. 11 Mad. 149 note**

See SRINIVASA *v.* VENKATA **I. L. R. 11 Mad. 148**

80 ——— *Madras Civil Courts Act, s. 12—Court Fees Act, Sch. II, Art. 17, s. 6—Suit to remove a karnavan—Valuation for jurisdiction.* Although, for the purposes of the Court Fees Act, a suit to remove the karnavan of a Malabar tarwad is incapable of valuation and subject to the fee prescribed by s. 6, Art. 17 of Sch. II of that Act, yet, for the purposes of determining jurisdiction under s. 12 of the Civil Courts Act, the right of management, which is the subject-matter of the suit, must be valued. If the value is estimated *bonâ fide* by the plaintiff, the Court should adopt it. KRISHNA *v.* RAMAN **I. L. R. 11 Mad. 266**

81. ——— *Suit to remove a karnavan for mismanagement as de facto karnavan—Madras Civil Courts Act (III of 1873), s. 13.* In a suit brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property, to the extent of more than R2,500, brought in the Court of a District Munsif :—*Held*, that for the purpose of jurisdiction the suit was not one for the recovery of tarwad properties, nor to be valued as such, but it was a suit for relief that was incapable of valuation, and therefore was within the jurisdiction of the District Munsif. KUNHAN *v.* SANKARA **I. L. R. 14 Mad. 78**

82. ——— **Mesne profits, suit for—** *Denial of plaintiff's title.* In a suit for wasilat, the stamp on the plaint will be sufficient if it cover the amount claimed for wasilat, notwithstanding the defendant may deny the title of the plaintiff to the land. KADIR BUKSH *v.* WISE **Marsh. 165 : 1 Ind. Jur. O. S. 103 1 Hay 370**

83. ——— *Suit for possession and mesne profits.* Where a suit for mesne profits is united with one for possession, no separate stamp-fee is necessary in respect of mesne profits. SYEDUN *v.* ALLAH AHMED **W. R. 1864, 327**

84. ——— **Mortgage**—*Court Fees Act (VII of 1870), s. 7, cl. 19—Suit by the mortgagee against the heir of the mortgagor for recovery of the mortgage-debt by sale of mortgaged and other property—Suit for money.* A suit instituted by the mortgagee against the heir of the original mortgagor, to have the mortgage-debt paid by sale not exclusively of the mortgaged property, but also of all the other property in the hands of such heir liable for the debts of the original mortgagor, is virtually a suit for money, and should be valued, not at the principal debt, but the entire amount

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

including interest. KASHINATH BALLAL *v.* GANPATRAO AMRITESHVAR JOSHI
I. L. R. 18 Bom. 696

85. ——— *Court Fees Act (VII of 1870), s. 7, cls. 5 and 9—Suit against mortgagee for recovery of mortgaged property.* Cl. 9, s. 7, of the Court Fees Act, applies not only to suits for redemption of mortgaged properties, but to all suits against the mortgagee for the recovery of the mortgaged properties, and whatever may be the actual amount due to the mortgagee, the Court-fee will always be upon the amount appearing in the bond. KORAMAN SINGH *v.* NORMAN COCKELL . . **1 C. W. N. 670**

86. ——— **Partition, suit for**—*Madras Civil Courts Act, s. 12—Jurisdiction—Subject-matter of suit.* In suits for partition, the value of the property of which the plaintiff claims a share, and not the value of the share claimed, determines the jurisdiction of the Court under s. 12 of the Madras Civil Courts Act, 1873. VYDINATHA *v.* SUBRAMANYA . . . **I. L. R. 8 Mad. 235**

87. ——— *Suit for partition of share of land.* In a suit for ascertainment, partition, and delivery to the plaintiff, of a share of certain land, the suit should be valued at the amount of the value of the whole estate. *Vydinatha* v. *Subramanya, I. L. R. 8 Mad., 235,* followed. NAGAMMA *v.* SUBRA . . **I. L. R. 11 Mad. 197**

88. ——— *Court Fees Act (VII of 1870)—Suit for partition and for possession of share.* The stamp on a suit for partition and possession of the plaintiff's share of joint family property must be an *ad valorem* one of the value of the share. BALVANT GANESH *v.* NANA CHINTAMON . . . . **I. L. R. 18 Bom. 209**

89. ——— *Suit for partition of family property—Valuation for purposes of jurisdiction—Court Fees Act (VII of 1870), s. 7, cl. (iv) (b)—Suits Valuation Act (VII of 1887), s. 8.* In a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share, the value of the suit for the purposes of jurisdiction is the amount at which the plaintiff values his share. VELU GOUNDAN *v.* KUMARAVELU GOUNDAN
I. L. R. 20 Mad. 289

90. ——— *Suits Valuation Act (VII of 1887), s. 8—Jurisdiction of Subordinate Judge—Valuation of a suit for partition.* In a suit for partition of certain property, the value of the whole property sought to be divided was over R5,000. Plaintiff valued his share at R250, and paid Court-fees on this amount. The suit was filed in the Court of a Subordinate Judge of the first class. *Held,* that the value of the subject-matter of the suit could not be held to be more than R250, so that the suit ought to have been filed in the Court of the second class Subordinate Judge. MOTIBHAI *v.* HARIDAS .
I. L. R. 22 Bom. 315

VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

91. ——— *Hearing fee, calculation of—Market value of property.* The ordinary rule for assessing the hearing fee according to the market value of the property in suit is not applicable to a suit for partition, and the Court in each case ought to fix the amount of such fee. Generally speaking, the value of the suit is the difference between the value after partition of the plaintiff's share which he requires to be partitioned and the value of the same share not partitioned. KIRTEE CHUNDER MITTER *v.* ANNATH NATH DEB . . . **13 C. L. R. 253**

92. ——— *Suit for division of lands according to established custom.* A co-owner of village lands sued in 1861 to have them divided among the villagers according to a custom (last observed in 1835) that at the expiration of every twelve years the lands should be redistributed by lot among the co-owners, and to have two of the shares delivered to him as one of such co-owners. In 1851 another co-owner had, in a suit to which some only of the present defendants were parties, obtained a decree for the periodical allotment of the lands; and in 1853 such decree, which clearly recognized the existence and validity of the custom, was affirmed on appeal. *Held,* that the plaintiff need not pay an institution fee on the aggregate amount of the value of all the sharers in the village, and that the stamp on the plaint need only be proportioned to the value of the property actually sued for. VENKATASVAMI NAYAKKAN *v.* SUBBA RAU. SANKARA SUBBAIYAN *v.* SUBBA RAU . . . . **2 Mad. 1**

93. ——— *Jurisdiction—Subject-matter of suit—Act XIV of 1869, s. 25.* What *primâ facie* determines the jurisdiction of a Court is the claim, or subject-matter of the claim, as estimated by the plaintiff; and the determination having given the jurisdiction, the jurisdiction itself continuous, whatever the event of the suit. And this is so notwithstanding a *bonâ fide* error in the estimate made by the plaintiff, but plaintiff cannot oust the Court of its jurisdiction by making unwarrantable additions to the claim which cannot be sustained, and which there is no reasonable ground for expecting to sustain. The subject-matter of a claim, within the meaning of s. 25 of Act XIV of 1869, is the specific thing sought by the plaintiff. In a partition suit, where the plaintiff seeks for a division and separate possession of his share in joint property, it is the share so claimed which is the subject-matter of the claim, and not the whole of the joint property which is sought to be divided. LAKSHMAN BHATKAR *v.* BABAJI BHATKAR . . . . . **I. L. R. 8 Bom. 31**

94. ——— *Bengal, N.-W. Provinces and Assam Civil Courts Act (XII of 1887), s. 21—Court Fees Act (VII of 1870), s. 7, cl. 4—Suits Valuation Act (VII of 1887), ss. 7, 8, and 11—Jurisdiction, valuation for purposes of.* For purposes of jurisdiction, the words "value of the original suit" in s. 21 of Act XII of 1887

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

are, in partition suits, to be taken to mean the value of the property in suit, and this is the valuation by which the Courts should be guided in such suits. *Kirty Churn Mitter* v. *Annath Nath Deb, I. L. R. 8 Calc. 757*, followed. The Court Fees Act (VII of 1870), s. 7, cl. 4, does not contemplate that a plaintiff should assign an arbitrary value to the subject-matter of the suit, and the provisions of the Suits Valuation Act (VII of 1887), ss. 7, 8, and 11, indicate that this was not the intention of the Legislature. BOIDYA NATH ADYA *v.* MAKHAN LAL ADYA . **I. L. R. 17 Calc. 680**

95. ——— *Stamp in partition suit.* The plaintiff brought a suit to have 99 items of property partitioned. The plaint bore a Court-fee stamp of R10. The defendants admitted that three of the properties were ancestral and joint, but as to the other items the second defendant stated that they were the self-acquired property of her deceased husband, and contended that the plaint was insufficiently stamped, as the object of the suit was to obtain a declaration of title to and possession of, properties in which the plaintiff had no interest. An issue was raised on this point, and on this issue the Subordinate Judge allowed the objection and rejected the plaint. On appeal:—*Held*, by PETHERAM, *C.J.*, and NORRIS, *J.*, that the plaint was sufficiently stamped. The only relief prayed for was partition, and for the purposes for the stamp, the cause of action which is stated in the plaint, and that only, must be looked at. MOHENDRO CHANDRA GANGULI *v.* ASHUTOSH GANGULI **I. L. R. 20 Calc. 762**

96. ——— "*Subject matter in dispute*"—*Jurisdiction of Munsif—Claim for partition of share less than R1,000 in family property exceeding R1,000.* In a suit instituted in the Court of a Munsif by a member of a Mahomedan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than R1,000, and the value of the whole family property exceeded R1,000. *Held*, that the subject-matter in dispute in the suit, within the meaning of s. 20 of the Bengal Civil Courts Act (VI of 1871), was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded R1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Vydinatha* v. *Subramanya, I. L. R. 8 Mad. 235; Kirty Churn Mitter* v. *Annath Nath Deb, I. L. R. 8 Calc. 757; Khoorshed Hossein* v. *Nubbee Fatima, I. L. R. 3 Calc. 551*; and *Ram Chandra Narayan* v. *Narayan Mahadev, I. L. R. 11 Bom. 216*, distinguished. HIKMAT ALI *v.* WALI-UN-NISSA **I. L. R. 12 All. 506**

97. ——— *Value of share on partition—Subject-matter of suit—Munsif, jurisdiction of.* Plaintiff sued in the District Court for portion of a one-seventh share purchased by him in an undivided agraharam, of which the total value was about R10,400, and obtained a decree. *Held*, that the subject-matter of the suit was the share sued for and not the total value of the agraharam, and therefore the suit should have been filed in the District Munsif's Court. *Vydinatha* v. *Subramanya, I. L. R. 8 Mad. 235*, distinguished. RAMAYYA *v.* SUBRAYUDU **I. L. R. 13 Mad. 25**

98. ——— *Madras Civil Courts Act (Mad. Act III of 1873), s. 12—Valuation of relief—Suits Valuation Act (VII of 1887), s. 11—Suit by a purchaser at a sale in execution of decree for partition—Jurisdiction of Munsif and Subordinate Judge.* The purchaser at a Court-sale of eight pangus out of an estate of 28½ pangus sold them to the plaintiff. The whole estate was worth more than R2,500, but the eight pangus sold to the plaintiff were worth less than that sum. The plaintiff brought this suit in a Subordinate Judge's Court against his vendor and certain persons, who were in possession of, and claimed to be entitled by right of purchase to, the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants. *Held*, (i) that the value of the share sought to be recovered, and not the entire value of the property, should be taken to be the value of the suit for the purpose of determining jurisdiction, and that the suit was within the pecuniary limits of the jurisdiction of a District Munsif; (ii) that since the disposal of the suit had not been prejudicially affected, the suits Valuation Act, s. 11, was applicable, and the decree of the Subordinate Judge should be confirmed. *Quære:* Whether the Subordinate Judge has not concurrent jurisdiction with a District Munsif in suits less than R2,500 in value. *Krishnasami* v. *Kanakasabai, I. L. R. 14 Mad. 183* NARAYANAN *v.* NARAYANAN . . **I. L. R. 15 Mad. 69**

99. ——— *Suits Valuation Act—Act VII of 1887, s. 8—Order by Appellate Court directing that the plaint be returned—Appeal against such order—Amendment of Memorandum of appeal.* The plaintiff sued in the Court of the District Munsif to recover his share of family property. The amount of the property exceeded, but the amount of the share claimed was within the pecuniary limit of the jurisdiction of the District Munsif who passed a decree for the plaintiff. On appeal it was held that the suit was not within the jurisdiction of the Court. The decree accordingly was reversed, and it was ordered that the plaint be returned for presentation to the proper Court. On second appeal to the High Court:—*Held*, that plaintiff's remedy was not by way of a second appeal, but he should have proceeded under Civil Procedure Code, s. 588. The petition of appeal having been allowed to be amended in accordance with this ruling:—*Held*, that the Court of the Munsif had jurisdiction to entertain the suit. CHINNASAMI

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VALUATION OF SUIT—*contd.*

1. SUITS—*contd.*

PILLAI *v.* KARUPPA *v.* UDAYAN
I. L. R. 21 Mad. 234

100. ——— Partnerships—*Suit for share of profits of partnerships after winding up and adjustment of accounts—Contract Act, s. 265—Court Fees Act (VII of 1870), s. 7, cl. 4—Suits Valuation Act (VII of 1887), s. 8—Jurisdiction of Munsif.* In suits brought for the several shares of the plaintiffs in the profits of a partnership after the partnership had been determined and an adjustment of accounts made:—*Held* (NORRIS and BANERJEE *JJ.*, RAMPINI, *J.* dissenting), that, under the provisions of s. 7, para. iv, cl. (*f*), of the Court Fees Act (VII of 1870), and s. 8 of the Suits Valuation Act (VII of 1887), the suits were properly brought in the Munsif's Court. *Ladubhai Premchand* v. *Revichand Venichand, I. L. R. 6 Bom. 143* followed. DHANI RAM SHAHA *v.* BHAGIRATH SHAHA . . . **I. L. R. 22 Calc. 692**

101. ——— Possession, suit for—*Suit by auction-purchaser—Procedure.* In a suit for possession by an auction-purchaser, where plaintiff valued his claim at what he paid for the property: —*Held*, that the valuation was *primâ facie* not incorrect, and, until rebutted by evidence and the result of a proper inquiry, should be accepted as correct. If the valuation was doubted, an enquiry should have been instituted under Act XXVI of 1867. SOOBUDRA *v.* RAM PROKASH SINGH . . . **16 W. R. 5**

102. ——— *Suit after foreclosure—Court Fees Act, s. 7, cl. 9.* Where a suit for possession is brought after a decree for foreclosure has been obtained, the valuation of such a suit in so far as the jurisdiction of the Court is concerned, is not to be calculated according to the scale laid down in the Court Fees Act, s. 7, cl. 9. AHOLLYA BAI DEBIA *v.* SHAMA CHURN BOSE
1 C. L. R. 473

103. ——— *Civil Procedure Code, 1859, s. 229, Procedure under—Fresh suit Jurisdiction.* For the purpose of jurisdiction, a claim under s. 229 of Act VIII of 1859 is a fresh suit and not a continuation of the suit in which the claim is made; so that where, by reason of a change in the law as to the mode of valuing suits for the purpose of jurisdiction between the date of the original suit and the claim, the Court that dealt with the original suit ceases to have jurisdiction over the subject-matter of the claim, that Court cannot try the claim. MUTTAMMAL *v.* CHINNAN GOUNDEN **I. L. R. 4 Mad. 220**

104. ——— *Madras Civil Courts Act (III of 1873), s. 1—Jurisdiction—Suit to recover share of inheritance—Subject-matter of suit.* The plaintiff sued to be declared an heir to a deceased Mahomedan and to recover her share of the inheritance, the share claimed being less than R2,500, while the value of the whole estate exceeded that amount. *Held*, that the suit was to be valued according to the share, and not according to the value of the whole estate, and the suit therefore was within the jurisdiction of a District Munsif. KHANSA BIBI *v.* ABBA
I. L. R. 11 Mad. 140

105. ——— *Suit for possession of share of estate and to set aside deed.* In a suit for possession of a share of an undivided estate, and to set aside a kobala by which the estate had been illegally alienated, plaintiff is not bound to value his claim according to the price stated in the kobala. AUGOPURA CHOWDHRY *v.* MEAH BIBEE
10 W. R. 207

106. ——— *Suit for possession and declaration of title.* Where a suit is for recovery of possession (with mesne profits) of a certain portion of land, and for a declaration of right in respect of the remainder, its valuation should not include the value of the latter, which is only nominal, and requires a stamp of R10. HURRO NATH BHUTTACHARJEE *v.* HARVEY
25 W. R. 23

107. ——— Suit for possession and mesne profits—*Value of the original suit—Bengal N.-W. Provinces, and Assam Civil Courts Act (XII of 1887), s. 21.* In a suit for possession and mesne profits, the value of the original suit for the purposes of s. 21 of Act XII of 1887 depends not merely upon the property sought to be recovered, but also upon the value or amount of the profits recoverable. MOHINI MOHAN DAS *v.* SATIS CHANDRA ROY . . **I. L. R. 17 Calc. 704**

108. ——— *Court Fees Act (VII of 1870), ss. 7 and 11—Mesne profits from the institution of suit, claim as to—S. 169 of the Code of Civil Procedure (Act VIII of 1859)—S. 50, cl. (f), and s. 211 of the Code of Civil Procedure (Act XIV of 1882).* The plaintiff in his plaint prayed for mesne profits only from the institution of his suit till the property in question was restored to him, and the decree awarded him those profits and directed that they should be determined in execution. After the property was restored to the plaintiff, he applied, in execution of the decree, to have the amount of mesne profits determined, which being done, a question arose as to whether the plaintiff could proceed to further execute his decree without paying the Court-fee on the amount so awarded in execution. *Held*, that no Court-fee was required S. 11 of the Court Fees Act (VII of 1870) applies to a claim for mesne profits for which an amount can be and has been claimed by the plaint, and in respect of which some fee has been actually paid. RAMKRISHNA BHIKAJI *v.* BHIMABAI
I. L. R. 15 Bom. 416

MAIDEN *v.* JANAKIRAMAYYA
I. L. R. 21 Mad. 371

109. ——— Pre-emption, suit for. In a suit for pre-emption, the valuation of the property sued for is to be calculated at the market value for which it would sell, and not at ten times

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VALUATION OF SUIT—*contd.*

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the value of the sudder jumma. ANJUD SINGH *v.* DEPUN SINGH . . . **3 B. L. R. Ap. 143 : 14 W. R. 238 note**

NAUNHOO SINGH *v.* TOFAN SINGH **14 W. R. 228**

110. ——— *Jurisdiction—Bengal Civil Courts Act (VI of 1871), s. 20.* In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871. NAUN SINGH *v.* RASH BEHARY SINGH **I. L. R. 13 Calc. 255**

111. ——— *Court Fees Act (VII of 1870), ss. 5 and 7, cls. (5) and (6)—Suit for pre-emption of separate plots of land not being a fractional share of a revenue-paying unit. Held,* that in a suit for pre-emption in respect of separate plots of land which did not constitute any definite fraction of a distinct revenue-paying area and were not themselves separately assessed to revenue, the Court-fee should be paid on the market value of the land in suit, and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. REFERENCE UNDER THE COURT FEES ACT, 1870, s. 5 **I. L. R. 16 All. 493**

112. ——— **Redemption, suit for**—*Value for purpose of jurisdiction.* The purchaser of the equity of redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a *pro formâ* defendant. *Held,* that the value of the subject-matter of the suit was not the market value of the land, but the amount of the mortgage-money. KUBAIR SINGH *v.* ATMA RAM **I. L. R. 5 All. 332**

113. ——— *Madras Civil Courts Act, 1873, ss. 12 and 14—Value of Improvements. Per Curiam* (TURNER, *C.J.*, and MUTTUSAMI AYYAR, *J.*, dissenting), that where an instrument of mortgage does not expressly secure the amount to be allowed for improvements or redemption of the mortgage, the value of the improvements is not to be calculated in ascertaining the "value of the subject-matter of the suit" for the purposes of jurisdiction under s. 12 of the Madras Civil Courts Act. *Per* TURNER, *C.J.* (MUTTUSAMI AYYAR, *J.*, concurring), that by the custom of Malabar, a condition is attached to all kanom demises that the mortgagor shall pay the value of improvements made by the mortgagee during the term of the demise before he can redeem, and the repayment of the sums spent in improvements thus secured by the mortgage in the same manner as the repayment of the principal advanced, and must be calculated in determining the value of the subject-matter of the suit for the purpose of jurisdiction. ZAMORIN OF CALICUT *v.* NARAYANA **I. L. R. 5 Mad. 284**

ANONYMOUS . **I. L. R. 5 Mad. 287 note**

VALUATION OF SUIT—*contd.*

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114. ——— *Jurisdiction of Munsif.* The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right *qua* such share was under R1,000. The mortgagee set up as a defence to such suit that a bond, under which a sum exceeding R1,000 was due, had been tacked to the mortgage, and that, until such sum had been satisfied, the plaintiff could not recover possession of his share. *Held,* on the question whether the Munsif had jurisdiction, that the value of the subject-matter of the suit was the value of the mortgagee's right *qua* the plaintiff's share ; and as the value of such right did not exceed R1,000 even if it were held that the mortgaged property was further incumbered with such bond, such suit was cognizable in the Munsif's Court. The principle laid down in *Gobind Singh* v. *Kallu, I. L. R. 2 All. 778,* followed. BAHADUR *v.* NAWAB JAN . **I. L. R. 3 All. 822**

115. ——— *Joint mortgage—Jurisdiction—Court-fee—Valuation of suit—"Subject-matter in dispute"—Act VII of 1870, s. 7, Art. (ix)—Act VI of 1871, s. 20—Statute, construction of.* A deed of mortgage was executed by *P*, *T*, and *S* for R4,000. *A*, the purchaser of the share of *S*, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of *P* and *T*, the other mortgagors. *Held* by the Full Bench with reference to s. 7, Art. (*ix*), of the Court Fees Act (VII of 1870), that the defendants mortgagees having brought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount,—namely, R1,333-5-4,—more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo* v. *Nagvekar, I. L. R. 6 Bom. 324,* referred to. *Held,* also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off ; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was R1,333-5-4, the one-third of the original mortgage sum of R4,000 ; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. *Per* MAHMOOD, *J.*—It is a rule of construction that, while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the

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highest Court. Observations by MAHMOOD, *J.*, as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction. AMANAT BEGAM *v.* BHAJAN LAL . . . . **I. L. R. 8 All. 438**

116. ——— *Usufructuary mortgage—Over-valuation of suit, effect of Jurisdiction.* The mere fact that a suit has been over-valued does not deprive the Court in which it is brought of jurisdiction, if the over-valuation was *bonâ fide* and had not the effect of altering the appellate jurisdiction, that is to say, did not cause the appeal from the judgment of the Court of first instance to lie to a different Court from that to which it would have laid had the suit been instituted in a Court having a more limited jurisdiction. RAJENDRO LALL GOSSAMI *v.* SHAMA CHURN LAHORI . . **I. L. R. 5 Calc. 188**
4 C. L. R. 417

117. ——— *Suit to redeem mortgaged land paying revenue to Government.* The stamp duty payable under Sch. B of Act X of 1862, on a suit to redeem mortgaged land paying revenue to Government, should be calculated on the sum for which the land is mortgaged, and not on the market value of such land. NANDRAM SUNDARJI NAIK *v.* BALAJI VITHAL
5 Bom. A. C. 153

118. ——— *Suit by kanom-holder against jenmi and holders of prior kanom in possession.* A suit brought by a kanom-holder against the jenmi and the holders of a prior kanom in possession, to recover possession of the lands, may be properly treated, for the purpose of jurisdiction, as a suit for land, although it results in a decree for redemption and, if regarded as a redemption suit, would be cognizable by a Court of subordinate jurisdiction. MARAKAR *v.* PARAMESWARAN
I. L. R. 6 Mad. 140

119. ——— *Court Fees Act (VII of 1870)—Dekkan Agriculturists' Relief Act (XVII of 1879), Ch. II.* The valuation of a suit for redemption for purposes of jurisdiction is the amount remaining due on the mortgage, or claimed on it by the mortgagee. It is that amount, and the right connected with it, which is the usual subject of contention in a mortgage-suit. *Per* BIRDWOOD, *J.*—The rules laid down in the Court Fees Act (VII of 1870) are not to be taken as necessarily a guide in determining the value of the subject-matter of a suit for purposes of jurisdiction. RUPCHAND KHEMCHAND *v.* BALVANT NARAYAN . . . . **I. L. R. 11 Bom. 591**

120. ——— *Dekkan Agriculturists' Relief Act (XVII of 1879), Ch. II, s. 3—Appeal—Jurisdiction.* In a redemption-suit the valuation of the subject-matter does not depend on the value of the mortgaged property. Where the mortgage itself is denied, and the mortgagee does not say what he claims in respect of the mortgage-debt, the amount found to be remaining due on the mortgage, if any amount was due at the date of the suit, would represent the true valuation of the subject-matter of the suit. *Rupchand Khemchand v. Balvant Narayan, I. L. R., 11 Bom. 591,* followed. The plaintiffs, who were agriculturists, suit to redeem certain lands, alleging that they had been mortgaged to the defendants' father for R50, and that the debt had been satisfied out of the rent and profits of the mortgaged property. The defendants denied the alleged mortgage. The Subordinate Judge found that the mortgage was proved, and the mortgages-debt had been more than paid off out of the profits of the property in dispute. He therefore passed decree awarding possession to the plaintiffs. Against this decree the defendant appealed. The District Court found that the mortgage was not established and reversed the decree of the Subordinate Judge. *Held*, on second appeal, that no appeal lay to the District Court from the decision of the Subordinate Judge. As the Subordinate Judge found that no sum remained due on the mortgage, and as the original advance was alleged to have been R50, the suit was governed by the provisions of Ch. II of the Dekkan Agriculturists' Relief Act (XVII of 1879). AMRITA BIN BAPUJI *v.* NARU BIN GOPALJI SHAMJI
I. L. R. 13 Bom. 489

121. ——— *Suit on mortgage—Suit for redemption of mortgage—Value of subject-matter of suit.* In a suit upon a mortgage, where the sum due upon the mortgage is unknown, what determines the value of the subject matter of the suit is the amount of the mortgage, the rights connected with which are the subject of contention. RAM CHANDRA BABA SATHE *v.* JANARDHAN APAJI
I. L. R. 14 Bom. 19

122. ——— *Court Fees Act (VII of 1870), s. 7—Suit for redemption of mortgage.* In a suit for the redemption of a kanom the institution fee must be computed on the kanom debt as it originally stood. REFERENCE UNDER COURT FEES ACT, S. 5 . **I. L. R. 14 Mad. 480**

123. ——— *Court Fees Act (VII of 1870), ss. 7 (ix) and 17—Redemption suit against mortgagee in possession—Arrears of rent covenanted for, to be deducted from the mortgage amount.* In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for, and the plaintiff asks for an account in taking which the arrears of rent should be deducted from the mortgage amount:—*Held*, that the Court-fee should be computed according to the principal sum expressed to be secured by the mortgage. EACHARAN PATTER *v.* APPU PATTER . . . **I. L. R. 19 Mad. 16**

124. ——— *Suit to redeem mortgage and for rent—Madras Civil Courts Act (Mad. Act III of 1873), s. 14.* The karnavan of a Malabar tarwad, having the jenm title to certain land and holding the uraima right in a certain public devasom to which other land belonged,

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demised lands of both description on kanom to the defendants' tarwad, and subsequently executed to the plaintiff a melkanom of the first mentioned land and purported to sell to him the jenm title to the last mentioned land. In a suit brought by the plaintiff to redeem the kanom and to recover arrears of rent:—*Held*, that, for the purposes of determining the jurisdiction of the Court of Appeal, the value of the subject-matter of the suit was the aggregate value of the two heads of relief. KONNA PANIKAR *v.* KARUNAKARA . . . . **I. L. R. 16 Mad. 328**

125. ——— Restitution of conjugal rights, suit for—*Burma Courts Act, 1875, s. 49—Appeal.* The proviso in s. 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an amount or value capable of being estimated in money, and that amount or value must fall within certain specified limits. A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon. GOLAM RAHAMAN *v.* FATIMA BIBI . . . **I. L. R. 13 Calc. 232**

126. ——— A suit for restitution of conjugal rights is not one to which any special money value can be attached for the purposes of jurisdiction. *Golam Rahman* v. *Fatima Bibi, I. L. R. 13 Calc. 232*, folllowed. MOWLA NEWAZ *v.* SAJIDUNNISSA BIBI . **I. L. R. 18 Calc. 378**

127. ——— Sale, suit to set aside—*Sale in execution of decree—Value of property sold.* In a suit to set aside an auction sale, the plaint must be stamped as if the suit were for the recovery of the property. DRAPU CHOWDHRY *v.* ISHAN CHUNDER DAS . . **9 C. L. R. 231**

128. ——— Share of land, suit for—*Suit relating to land—Rental of share.* In valuing a suit relating to a share of land, the rental of the share is to be the criterion of the stamp. RAM BUKSH THAKOOR *v.* AJOODHYA LAL **2 W. R. Mis. 45**

129. ——— Waste lands, suit for—*Waste Lands Act (XXIII of 1863), s. 5, suit under.* In a suit under s. 5, Act XXIII of 1863, by a claimant to waste land proposed to be sold or otherwise dealt with on account of Government, or by an objection to the sale or other disposition of such land, the plaint must be on a stamp of R100. GREESH CHUNDER ROY *v.* COLLECTOR OF SYLHET . . . . **7 W. R. 349**

130. ——— "Land"—*Pre-emption—Wajib-ul-arz—Court-fee—Act VII of 1870 (Court-fees Act), s. 7, sub-s. V (b)—Land—Valuation of suit.* The term "land," as used in the Court-fees Act, 1870, does not include buildings. A claim, therefore, for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to the Government, must be valued, and court-fees paid thereon according to the value of the buildings constituting the factory and not according to the value of the site. Such buildings as constitute an indigo factory would fall within the meaning of the term "houses," as used in the Court-fees Act. DURGA SINGH *v.* BISHESHAR DAYAL (1898) . . . **I. L. R. 24 All. 218**

131. ——— Membership of tarwad—*Valuation of a suit for declaration as to membership of tarwad.* The value of a suit for a declaration that certain persons are or are not members of a *tarwad* in the value of the share of the *tarwad* property which would be allotted to them if a partition were made by common consent. PANGA *v.* UNNIKUTTI (1900) . **I. L. R. 24 Mad. 275**

132. ——— Partition—*Bengal Civil Courts Act (XII of 1887), s. 21—Act I of 1887 (General Clauses Act), s. 3 cl. (13)—Valuation of suit—Appeal—Suit for partition.* In a suit for partition of the share of one only out of several co-sharers in immoveable property, the proper valuation of the suit for purposes of jurisdiction is the value of the share sought to be separated from the rest of the property, and not the value of the entire property out of which the share is to be taken. WAJIH-UD-DIN *v.* WALIULLAH (1902) **I. L. R. 24 All. 381**

133. ——— Revision of valuation—*Court-fees Act (VII of 1870)—Suit for an account—Petition to increase valuation after finding by Commissioner—Increase to amount exceeding Courts' jurisdiction—Return of plaint for presentation to proper Court—Material irregularity.* In a suit for an account, the usual valuation for purposes of Court-fees was made in the plaint, which was filed and received in a Munsif's Court. The Munsif appointed a Commissioner to take an account, and the result was that plaintiff was found by the Commissioner to be entitled to a much larger sum. Plaintiff then applied for leave to amend the plaint, which was granted, and the valuation of the suit was accordingly increased. As the amount claimed in the amended plaint was greater than that over which the Court of a Munsif ordinarily has jurisdiction, the Munsif ordered the plaint to be returned for presentation to the proper Court. *Held*, that the Munsif had acted with material irregularity in permitting the valuation of the suit to be revised; and that he ought to have tried the case. AROGYA UDAYAN *v.* APPACHI ROWTHAN (1901) . . . . **I. L. R. 25 Mad. 543**

134. ——— Under-valuation—*Suits Valuation Act (VII of 1887), s. 11—Under-valuation of suit—Disposal of suit not prejudicially affected—Admissibility of objection on second appeal.* The defendant in a suit raised the objection that its valuation was incorrect, and that, incorrectly valued, it would exceed the jurisdiction of the Munsif's Court. The objection was overruled, both in the Munsif's Court and in that of the District Judge, but was raised again on

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second appeal. *Held*, that the objection was one that could be raised on second appeal. *Held*, also, that, even though the suit were under-valued, as contended, the objection to it on that ground was not one that the Court would entertain, having regard to s. 11 of the Suits Valuation Act (VII of 1887), inasmuch as it had not been shown that the disposal of the suit had been thereby prejudicially affected. GOVINDA MENON *v.* KARUNAKARA MENON (1900) **I. L. R. 24 Mad. 43**

135. ——— Suit for account—*Appeal—Forum of appeal—Bengal, N.-W.P. and Assam Civil Courts Act (XII of 1887), s. 21.* When the plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the amount of his claims may be ascertained in the course of the suit, the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the forum of appeal, under s. 21 of Act XII of 1887. *Mohini Mohan Das* v. *Satis Chandra Roy, I. L. R. 17 Calc. 704; Nilmoney Singh* v. *Jagabandhu Roy, I. L. R. 23 Calc. 536;* and *Modhu Suddun Roy* v. *Prosanno Kumar Dutt (unreported)*, referred to. *Rameswar Mahton* v. *Dilu Mahton, I. L. R. 21 Calc. 550*, and *Nagendra Nath Mazumdar* v. *Russik Chandra Rai, 6 C. W. N. 346*, distinguished. GULAB KHAN *v.* ABDUL WAHAB KHAN (1904) . . . **I. L. R. 31 Calc. 365**

136. ——— Claim to attached property—*Jurisdiction—Suit by unsuccessful claimant under s. 283 of the Code of Civil Procedure to obtain the declaration rendered necessary by the order allowing attachment when there is no distinct claim against judgment-debtor for declaration of title, to be valued at the amount for which attachment is made and not at the value of the property—Judgment-debtor not party, merely as such, to claim proceedings in the eye of law.* A claim to attached property under s. 278 of the Code of Civil Procedure being dismissed, the unsuccessful claimant sued for a declaration that the property was not liable to attachment as the property of the judgment-debtor. The judgment-debtor was made a party but no distinct claim was made against him. The value of the attached property was R2,775, while the amount for which attachment took place was only R1,700:—*Held*, that such a suit was not a suit to obtain a declaration of title to the property, but one for getting rid of the effect of the order disallowing the claim and ought to be valued at the amount for which the property was attached when such amount is less than the value of the property. *Dwarka Das* v. *Kameshar Prasad, I. L. R. 17 All. 69* distinguished. A judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment-debtor. *Moidin Kutti* v. *Kunhi Kutti Ali, I. L. R. 25 Mad. 721*, followed. KRISHNASAMI NAIDU *v.* SOMASUNDARAM CHETTIAR (1907) **I. L. R. 30 Mad. 335**

VALUATION OF SUIT—*contd.*

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137. ——— Suit for declaring document invalid—*Court Fees Act (VII of 1870), s. 7, para. IV, cl. (c)—Suit for declaring invalidity of document, which plaintiff is not bound to have set aside is not a suit for declaration and consequential relief within section—Jurisdiction Rule 2 of Rules under s. 9 of Suits Valuation Act.* In order to determine whether a suit falls under s. 7, paragraph IV, clause (c) of the Court Fees Act, the substance of the plaint and not the words which the plaintiff chooses to use, must be considered. A person may rely on the invalidity of a void instrument as against himself without suing for its cancellation; and a suit by him for declaring the invalidity of such instrument will not be a suit for declaration and consequential relief under s. 7, paragraph IV, clause (c), of the Court Fees Act. It will be otherwise where the party cannot impeach the arrangement effected by the deed without having it cancelled. A transaction by the Karnavan of a Tarwad is void against members not consenting thereto, if it is in excess of his powers as such Karnavan. In declaratory suits where no consequential relief is prayed, the value for purposes of jurisdiction is the value of the property likely to be effected by the declaration and rule 2 of the rules of the High Court of 26th February, 1903, does not apply to such cases. CHINGACHAM VITIL SANKARAN NAIR *v.* CHINGACHAM VITIL GOPALA MENON (1906) **I. L. R. 30 Mad. 18**

138. ——— Suit for recovery of land and mesne profits—*Valuation of suit Appeal—Forum of appeal—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 21—Interest pendente lite—Court Fees Act (VII of 1870), s. 11. Held*, by RAMPINI, *A.C.J.*, BRETT, MITRA and WOODROFFE, *JJ.*, that when in a suit for possession of land and mesne profits, which was originally valued at a sum below R5,000, and which was instituted in the Court of a Subordinate Judge, but in which the whole amount actually found due, inclusive of mesne profits payable by the defendant to the plaintiff, was over R5,000, an appeal would lie to the High Court and not to the District Court. Where a plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the amount may be ascertained in the suit, the amount found by the Court to be due to him must generally be regarded as the value of the original suit for the purpose of determining the *forum* of appeal. *Gulab Khan* v. *Abdul Wahab Khan, I. L. R. 31 Calc. 365*, approved. *Held*, also, that interest *pendente lite* on the mesne profits should not be taken into account in estimating the value of the original suit. *Held*, by MUKERJEE, *J.*, that the rule formulated in *Gulab Khan* v. *Abdul Wahab Khan, I. L. R. 31 Calc. 365*, was too wide and required to be qualified; that where a plaintiff was permitted by s. 50 of the Code of Civil Procedure to put upon the relief claimed by him an approximate or tentative value, and the Court determined

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the amount which the plaintiff was entitled to recover, such amount, if accepted by the plaintiff as the value of the relief claimed by him, determined the value of the suit and, consequently, the *forum* of appeal, under s. 21 of Act XII of 1887. IJJATULLA BHUYAN *v.* CHANDRA MOHAN BANERJEE (1907) . . . . **I. L. R. 34 Calc. 954**

139. ——— **Suit under Civil Procedure Code (Act XIV of 1882), s. 283**—*Property of plaintiff wrongly attached—Claim in execution proceedings rejected—Court Fees Act (VII of 1870), Sch. II, Art. 17, sub-s. (1)—Suit to set aside summary decision of Court not established under Letters Patent.* The plaintiff was in possession of immoveable property, which she had purchased from the second defendant against whom the first defendant obtained, in the Court of a Subordinate Judge, a decree in execution of which the plaintiff's property was attached. Her claim in the execution proceedings was rejected, and she thereupon brought in the Subordinate Judge's Court, a suit for a declaration of her right to the property and for an injunction to restrain the first defendant from executing his decree against it. *Held* (reversing the decisions of the Court below), that the suit was under s. 283 of the Civil Procedure Code (Act XIV of 1882), for which the proper Court-fee was that prescribed by sub-s. (1) of Art. 17 of Sch. II of the Court Fees Act (VII of 1870), namely, R10 for "a suit to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent." *Dhondo Sokharam Kulkarni* v. *Govind Babaji Kulkarni, I. L. R. 9 Bom. 20*, followed. PHUL KUMARI *v.* GHANSHYAM MISRA (1907).
I. L. R. 35 Calc. 202
s.c. L. R. 35 I. A. 22
12 C. W. N. 169

2. APPEALS.

1. ——— **Question of valuation**—*Appellate Court, power of—Act XXVI of 1867.*—An Appellate Court has no power to set aside a decision arrived at by the Court of first instance as to the valuation of the property in suit. MAFIZUDDIN *v.* KARIMUNNISSA BIBEE
6 B. L. R. Ap. 11 : 14 W. R. 381

ISHAN CHANDRA MOOKERJEE *v.* LOKENATH ROY **6 B. L. R. Ap. 12 : 14 W. R. 451**

2. ——— *Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 21, cl. (a)*—"*Value of the original suit*"—"*Amount or value of the subject-matter of the suit*" *District Judge, jurisdiction of—General Clauses Act (I of 1887), s. 3, cl. 13.* For the purpose of determining the proper Appellate Court in a civil suit, what is to be looked to is the value of the original suit, that is to say, the "amount or value of the subject-matter of the suit." Such "amount or value of the subject-matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint, and not the value as found by the Court unless it appear that, either purposely or through

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gross negligence, the true value of the suit had been altogether misrepresented in the plaint. MAHABIR SINGH *v.* BEHARI LAL
I. L. R. 13 All. 320

3. ——— ——— *Ground of appeal going to the whole of the respondent's decree.* Where one of several appellants takes a ground of appeal which goes to the root of the respondent's case and which, if successful, would deprive the respondent of his decree as a whole, and not merely of his interest in it *quoad* the particular appellant, the Appellate Court is justified in refusing to hear such appellant on such ground as aforesaid unless he pays a Court-fee sufficient to cover the whole relief obtainable on such ground of appeal. BUJHAWAN RAI *v.* MAKUND LAL
I. L. R. 15 All. 112.

4. ——— *Suit of the nature cognizable in Courts of Small Causes.* For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed and not merely the actual amount affected by the order sought to be appealed. NAZAR HUSAIN *v.* KESRI MAL
I. L. R. 12 All. 581

5. ——— *Jurisdiction of District Judge—Valuation put by plaintiff in his plaint—Amount awarded by decree—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887).* The pecuniary jurisdiction of a Civil Court on its appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint; and if a suit, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its pecuniary jurisdiction should be given to the plaintiff. There is nothing in Act XII of 1887 to confine the sum for which a Civil Court may pass a decree to the limit of its jurisdiction to entertain a suit. *Mahabir Singh* v. *Behari Lal, I. L. R. 13 All. 320*, referred to. MADHO DAS *v.* RAMJI PATAK
I. L. R. 16 All. 286

6. ——— *Jurisdiction—Appellate Court.* Where it appears on appeal that the suit has not been rightly valued, and if rightly valued the Court of first instance would not have had jurisdiction to try it, the Appellate Court may entertain the objection, though it had not been raised in the Court below. SHEO GOBIND RAUT *v.* ABHAI NARAIN SINGH **5 B. L. R. Ap. 17**

7. ——— **Under-valuation**—*Ground for dismissing appeal—Insufficient stamp.* Where an appeal was brought on an insufficient stamp, the appeal was dismissed without prejudice to the appellant bringing a fresh appeal within twenty days on a full stamp. WALI ALAM *v.* NASRAN
3 B. L. R. Ap. 104
s. c. WOLEE ALUM *v.* MISRUN . **12 W. R. 50**

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VALUATION OF SUIT—*contd.*

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8. ——— *Ground for dismissing appeal.* When a suit has been admitted upon a certain stamp, tried, and decreed for the plaintiff, "under-valuation" is no ground for dismissing the defendant's appeal. EMAMUDDIN KHAN *v.* RAMKISHORE KOWAR
5 B. L. R. Ap. 30

9. ——— *Insufficiently-stamped appeal—Deputy Registrar, power of—Civil Procedure Code, 1859, s. 31.* The Deputy Registrar has no authority to make an order returning a petition of appeal when the stamp fee paid upon is insufficient. The right course for that officer, if his requirements as to stamps are not complied with, is to lay the matter before the Court. But if the appellant is ready to pay what is required, then, whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it if it was originally presented in time. AMBUR ALI *v.* KALI CHAND DOSS . . . . . **24 W. R. 258**

10. ——— **Over-valuation**—*Refund of stamp duty.* Where excess stamps had been filed in consequence of an over-valuation of the appeal, the surplus amount was ordered to be refunded. *In the matter of* GRANT . . **14 W. R. 47**

11. ——— **Law applicable to valuation**—*Law in force at presentation of appeal.* The valuation of an appeal must be according to the Act in force at the time of its presentation, and the original valuation under a law obsolete at the period of appeal can have no influence in the decision. ANONYMOUS . . **5 Mad. Ap. 44**

BHUGOBUTTY KOOER *v.* KUSTOOREE KOOER
15 W. R. 272

12. ——— *Civil Procedure Code, 1859, s. 229—Change of law between date of original suit and date of claim, effect of, on jurisdiction.* The subject-matter of an appeal should be valued for the purpose of jurisdiction according to the law in force at the date of the appeal, and not of the suit which has led to it. For the purpose of jurisdiction, a claim under s. 229 of Act VIII of 1859 in a fresh suit, and not a continuation of the suit in which the claim is made, so that where, by reason of a change in the law as to the mode of valuing suits for the purpose of jurisdiction between the date of the original suit and the claim, the Court that dealt with the original suit cases to have jurisdiction over the subject-matter of the claim, that Court cannot try the claim. MUTTUMMAL *v.* CHINNANA GOUNDEN
I. L. R. 4 Mad. 220

13. ——— **Bengal Civil Courts Act (Beng. Act VI of 1871), s. 22**—*Subject-matter in dispute—Jurisdiction of the High Court.* The appeal from the decree or order of a Subordinate Judge or Munsif, where the amount or value of the subject-matter in dispute in a suit exceeds R5,000, lies to the High Court, although the amount or

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value of the subject-matter in dispute in appeal is less than R5,000. *In the matter of the appeal of* DULI CHAND . . . **9 B. L. R. 190**

S. C. DOOLY CHUND *v.* NIRBAN SINGH. NURRENDER NARAIN SINGH *v.* SREE NARAIN DOSS. MEERBHOY SINGH *v.* RAMPERSHAD SINGH
18 W. R. 261

So also held, under s. 18, Act XVI of 1868, by the majority of the Court (PEARSON, *J.*, dissenting) of the North-Western Provinces in MAHOMED HOSSEIN KHAN *v.* SHIB DYAL
5 N. W. 108 : Agra, F. B. Ed. 1874, 276

MASOOMA BEBEE *v.* NAZUR FATMA
1 N. W. 117 : Ed. 1873, 203

CHUNDER BHAN SINGH *v.* JAIRAM GEER
5 N. W. 175

But *see* SRIMATI DASI *v.* SOUDAMINI DOSSEE
9 B. L. R. 192 note

14. ——— *Appeal where one suit has been split up into several.* Where a suit for R13,777 was brought against defendants whose interests were not identical, and the Judge ordered separate trials of the different causes involved, as provided in s. 9, Act VIII of 1859, an appeal by the defendants from the decision in one of the suits valued at R149 was *held* not to lie to the High Court. RAM COOMAR DOSS *v.* BIDHOO MOOKEE DASSEE . . . **15 W. R. 31**

15. ——— *Interest on amount of appeal.* Where an appeal was brought from an order in execution of the decree in a suit in which both the amounts sued for and the amount of the decree were below R5,000, but by reason of interest the appeal was valued at more than that sum, the case was *held* to come within the principle of *In re Duli Chand.* RAI DHANPAT SINGH BAHADOOR *v.* MADHUMATI DEBI
9 B. L. R. 197 note : 18 W. R. 316

16. ——— *Subject-matter in dispute—Jurisdiction of High Court—Execution of decree—Act XXIII of 1861, s. 11.* The appeal from an order of a Subordinate Judge directing execution to issue lies to the District Judge, and not to the High Court, where the amount claimed in a suit is under R5,000, although the amount sought to be recovered in execution has, by the addition of interest since decree, grown to a sum exceeding R5,000. RUTTANJOTE KOOER *v.* RAM DASS . **10 B. L. R. 290 : 19 W. R. 131**

17. ——— *Execution of decree.* When the High Court called up an appeal to the Zillah Judge, and tried it as a regular appeal, and passed a decree thereon:—*Held,* that this did not entitle the parties to prefer an appeal to the High Court in the proceedings in execution of that decree. Such appeal would lie to the Zillah Judge. RAMANOOGRA SAHOY *v.* BYJNATH LAL
10 B. L. R. 291 note : 15 W. R. 164

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VALUATION OF SUIT—*contd*

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18. _____ *Suit in value over R5,000—Appeal heard by Judge without jurisdiction.* The High Court in special appeal remanded a case to the Subordinate Judge for re-trial. The case having been re-tried, an appeal against the second decree of the Subordinate Judge was filed in the Court of the District Judge, who declared that it was not cognizable by him, as the value of the property in dispute exceeded R5,000. A regular appeal was preferred to the High Court. *Held*, that the entire proceedings subsequent to the first decree of the Subordinate Judge were *ultra vires* and could not be recognized, and that the appeal would not lie. THAKOOR PERSHAD SINGH *v.* MAHADEO SINGH
5 N. W. 210

19 _____ **Computation of value**—*Valuation of appeal for jurisdiction—Madras Civil Courts Act (Mad. Act III of 1873).* According to s. 13 of Act III of 1873 (the Madras Civil Court Act), it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. *Held*, therefore, that where the amount of the original suit was more than R5,000, and an appeal was preferred to the District Court, but the amount in dispute in the appeal did not exceed R5,000, that the District Court had no jurisdiction to hear the appeal. MUTHUSAMI PILLAI *v.* MUTHU CHIDAMBARA CHETTI . . . . **7 Mad. 356**

20. _____ **Appeals in measurement cases**—*Miscellanoeus petitions.* Petitions of appeal in cases to obtain an order for measurement may be written on the stamp used for miscellaneous petitions. SMITH *v.* NUNDUN LAL
6 W. R. Act X, 13

21. _____ *Right to Measure valued at specified amount.* Where a zamindar values his right to measure at a certain amount, the petition of appeal must be written on a regular stamp according to such valuation, and not upon a stamp used for miscelleneous petitions. OOMA CHURN BISWAS *v.* SHIBNATH BAGCHEE **8 W. R. 14**

22. _____ **Appeal from order declaring party to have no locus standi**—*Miscellaneous appeal—Petition.* An appeal from an order of the Lower Appellate Court, declaring that a party who claimed to be in possession of property taken in execution of a decree to which he was no party, and with which he had no concern, had no *locus standi* in the execution case, is in the nature of a miscelleneous appeal, and should be on a stamp for an ordinary petition. MOHESH CHUNDER BANERJEE *v.* CHUNDER MONEE DABEE
9 W. R. 139

23. _____ **Appeal from order rejecting application to set aside ex parte decision**—*Summary appeal.* The stamp required for a petition of appeal from an order rejecting an application to set aside an *ex parte* decision under s. 119, Act VIII of 1859, was a two-rupee stamp. Such an appeal was treated as a summary and not a regular appeal. PARBUTTY *v.* GREEDHAREE LALL . . . **4 W. R. Mis. 15**

24. _____ **Appeal from order rejecting plaint for misjoinder**—*Miscellaneous appeal—Stamp.* An appeal from an order rejecting a plaint for misjoinder is a miscellaneous appeal; and if it is rejected, an appeal from the order of rejection is also of the nature of a miscellaneous appeal, and is to be valued and stamped as such. KOSSELLA KOER *v.* BEHAREE PATUCK
12 W. R. 70

25. _____ **Appeal by mortgagee on question of lien.** Where the appeal by the mortgagee was not with reference to the property, but to a mortgage lien :—*Held*, that the valuation for the purpose of stamp in such appeals should be with reference to the value of the lien for the mortgage-debt of incumbrance, and not with reference to the value of the mortgaged property. MAHOMED SHEERUN KHAN *v.* MISSER KOONDUN LALL. BHEEKA *v.* NUND KISHORE
Agra, F. B. 158 : Ed. 1874, 119

26. _____ **Appeal in suit for profits in respect of several years**—*Court-fees—Distinct causes of action—Distinct subjects—Court Fees Act (VII of 1870), s. 17—Civil Procedure Code, ss. 43, 44.* In an appeal in a suit for recovery of profits under s. 93 (*h*) of the N.-W. P. Rent Act in respect of several years, the proper Court-fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year. MUHAMMAD MALICK KHAN *v.* NIRHAI BIBI
I. L. R. 7 All. 761

27. _____ **Appeal from rejection of claim by forest settlement officer**—*Madras Forest Act (V of 1882), s. 10—Appeal to the District Court—Court Fees Act, Sch. II, Art. 11 (a); Art. 17, cl. (vi).* An appeal to the District Court from the rejection of a claim by a forest settlement officer under cl. 2 of s. 10 of the Madras Forest Act, 1882, falls under Art. 17, cl. (*vi*), and not under Art. 11 (*a*) of Sch. II of the Court Fees Act, 1870. KAMARAJA *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 8 Mad. 22

28. _____ **Appeal from order disallowing an application to file an agreement to refer to arbitration**—*Court-fee, mode of calculation of.—Per* OLDFIELD, *J.* The Court-fee payable on a memorandum of appeal from an order under s. 523 of the Civil Procedure Code, disallowing an application to file an agreement to refer to arbitration, is an *ad valorem* fee computed on the value of the subject matter in dispute in the appeal. DAYA NAND *v.* BAKHTAWAR SINGH
I. L. R. 5 All. 333

29. _____ **Appeal against award under Land Acquisition Act**—*Court Fees Act (VII of 1870). ss. 5 and 8.* An appeal against an

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VALUATION OF SUIT—*contd.*

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award made by the District Judge under Land Acquisition Act (I of 1894) was filed in the High Court; the appeal memorandum bearing a Court-fee stamp of R10 only was admitted by the Registrar, no question having been raised as to the sufficiency of the stamp. On the appeal having been posted for hearing, it was objected on the part of the respondent that the stamp paid was insufficient: *Held*, that the appeal memorandum should have borne an *ad valorem* stamp under Court Fees Act, s. 8, and that there having been no decision by the taxing officer under s. 5, it was open to the respondent to raise the objection on appeal at the hearing. KASTURI CHETTI *v.* DEPUTY COLLECTOR, BELLARY . . . **I. L. R. 21 Mad. 269**

30. ——— Appeal from order of Judge under Land Acquisition Act (I of 1894) on reference by Collector as to disposal of compensation awarded—*Court Fees Act (VII of 1870).* In an appeal to the High Court from the order of the District Judge made upon a reference by the Collector under ss. 18 and 19 of the Land Acquisition Act, 1894, as to the disposal of compensation awarded for land taken up by Government under the Act, the memorandum of appeal must be stamped as an appeal from an original decree. SHEO RATTAN RAI *v.* MOHRI **I. L. R. 21 All. 354**

31. ——— Appeal from order disposing of dispute under Civil Procedure Code, s. 322B—*Dispute as to extent of judgment-debtor's liability to claim—Nature of appeal—Court Fees Act (VII of 1870), Sch. II, Art. 11.* An appeal from the decision of a dispute under s. 322B of the Civil Procedure Code falls directly within the exception of Art. 11, Sch. II of the Court Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit upon an *ad valorem* stamp. *Srinivasa Ayyangar* v. *Pria Tambi Nayakar, I. L. R. 4 Mad. 420,* dissented from. AHMAD KHAN *v.* MADHO DAS . . . . **I. L. R. 7 All. 565**

32. ——— Appeal in partition suit—*Court Fees Act, Sch. II, Art. 17, cl. 6—Stamp on Memorandum of appeal in partition suit.* The stamp fee payable on appeals to the High Court in suits asking for "partition, the separation of a share, and for khas possession of that share after separation," is that leviable under Art. VI, cl. 17, Sch. II, of the Court Fees Act. For the purpose of jurisdiction the Court should be guided by the value of the property in suit, but the amount of the stamp fee should be governed by a different principle. KIRTY CHURN MITTER *v.* ANNATH NATH DEB . **I. L. R. 8 Calc. 757: 11 C. L. R. 95**

See BADYANATH ADYA *v.* MAKHAN LAL ADYA **I. L. R. 17 Calc. 680**

33. ——— Appeal from decree for possession disallowing perpetual character of leases. A suit for possession of certain lands having been decreed on the ground of plaintiff's right of occupancy, but the perpetual (mirasi) character of the leases under which the claim had been made having been disallowed, an appeal was preferred to have it declared that the leases were perpetual. *Held*, that, as the value of the claim would be the difference in the value of the land as held under a mirasi tenure at a fixed rent, or an ordinary tenure at a fluctuating rent, and as this might be an extremely difficult calculation, the stamp fee upon the appeal would be properly fixed according to the valuation put by the appellant upon the subject-matter of his claim. KEBUL RAM MUNDUL *v.* WELLS **24 W. R. 454**

34. ——— Appeal from decree in suit for possession and mesne profits—*Mesne profits to be determined in execution of decree—Valuation of appeal against decree.* In a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit. The defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or costs. In the valuation of the appeal for the purposes of the Court Fees Act, nothing was included on account of the mesne profits. *Held*, that no stamp duty was payable in respect of the mesne profits subsequent to the institution of the suit. MAIDEN *v.* JANAKIRAMAYYA . **I. L. R. 21 Mad. 371**

See RAMAKRISHNA BHIKAJI *v.* BHIMABAI . . **I. L. R. 15 Bom. 416**

35. ——— Appeal under cl. 10 of Letters Patent, High Court, N.-W.P., from an order of remand under s. 562 of the Code of Civil Procedure—*Court Fees Act (VII of 1870), Sch. II, Art. 11. Held*, that in an appeal under s. 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under s. 562 of the Code of Civil Procedure the proper Court-fee is R2. BALLI RAI *v.* MAHABIR RAI . . . . **I. L. R. 21 All. 178**

36. ——— Appeal under Agency Rules, No. 22, under Act XXIV of 1839—*Court Fees Act (VII of 1870).* An appeal preferred to His Excellency the Governor in Council under Rule No. 22 of the Agency Rules framed under Act XXIV of 1839 against the decision of the Governor's Agent at Vizagapatam and referred by Government to the High Court for disposal is not chargeable under the Court Fees Act. REFERENCE UNDER COURT FEES ACT, S. 5 **I. L. R. 22 Mad. 162**

37. ——— Appeal in suit to enforce a right of pre-emption—*Appeal by purchaser—Court-fee—Court Fees Act (VII of 1870) s. 7 (i) and (vi).* Where, in a suit to enforce a right of pre-emption, a decree was passed against the vendees-defendants, and they appealed from

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the same on the grounds that they were entitled to receive from the plaintiffs-pre-emptors a sum larger than that found by the Court of first instance to have been the purchase-money, and also that the plaintiffs had estopped themselves from asserting the right by refusing to purchase :—*Held*, that the nature of the suit was not changed in appeal, and that, on the contrary, the subject-matter of the dispute between the parties was the right of pre-emption the value of which, for the purposes of Court-fee, was to be determined in manner directed by s. 7, cl. (*vi*), of the Court Fees Act, VII of 1870. *Ram Lakhan Rai* v. *Bandan Rai, I. L.R. 2 All. 711*, distinguished. Where an appeal is preferred in a suit for pre-emption, on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject matter in dispute, for the purposes of the Court Fees Act, must be determined as in terms provided in art. (*vi*) of s. 7 of the Act. Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the Court fee should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other. HAFIZ AHMAD *v.* SOBHA RAM
I. L. R. 6 All. 488

38. ——— Appeal in suit for redemption—*Court Fees Act (VII of 1870), s. 7, cl. 9—Madras Civil Courts Act (Mad. Act III of 1873), s. 13—Suits Valuation Act (VII of 1887), s. 11—District Judge, jurisdiction of.* In a suit in the Court of a Subordinate Judge to redeem certain land on payment of R1,625, being a quarter of a debt for which it had been mortgaged together with other land, a decree was passed for redemption of part of the land, but the Court held that the plaintiff had not established his right to the rest. The plaintiff appealed to the High Court paying *ad valorem* Court-fees computed on the value of the land exonerated only. *Held*, (i) that the *ad valorem* Court-fees should be computed on one-fourth of the mortgage-debt ; (ii) that the appeal lay to the District Court, and since Act VII of 1887, s. 11, did not apply to the case, the petition of appeal should be returned for presentation in that Court. VASUDEVA *v.* MADHAVA
I. L. R. 16 Mad. 326

39. ——— *Court Fees Act (VII of 1870), s. 17—Claim by Mortgagor for rent in same suit—Court-fee on appeal.* A suit to redeem a mortgage for R3,500 and to recover a certain sum on account of rent was dismissed so far as the prayer for redemption was concerned, and also part of the claim for rent was disallowed. It did not appear that the arrears of rent were intended to be set off against the mortgage-debt. The plaintiff appealed. *Held*, that the Court-fee should be computed on the principal amount of the mortgage-debt and on the claim which had been disallowed on account of rent. RAMA VARMA RAJAH *v.* KADAR . . **I. L. R. 16 Mad. 415**

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40. ——— Appeal in suit for redemption of usufructuary mortgage—*Bengal Civil Courts Act (VI of 1871), s. 22.* The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage-debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interest in the property was below R5,000 ; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit, it was contended that the appeal from that decree lay to the District Court and not to the Hight Court. *Held*, that the "subject-matter in dispute," within the meaning of s. 22 of Act VI of 1871, was the mortgage and the mortgagees' rights under it, and that, the value of this being only R2,000, the appeal should have been preferred to the District Court. Second Appeal No. 1039, of 1877, dissented from. GOBIND SINGH *v.* KALLU . . **I. L. R. 2 All. 778**

41. ——— Appeal from decree making property liable for mortgage-debt—*Court Fees Act (VII of 1870), s. 6, Sch. II, Art. 17.* In a suit on a mortgage-bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of R10 only. *Held*, that the proper stamp to be paid was not R10 as in the case of the declaratory decree, but on the value of the debt not exceeding the value of the property. VENKAPPA *v.* NARASINHA
I. L. R. 10 Mad. 187

42. ——— Appeal from decree for ejectment and mesne profits—*Court Fees Act (VII of 1870), s. 7—Court-fee on Memorandum of appeal.* A memorandum of appeal from a decree directing ejected and awarding mesne profits is chargeable with Court-fees calculated both on the land and on the mesne profits. BRAHMAYYA *v.* LAKSHMINARASIMHAM
I. L. R. 16 Mad. 310

43. ——— Appeal in suit for ejectment—*Claim by tenants for improvements of greater value than plaint valuation—Appeal by tenants for improvements—Court-fees payable on such appeal.* In a suit for ejectment, in which the plaint land was valued at R50 and Court-fee paid on that valuation, the tenants claimed R500 as compensation for improvements, which claim was disallowed. The tenants appealed on the ground that their claim for improvements should have been allowed, but only paid Court-fee on the plaintiff's valuation. On a reference as to whether the value of the improvements ought not to be taken into account for the purpose of levying the Court-fee :—

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Held, that, as the claim for improvements was not the subject-matter of the suit, but was merely incidental to the decree for possession, and on grounds of convenience, the fee payable by an appellant in such a case should be that payable in a suit for possession of land. REFERENCE UNDER COURT FEES ACT, s. 5 . I. L. R. 23 Mad. 84

44. ——— **Appeal, memorandum of, under Bengal Tenancy Act (VIII of 1885), s. 108, cl. 3**—*Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. 6.* The Court-fee payable on a memorandum of appeal presented to the High Court under s. 108, cl. 3 of the Bengal Tenancy Act of 1885 is that prescribed by Art. 17, cl. 6, of Sch. II of the Court Fees Act. PETU GHORAI *v.* RAM KHELAWAN LAL BHUKUT
I. L. R. 18 Calc. 667

45. ——— **Court-fees stamp on memorandum of second appeal to High Court from decision of District Court on appeal from Talukhdari Settlement Officer**—*Court Fees Act (VII of 1870), Sch. II, Art. 1, and Sch. I, Art. 1—Application for execution of decree for partition—Gujarat Talukhdars Act (Bom. Act VI of 1888).* A second appeal from an order rejecting an application for execution of a partition-decree under the Gujarat Talukhdars Act (Bombay Act VI of 1888) is not within the contemplation of Art. 1, Sch. I, but is an application falling under Art. 1 of Sch. II of the Court Fees Act (VII of 1870). The Court-fee stamp of R2 should therefore be affixed to the momorandum of appeal. JAMSANG DEVABHAI *v.* GOYABHAI KIKABHAI I. L. R. 16 Bom. 408

46. ——— **Appeal from decree payable by instalments**—*Court Fees Act (VII of 1870), s. 16, and Sch. I, Art. 1—Court-fee on appeal from decree granting partial relief.* The Court-fees which an appellant has to pay on a memorandum of appeal from a decree which gives him only partial relief are to be calculated upon the difference between the value of the relief which he claims and the relief granted by the decree appealed against. Where a decree was made payable by three instalments and the plaintiff appealed on the ground that it should not have been made so payable :—*Held*, that the Court-fee should be calculated upon the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned in the decree. LUKHUN CHUNDER ASH *v.* KHODA BUKSH MONDUL . . I. L. R. 19 Calc. 272

47. ——— **District Judge, jurisdiction of**—*Madras Civil Courts Act (III of 1873), s. 13 (2)—Appeal from Subordinate Judge.* Certain members of a Moplah family sued the others in a Subordinate Judge's Court to recover their distributive share under Mahomedan law. The property to be divided was more than R5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. On appeal to the High Court against the decision of the District Judge :—*Held*, that it is the value of the share claimed and not the value of the property from which that share has to be taken, that is the value of the subject-matter of the suit within the meaning of cl. 2, s. 13 of the Madras Civil Courts Act, and therefore the District Court had jurisdiction to entertain the appeal. KUNHIKUTTI *v.* ACHOTTI
I. L. R. 14 Mad. 462

48. ——— *Madras Civil Courts Act (Mad. Act III of 1873), s. 12—Valuation of relief—Suit for partition.* In an appeal against a decree of a Subordinate Judge dismissing a suit brought by the members of one Nambudri illom against the members of another for partition and delivery of a moiety of the property of an extinct illom, it appeared that the value of the share claimed was less than R5,000. *Held*, that the appeal lay to the District Court. *Krishnasami* v. *Kanakasabai, I. L. R. 14 Mad. 183*, followed. NARAYANAN *v.* NARAYANAN
I. L. R. 15 Mad. 69

49. ——— *Madras Civil Courts Act (III of 1873), s. 13—Civil Procedure Code (Act XIV of 1882), s. 331.* The plaintiff, being the holder of a decree of a Subordinate Court for more than R5,000, was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than R5,000, and the Subordinate Judge directed that the application be registered as a regular suit under the Civil Procedure Code, s. 331, and ultimately passed a decree in favour of the plaintiff. *Held*, that the valuation of the appeal for the purpose of jurisdiction was to be taken as being less than R5,000, notwithstanding that the subject-matter of the original suit was valued above that sum, and that the appeal lay to the District Judge, and not to the High Court. KALIMA *v.* NAINAN KUTTI. MAHOMED *v.* NAINAN KUTTI . . . I. L. R. 31 Mad. 520

50. ——— *Suits Valuation Act (VII of 1887), s. 8—Valuation for purposes of Court-fees and for purposes of jurisdiction—Suit for account.* In a suit for an account the valuation entered in the plaint for the purpose of fixing Court-fees determines the question of jurisdiction, the valuation for both purposes being the same under s. 8 of Act VII of 1887. The plaintiff sued for an account, and valued the relief sought at R130. The suit was filed in the Court of a Subordinate Judge of the first class. The Subordinate Judge rejected the claim. Thereupon the plaintiff appealed to the High Court, valuing his claim in appeal at R10,500. *Held*, that the appeal lay to the District Court, and not to the High Court. BHAGVANTRAI MUNSHI *v.* MEHTA BAJURAO
L. R. 18 Bom. 40

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VALUATION OF SUIT—*contd.*

2. APPEALS—*contd.*

51. ——— *Suits Valuation Act (VII of 1887), s. 8—Suits for account—Court-fee stamp—Amount of claim as fixed by plaintiff—Relief incidental to the principal relief.* According to s. 8 of the Suits Valuation Act (VII of 1887), in suits for taking an account the Court-fee stamp and jurisdiction are both determined by the amount of claim as fixed by the plaintiff. In a suit for taking an account the plaint having contained several items which were all incidental to the chief item of relief, the plaint was held to be substantially one to have a minor plaintiff's estate administered, that is, to have accounts taken and the accounting party ordered to pay what (if any) should be found due from him on the balance of such account. The plaintiffs having put the valuation of the suit at R130 in the plaint:—*Held*, that the High Court had no jurisdiction to hear the appeal against an order rejecting the plaint. The appeal lay to the District Court. The appeal was therefore returned for presentation in the proper Court. BAI AMBA *v.* PRANJIVANDAS DULLABHRAM **I. L. R. 19 Bom. 198**

52. ——— *Suits Valuation Act (VII of 1887), s. 8—Suit for account—Court Fees Act (VII of 1870), s. 7 (iv), cl. (f), and s. 11—Bombay Civil Courts Act (XIV of 1869), s. 26.* In a suit for an account or partnership dealings, the plaintiffs valued the claim approximately at R600. The Subordinate Judge passed a decree awarding to the plaintiffs a sum of R30,830-9-2. The plaintiffs thereupon paid an additional Court-fee of R900 under s. 11 of the Court Fees Act (VII of 1870). The defendants appealed to the High Court from the decree of the Subordinate Judge. The plaintiffs objected that the appeal lay to the District Judge, and not to the High Court. *Held*, that the value of the subject-matter of the suit exceeded R5,000; the appeal therefore lay to the High Court under s. 26 of Act XIV of 1896. IBRAHIMJI ISSAJI *v.* BEJANJI JAMSEDJI . **I. L. R. 20 Bom. 265**

53. ——— *Bombay Civil Courts Act (XIV of 1869), s. 26—Administration suit—Suit filed in second class Subordinate Judge's Court—Decree in such a suit—Appeal from such decree.* The plaintiff filed an administration suit in the Court of a Subordinate Judge of the second class valuing the relief claimed at R130. The Subordinate Judge found that the property in suit was worth over a lakh of rupees, that the liabilities came to R5,729, and that the defendant was indebted to the estate in the sum of R5,199. He drew up a preliminary decree, directing (*inter alia*) that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for representation to the High Court, on the ground that the subject-matter exceeded R5,000. *Held*, reversing the order of the District Judge, that the appeal lay to the District Court. SHET KAVASJI MANCHERJI *v.* DINSHAJI MANCHERJI . **I. L. R. 22 Bom. 963**

VALUATION OF SUIT—*contd.*

2. APPEALS—*contd.*

54. ——— *Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Art. 17—Suit on bond.* In a suit upon a hypothecation-bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent. *Held*, that the Court-fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered. RAMASAMI *v.* SUBBUSAMI **I. L. R. 13 Mad. 508**

55. ——— *Suit for ejectment—N.-W. P. Rent Act, s. 93, cl. (h)—General Clauses Act (I of 1887), s. 39, cl. (13)—Subject-matter of suit—Appeal valued for purposes of jurisdiction at a higher amount than the suit.* Where a plaintiff in a suit under s. 93 of the N.-W. P. Rent Act valued his suit at R46-3, which valuation was not objected to either by the defendant or the Court, and subsequently, being defeated in his suit preferred an appeal, which he valued at a very much greater amount:—*Held*, that he must be bound by the valuation put by him upon his suit, and could not by alleging a greatly enhanced value obtain an appeal which would not have lain on the valuation stated in the plaint. *Ram Raj Tewari* v. *Girnandan Bhagat, I. L. R. 15 All. 63*, distinguished. *Mahabir Singh* v. *Behari Lal, I. L. R. 13 All. 320*, referred to. RADHA PRASAD SINGH *v.* PATHAN OJAH . . **I. L. R. 15 All. 363**

56. ——— *Court Fees Act (VII of 1870), s. 10, cl. 2, s. 12, cl. 11, Sch. II, Art. 17, cl. 6—Order in appeal by defendant for payment of fee by plaintiff.* The plaintiffs, having raised a claim to a Kanom attached in execution of a decree against their undivided brother, which was allowed in part, sued for a declaration of their title to four-fifths of the Kanom amount, affixing to the plaint a R10 stamp. The plaintiffs obtained a decree, against which the defendant appealed to the District Court. While the appeal was pending, the District Judge, holding that the Court-fee paid on the plaint was insufficient, ordered that the plaintiffs should pay the balance due on an *ad valorem* computation of the fee, and in default, that the suit should stand dismissed. The plaintiffs first became aware of this order on the 26th March; the balance was not paid within the time fixed by the District Judge for the payment to be made, and on the 28th March he accordingly made an order dismissing the suit. *Held*, that the plaint was sufficiently stamped, and that, in any case, the order dismissing the suit while the appeal was still pending was irregular. KAMMATHI *v.* KUNHAMED . . . . **I. L. R. 15 Mad. 288**

57. ——— *Judge on appeal dealing with valuation of suit irregularly—Appeal by one of several defendants—Court Fees Act, s. 10, cl. (2), s. 12, cl. (2).* The plaintiff sued four persons to recover, with arrears of rent, possession of three parcels of land and obtained a decree in the

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VALUATION OF SUIT—*contd.*

2. APPEALS—*contd.*

Court of a District Munsif. The suit was valued at R489-8-0. Defendant 4, who claimed to be entitled as jenmi to one of the parcels, preferred an appeal. The District Judge held that the suit should have been valued at R1,164-8-0, and he made an order that additional Court-fees should be paid accordingly; the order not having been complied with, he made an order, "Original suit rejected." He subsequently referred the appeal for disposal to a Subordinate Judge, who accordingly passed a decree, allowing the appeal of defendant 4 with costs. On appeal against the above order and decree:—*Held*, that the order of the District Judge was irregular, and the appeal should be restored to the file of the Subordinate Judge to be disposed of according to law. KERALA VARMA *v.* CHADAYAN KUTTI . . . **I. L. R. 15 Mad. 181**

58. ——— *Suit for declaration of title and for injunction—Consequential relief—Court Fees Act (VII of 1870), s. 7, cl. 4—Suits Valuation Act (VII of 1887), s. 8.* Where plaintiffs sued for a declaration that they were entitled to share in certain talukhdari estates and for an injunction to restrain defendant from cutting and removing timber from certain forests, or, if the injunction was not granted for an order to defendant to keep a correct account of the timber removed, the first class Subordinate Judge rejected the claim for want of jurisdiction:—*Held*, that the suit was one for a declaration and consequential relief under s. 7, cl. 4 (c), of the Court-fees Act, and that, as the claim was valued at R230 only, the appeal lay under Act VII of 1887, s. 8, to the District Court. An injunction is in the nature of consequential relief. GULAB SINGJI *v.* LAKSHMANSINGJI . . . **I. L. R. 18 Bom. 100**

59. ——— *Suit for injunction and specific performance—Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1870)—Valuation for purposes of jurisdiction.* The provisions of s. 8 of Act VII of 1887 apply to Appellate Courts as well as to Courts of first instance, and the value of the subject-matter of suits for the purpose of jurisdiction must be determined by the provisions of that section. In a suit of the description mentioned in s. 8 of Act VII of 1887, the plaintiff valued his claim at R664 for the computation of Court-fees, and at R14,000 for purposes of jurisdiction. *Held*, that the appeal from the decree of the Court of first instance lay to the District Court, and not to the High Court. BAI VARUNDA LAKSHMI *v.* BAI MANEGAVRI **I. L. R. 18 Bom. 207**

60. ——— *Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 21, sub-s. (1)—"Value of the original suit."* Where the value of a suit was found by the lower Court to be less than R5,000, and the plaintiff contested that finding and preferred his appeal to the High Court on the valuation of R7,500 made in his plaint:—*Held*, that the words "value of the original suit" in sub-s. (1), s. 21 of the Bengal, W.-W. P., and Assam Civil Courts Act (XII of 1887), did not mean the value as found by the original Court, and the appeal was rightly preferred to the High Court; that as it did not appear in the present case that the overvaluation was the result of any design to change the venue of appeal, the question whether "value" in the said section should be taken to be *bonâ fide* value need not be considered. *Lakshman Bhatkar* v. *Babaji Bhatkar, I. L. R., 8 Bom. 31* and *Mahabir Singh* v. *Behari Lal, I. L. R. 13 All. 320*, approved. NILMONY SINGH *v.* JAGABANDHU ROY **I. L. R. 23 Calc. 536**

61. ——— *Court Fees Act (VII of 1870), s. 16, and Sch. II, Art. 71, cl. iii—Declaratory decree, suit for—Consequential relief—Right of priest to charao (offerings to idol)—Suit for arrears of maintenance.* In a suit upon an ekrar executed by the priest of an idol for recovery of arrears of maintenance and for a declaration that the money due was realizable from the surplus of the charao (offerings to the idol) and recoverable from the defendant's successors in office, the original Court passed a decree for the arrears, but refused to make the declaration. The plaintiffs appealed only against the order refusing the declaration, the memorandum of appeal bearing a Court-fee stamp of R10. The respondent objected that the declaration asked for in appeal involved consequential relief, and that an *ad valorem* fee was payable by the appellant. *Held*, that the memorandum was correctly stamped under s. 16 and cl. iii, Art. 17, Sch. II of the Court Fees Act (VII of 1870). *Venkappa* v. *Narasimha, I. L. R. 10 Mad. 187* and *Vithal Krishna* v. *Balkrishna Janardan, I. L. R. 10 Bom. 610*, distinguished. GIRIJANUND DATTA JHA *v.* SAILAJANUND DATTA JHA **I. L. R. 23 Calc. 645**

62. ——— *Fee payable on appeal—Suit for declaratory decree—Possibility of valuing subject-matter—Original valuation by plaintiff—Court Fees Act (VII of 1870), s. 7 (iv) (c).* A plaintiff was granted a decree (which was affirmed on appeal to the Subordinate Court), declaring a sale-deed invalid on the ground that it had been obtained by fraud, coercion, undue influence, and without consideration. The suit had been originally valued by plaintiff at R800 but by an order of the Munsif's Court that figure was altered to R2,000, the amount mentioned in the deed. One of the defendants preferred a second appeal to the High Court, where a question arose as to the amount of duty payable on such appeal. *Held*, that s. 7 (iv) (c) of the Court Fees Act applied, and that the valuation given by the plaintiff was the valuation to be accepted. *Quære*: Whether the reference to an appeal in the sub-section applies to a case in which the subject-matter of the appeal is not co-extensive with subject-matter of the suit. *Karam Khan* v. *Daryai Singh, I. L. R. 5 All. 331*, considered. SAMIYA MAVALI *v.* MINAMMAL **I. L. R. 23 Mad. 490**

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VALUATION OF SUIT—*contd.*

2. APPEALS—*contd.*

63. ——— ——— *Memorandum of appeal to special Judge under Bengal Tenancy Act—Court Fees Act (VII of 1870), ss. 12 and 17, Sch. II, Art. 1, cl. (b), part II, Art. 17, cl. (vi)—Bengal Tenancy Act, s. 104, cl. (2), s. 108, cl. (2) and s. 189—Joinder of parties in one application—Rule 25 of Rules of Government of India under Bengal Tenancy Act.* A number of tenants were joined as defendants in a proceeding for settlement of rents under s. 104, cl. 2, of the Bengal Tenancy Act, and an appeal preferred by the landlords under s. 108, cl. 2, from the Revenue Officer's decision making all or nearly all the tenants respondents. The appeal was dismissed by the Special Judge, on the ground that as many Court-fees of R10 each as there were tenants defendants had not been paid and the appellants petitioned the High Court to set aside the order under s. 622 of the Civil Procedure Code. *Held*, by a Full Bench, that the Local Government acted within the powers conferred by s. 189, cl. 1, of the Bengal Tenancy Act in making rule 25 of Ch. VI of the Government rules under the Act by which the landlord was authorised to join as defendants several defendants in one application for settlement of rents. *Held*, also, that the decision of the Special Judge did not dispose of any question relating to valuation, far less of any question relating to the valuation of a suit, and the decision was not final under s. 12 of the Court Fees Act; and that the proceedings in this case could not properly be regarded as a suit and neither Art. 17, cl. vi, of Sch. II nor s. 17 of the Court Court Fees Act, was applicable. The memorandum of appeal was nothing more or less than an application subject to one Court-fee of eight annas only under Art. 1, cl. (*b*), part II of Sch. II of the Court Fees Act. The case of *Petu Ghorai* v. *Ram Khelawan Lall Bhukut, I. L. R. 18 Calc. 667*, was wrongly decided. UPADHYA THAKUR *v.* PERSIDH SINGH
I. L. R. 23 Calc. 723

64. ——— ——— *Court Fees Act (VII of 1870), Sch. I—Relief in respect of costs—Distinct retief.* When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, seeks distinct relief on the ground that by the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of the first schedule of the Court Fees Act. *In re* MAKKI. *In re* RAMAN . . **I. L. R. 19 Mad. 350**

65. ——— ——— *Memorandum of appeal insufficiently stamped—Conditional order admitting appeal—Deficiency made good after period of limitation—Appeal from decree granting two distinct declarations.* A plaint contained a prayer for a declaration (i) that certain property was the joint property of the plaintiff; and (ii) that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions, and want of title. The decree in the suit, passed on the 14th September 1887, granted both the declarations played for. The defendants appealed to the High Court against the whole decree and stamped their memorandum of appeal with a stamp of R10 only. On the 9th November 1887 it was tendered to a Judge for admission, and it then bore a report dated the 7th November by the officer appointed under s. 5 of the Court Fees Act, "Report will be made on receipt of record." The Judge made an order, "Admit, subject to stamp report," and the memorandum was then received by the office, and the appeal was entered on the register. On the 27th September 1888 the office reported that there was a deficiency in the stamp of R615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December 1888 it was made good. At the hearing of the appeal a preliminary objection was taken that the appeal had never been validly presented within time, or admitted, and that it could not be heard. *Held*, that there was before the Court no valid appeal as to the merits of which the Court could give a decision. *Held*, also, that the stamp of R10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection. BALKARAN RAI *v.* GOBIND NATH TIWARI
I. L. R. 12 All. 129

66. ——— ——— *Decree for redemption conditional on payment of a certain sum—Appeal by mortgagor—Court-fee payable on memorandum of appeal—Court Fees Act (VII of 1870), s. 7, cl. 4.* Where a mortgagor sues for redemption on the allegation that the mortgage-debt has been satisfied, and a decree for redemption is passed on payment of a certain amount, and the mortgagor appeals against the amount he is ordered to pay, the Court-fee payable on the memorandum of appeal must, under s. 7, cl. 9, of Act VII of 1870, be computed according to the principal money expressed to be secured by the instrument of mortgage, and not according to the balance which the mortgagor alleges to be due. *Semble:* If the decree had allowed redemption on payment of a certain sum, and the defendant mortgagee was appealing on the ground that the amount due was greater than that sum, the Court-fee should be calculated on the difference between the sum mentioned in the decree and the amount alleged by the appellant to be due. PIRBHU NARAIN SINGH *v.* SITA RAM . **I. L. R. 13 All. 94**

67. ——— **Improper valuation**—*Suits Valuation Act (VII of 1887), s. 11—Improper valuation for jurisdictional purposes—Case not finally*

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VALUATION OF SUIT—*contd.*

2. APPEALS—*contd.*

disposed of by lower Appellate Court, but only remanded for findings—Validity of order of remand. S. 11 of the Suits Valuation Act (VII of 1887) has the effect of curing a want of jurisdiction caused by improper valuation, not only in cases where there has been a final disposal by the lower Appellate Court, but also where a case has been remanded by the lower Appellate Court to the Court of first instance for a finding. RAMAN *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (1901)

I. L. R. 24 Mad. 427

68. ——— Increase of valuation—*Jurisdiction—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 21.* Plaintiff sued for an account, and valued the suit at R2,000, but added that if any further sum were found due he would pay the additional Court-fee. A preliminary decree was passed, directing the defendant to render accounts. On defendant's failure to account, plaintiff filed an account claiming that R11,000 were due, and prayed for a decree for that amount. Plaintiff subsequently reduced the amount to R9,000. Defendant thereupon objected, and, on an account being taken, plaintiff's suit was dismissed, and he preferred an appeal to the District Judge, valuing his appeal at R4,500. The District Judge held that the appeal did not lie to him, as the value of the suit was R9,000 and not R2,000. *Held*, that the appeal lay to the District Judge, as the value of the suit must be considered as that stated in the plaint (R2,000). NOGENDRA NATH MOZUMDAR *v.* RUSSIK CHANDRA RAI (1901)

6 C. W. N. 346

69. ——— Partition—*Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 21—(N.-W. P. Land-revenue Act (XIX of 1873), ss. 113, 114—Partition—Determination by Revenue Court of question of title—Jurisdiction. Held*, that s. 21 of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887, applies to partition cases in which, under s. 113 of the North-Western Provinces Land-revenue Act, 1873, a Court of Revenue has determined a question of title, and that "the value of the original suit," if not the value of the entire property sought to be partitioned, is at any rate the value of the share which the applicant for partition seeks to have divided off. SHEO SINGH *v.* BALDEO SINGH(1903)

I. L. R. 25 All. 277

70. ——— Suit for foreclosure—*Appeals—Appeal from decree making property liable for mortgage-debt—Court Fees Act (VII of 1870), Sch. I, Art. 1—Value of the subject-matter in dispute—Form of mortgage—Creation of charge on property—Words creating simple mortgage—Paibandh—Intention of parties—Registration—Effect of registration in the wrong book—Extinguishment of mortgage by payment—Effect of payment of prior mortgage by subsequent mortgagee—Intention of parties to keep mortgage alive—Assignment of mortgage—Surogation.* Where the purchaser of mortgaged property being a defendant in the mortgagee's suit for foreclosure, preferred an appeal against the decree for foreclosure made in the suit, the amount found due on the mortgage being over a lakh of rupees :—*Held* (for the purpose of ascertaining the Court-fee payable on the memorandum of appeal) that the value of the property affected by the decree must be taken to be R2,500, being the amount for which the appellant had purchased the property. *Venkappa* v. *Narasimha, I. L. R. 10 Mad. 187*, followed. By a bond, being on the face of it an ordinary bond, the obligor agreed to repay the debt and admitted that, if he failed to do so, the obligee would be entitled to recover the debt by sale of a certain factory belonging to him and from his person and other properties, and that the property referred to in the bond will be held *Paibandh* for the debt. *Held*, that the bond created no special lien on the factory, and that the circumstance that the bond was registered as an agreement in Book I and that the obligee took no steps to have it registered as a mortgage was evidence that the parties intended to treat it as an agreement rather than as a mortgage. *Najibulla Mulla* v. *Nusir Mistri, I. L. R. 7 Calc. 196*, referred to. Plaintiffs paid out of their own funds the amount due under a mortgage-bond payable by five annual instalments, the first of which was due on the 15th January, 1895, and the last on the 15th January 1899, executed by *C* on the 8th April 1894, mortgaging his Indigo Concern and the mortgagee on the 7th November 1899, after the payment of the last instalment, executed at *C's* request an assignment of the mortgage in their favour. On the 21st December 1895, *C* being indebted to the plaintiffs in a large amount recoverable only out of the produce of the factory had executed in their favour an agreement to give them a first mortgage on the concern and certain other properties, and on the 13th November 1896 *C* executed two other deeds creating in their favour a valid charge on the said concern and certain other properties. *Held*, that, although there was no direct evidence of any formal bargain or agreement, the presumption was that the plaintiffs, when they paid off the instal ments due under the mortgage of the 8th April 1894, intended that the mortgage should be kept alive for their benefit and that in itself entitled them to come in as first mortgagee. *Held*, further, that under the agreement of the 21st December 1895, which created an equitable mortgage, and under the two deeds of the 13th November 1896 the plaintiffs were in the position of puisne mortgagees and when thereafter they paid off the last three instalments due to the first mortgagee, they were entitled to come in by subrogation as first mortgagee, and further that, the mortgage having been kept alive, the assignment to them under *C's* direction gave them all the rights, which the mortgagee had. Whether a mortgage paid off has been kept alive or extinguished depends on the intention of the parties, the mere fact that it has been paid off not deciding the question. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas, I. L. R. 10*

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VALUATION OF SUIT—*concld.*

2. APPEALS—*concld.*

Calc. 1035 : L. R. 11 I. A. 126 ; Dinobundhu Shaw Chowdhury v. *Jogmaya Dasi, I. L. R. 29 Calc. 154 : L. R. 29 I. A. 9 ; In re Wrexham, &c., Railway, [1899] 1 Ch. 440 ; Mohesh Lal* v. *Bawan Das, I. L. R. 9 Calc. 961 : L. R. 10 I. A. 62 ; Tulsa* v. *Khub Chand, I. L. R. 13 All. 581,* referred to. JAGATDHAR NARAIN PRASAD *v* BROWN (1906).
I. L. R. 33 Calc. 1133
s.c. 10 C. W. N. 1010

VALUE OF PROPERTY.

———— as stated in sale proclamation ; gross inadequacy of—

See APPEAL—EXECUTION OF DECREES—QUESTIONS IN EXECUTION.
I. L. R. 30 Calc. 617

———— inquiry as to—

See COURT-FEES ACT (VII OF 1870), S. 19 H . . **6 C. W. N. 898**

———— statement in will as to—

See EVIDENCE—CIVIL CASES—RECITALS IN DOCUMENTS **I. L. R. 1 Bom. 561**

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VARIANCE BETWEEN PLEADING AND PROOF.

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I. L. R. 19 Bom. 303

See ESTOPPEL—ESTOPPEL BY DEEDS AND OTHER DOCUMENTS.

See HINDU LAW—CUSTOM—INHERITANCE AND SUCCESSION.
I. L. R. 21 Bom. 110

See HINDU LAW—PARTITION—PARTITION OF PORTION OF PROPERTY.
I. L. R. 18 Bom. 611

See HINDU LAW—PARTITION—RIGHT TO PARTITION—PURCHASER FROM CO-PARCENERS . **I. L. R. 20 Mad. 243**

See ISSUES—FRESH OR ADDITIONAL ISSUES.

See LANDLORD AND TENANT—EJECTMENT—NOTICE TO SUIT.
I. L. R. 17 Bom. 631

See PLAINT—AMENDMENT OF PLAINT.
See RELIEF . **I. L. R. 15 Mad. 489**
I. L. R. 19 Bom. 323

VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

See TITLE—EVIDENCE AND PROOF OF TITLE—LONG POSSESSION.
I. L. R. 2 Calc. 418

See WRITTEN STATEMENT.
I. L. R. 1 Bom. 209

1. GENERAL CASES.

1. ———— **Decision on point not raised in pleadings or issues.**—A plaintiff must recover *secundum allegata et probata,* and no decree should be given in his favour on a point not raised in the pleadings nor embodied in an issue. JOYTARA DASSEE *v.* MAHOMED MOBARUCK
I. L. R. 8 Calc. 975 : 11 C. L. R. 399

JANKEE *v.* JHANJOO **2 N. W. 407**

MOOKTAKESHEE DEBEA *v.* COLLECTOR OF BURDWAN . . . . **12 W. R. 204**

TARA CHAND ROY *v.* NOBIN CHUNDER ROY
21 W. R. 132

PROTAB CHUNDER BOROOAH *v.* COLLECTOR OF GOWALPARA **22 W. R. 216**

2. ———— **Basis of decision of case—** *Pleadings.* The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. *Eshen Chunder* v. *Shama Churn Bhutto, 11 Moo. I. A. 7,* referred to. MYLAPORE IYASAWMY VYAPOORY MOODLIAR *v.* YEO KAY
I. L. R. 14 Calc. 801
L. R. 14 I. A. 168

3. ———— *Exception to rule "Secundum probata et allegata"—Admission of defendant.* The rule that the decree should be in accordance with what is alleged and proved is intended to prevent surprise, and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him. APPAYA *v.* RAMIREDDI . **I. L. R. 11 Mad. 367**

4. ———— **Amendment of case—***Mistake or misapprehension.* A plaintiff can be allowed to amend his case only when he has an honest case, but either through mistake or some misapprehension he has not placed the real facts before the Court. BHYRO DUTT *v.* LEKHRANEE KOOER
16 W. R. 123

5. ———— *Civil Procedure Code, 1859, Operation of, as compared with old procedure in equity.* Under the Civil Procedure Code, parties are not bound so strictly to the pleadings as in any equity suit under the old procedure, if their being so bound would work injustice. DOSSEE *v.* TARRACHURN COONDOO CHOWDHRY . . . . **Bourke. A. O. C. 48**

6. ———— **Variance in plaint—***Dismissal of suit, ground for. Held,* by a majority, that the Code of Civil Procedure does not require the dismissal of a suit by reason of any variance in the plaint. MAHOMED REEZAOODEEN *v.* HOSSEIN BUKSH KHAN . . . . **1 W. R. 300**

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VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

1. GENERAL CASES—*contd.*

7. ——— Raising issues after variance is shown. A plaintiff will not be allowed to set up one case, and, having proved another, to ask for issues to be raised to suit the proof; but when a plaint and its proof necessarily lead to one or more particular issues, it is the duty of the Court, if these issues do not come by surprise on the defendant, to raise such issues, and to give the relief thereon to which the plaintiff is entitled. OBHOYCHURN MULLICK *v.* WOOMES CHUNDER PAUL . . . . . **2 Hyde 263**

8. ——— Proof of cause of action not alleged—*Dismissal of suit, ground for—Claim on one cause of action, evidence showing another.* Where a plaintiff sues on one cause of action and in support thereof gives evidence which, if it establishes anything, establishes a different cause of action, the Court acts properly in dismissing his suit. MUDHOOSOODUN GOSSAMEE *v.* HILLS **10 W. R. 242**

9. ——— Amount proved exceeding amount claimed—*Decree.* Where the amount to which the plaintiff would be entitled on the evidence exceeds that specified in the plaint, plaintiff is restricted to the amount so specified. NATHOORAM *v.* JARDINE, SKINNER & Co. **Cor. 118**

10. ——— Presumption from failure to prove allegations—*Onus of proof.* An adversary is entitled to the benefit of such presumptions as naturally arise from a party's failure to prove his allegations, even though the onus was in the first instance on the former. GUNEE BISWAS *v.* SREE GOPAL PAUL CHOWDHRY . **8 W. R. 395**

11. ——— Failure to prove precise case pleaded—*Decree, right to.* A previous ruling in *Beejoynath Chatterjee* v. *Lukhee Monee Dabee, 12 W. R., 248,* explained not to mean that a plaintiff must either get the thing he claims or nothing at all, but that having come into Court upon one title, which he asks to have declared and fails to prove, a plaintiff cannot claim the declaration of another. GOLUCK CHUNDER SIRCAR *v.* ISHAN CHUNDER DEB . . **23 W. R. 437**

12. ——— Suit for possession alleging fraud—*Change to suit for redemption.* Where in a suit for possession the plaintiff went to trial on the question of fraud, and that question was tried out, he is not entitled upon appeal to abandon that issue and to ask the Court to treat his suit as one for redemption. RAM DAO MONDAL *v.* INDROMONI DASI . . . . . **3 C. W. N. 325**

13. ——— Right to make party liable in different character—*Suit against party personally—Representative's liability.* In a suit to recover advances made to the defendant to carry on an indigo factory under a karbarnamah, in which it was agreed that the advance should first be repaid out of the profits realized from the manuacture, where it was found that the sale of the indigo had yielded more than the amount advanced, but had been credited by the plaintiff to old debts owing him by the defendant's father instead of to the defendant's personal debt:—*Held,* that the plaintiff had violated the terms of the agreement, and had not in good faith attempted to make the defendant personally liable, and he could not be allowed to proceed against the defendant as representative of his father. PERROUX *v.* LUCHMEEPUT SINGH . . . . . **12 W. R. 113**

14. ——— Unestablished defence—*Decree, right to.* The Court should not necessarily decree the plaintiff's claim in full because the defence set up by defendant has entirely failed. MUTLOOB ALI *v.* KIRIA . . **1 Agra 276**

15. ——— Defence not set up by defendant—*Inconsistent defence.* It is not competent to a Court to set up a defence not only not made by the defendant, but inconsistent with his own statement. SHURUT SOONDUREE DABEE *v.* PURESH NARAIN ROY . . **13 W. R. 464**

RADHA BINODE DUTT *v.* KOOTABODE MUNDUL **15 W. R. 363**

CHITTRA COOMARY BEBEE *v.* RAM LALL MOOKERJEE . . . . **18 W. R. 334**

RAJARAM BANERJEE *v.* SONATUN ROY **23 W. R. 404**

16. ——— Failure to establish case set up—*Practice—Pleadings—Failure of plaintiff to establish case set up by him—Right to succeed upon facts found differing from those alleged.* The plaintiff sued the defendant alleging that the defendant was tenant of a certain house belonging to the plaintiff, that the tenancy had commenced some eleven years before suit, and that the defendant had for the last three years ceased to pay rent, and had recently denied the plaintiff's title. The defendant denied that the plaintiff was the owner of the house, or that he had leased it to the defendant. He pleaded also that he had been in adverse possession for more than twelve years. The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that the plaintiff had been in possession within a period of twelve years from the institution of the suit. *Held,* that, under the circumstances stated above, it being, on the failure of the plaintiff's case as to tenancy, for the plaintiff to prove that he had possession within twelve years, the plaintiff was not entitled to a decree. *Naiku Khan* v. *Gayani Kuar, I. L. R. 15 All., 186; Ali Husain* v. *Ali Bakhsh, All. Weekly Notes (1889), 176;* and *Balmakund* v. *Dalu, All Weekly Notes (1901), 157,* referred to. HAJI KHAN *v.* BALDEO DAS (1901) **I. L. R. 24 All. 90**

17. ——— *Practice—Pleadings—Failure of plaintiff to prove the whole case upon which he came into Court—Plaintiff entitled to succeed on case proved if sufficient to support a decree.* The plaintiff came into Court alleging (i)

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VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

1. GENERAL CASES—*concld.*

that he was the proprietor of a certain building, and (ii) that he had leased a part of the said building to the defendant, who, however, refused to pay the rent agreed upon, and he sought to have the defendant ejected, and to recover possession of the portion of the building occupied by him. No specific issue dealing with the plaintiff's title was framed, but evidence as to title was given on both sides. *Held*, that, even though the plaintiff had failed to make out his case as to the letting, he nevertheless should get a decree on his title, unless the defendant could show a better one. The fact that no distinct issue as to the plaintiff's title had been framed could not be construed to the prejudice of the plaintiff, inasmuch as the issue had in fact been tried, and it could not be said that the defendant had been in any way taken by surprise. *Adul Gani* v. *Babni*, *All. Weekly Notes*, (*1903*) *18*, followed. *Haji Khan* v. *Baldeo Das*, *All. Weekly Notes*, (*1901*) *188*, referred to. *Naiku Khan* v. *Gayani Kuar*, *I. L. R. 15 All. 186*, overruled. *Lakshmibai* v. *Hari-bin Ravji*, *9 Bom. H. C. Rep.*, *6* ; *Ramchandra* v. *Vasudev*, *I. L. R. 10 Bom. 451* ; and *Bajrang Das* v. *Nand Lal*, *All. Weekly Notes*, (*1884*) *285*, distinguished. BALMAKUND *v.* DALU (F.B., 1903) . . . **I. L. R. 25 All. 498**

2. SPECIAL CASES.

1. ———— **Account, suit for balance of**—*Failure to prove balance alleged—Issues—Civil Procedure Code, 1859, s. 141. Held*, in contravention of various rulings of the late Sudder Court, that a suit brought on an alleged settlement of accounts, and balance struck and admitted, should not be dismissed merely on account of the plaintiff's failing to prove the alleged settlement and admission of balance by defendant ; but that the Court, being competent under s. 141 of the Civil Procedure Code to amend to frame additional issues that may be necessary to determine the real question or controversy between the parties, ought to enter into evidence regarding the items composing the account, and decree the claim regarding such items, if they are found to be due and not otherwise barred. KISHUN PERSHAD *v.* BHAWANEE DEEN . . **Agra, F. B. 47 : Ed. 1874, 35**

RAMSAHOY *v.* SEETHOO **1 N. W. 28 : Ed. 1873, 26**

But where the issues had been framed solely on the alleged adjustment, the suit was held to be rightly dismissed. NOBIN CHUNDER KOONDOO *v.* SREEDHUR BHUTTARCHARJEE . **15 W. R. 24**

2. ———— **Accretion**—*Gradual accretion to a formation of dry land already existing, and appropriated to an owner of land, on a river's bank—The ownership of the bed of the river was not the subject of contest below—Variation of claim disallowed.* Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land

VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*contd.*

to which the accretion is made, following the ownership of that land, the rule is equally well established in both those provinces. Both parties were riparian proprietors of adjoining estates on both banks of the river Godavari. The plaintiff claimed the right to newly-formed land, in midstream, which she alleged to have been formed by accretion upon an already existing lanka or alluvial island which belonged to her. On that point there were concurrent findings against her. The accretion had taken place upon a lanka owned, not by her but by the Government, and higher up stream than hers. *Held*, that the plaintiff must abide by the ground of claim which she had presented below, that being that the new land was formed by gradual accretions to definite and visible portions of a lanka previously belonging to her. This she could not now vary to a claim founded on an ownership of the river-bed on the strength of her being zamindar and owner of the land on both banks of the river, without either issue or evidence directed to such sub-aqueous ownership. BALUSU RAMALAKSHMAMMA *v.* COLLECTOR OF THE GODAVARI DISTRICT . . . **I. L. R. 22 Mad. 464 L. R. 26 I. A. 107**

3. ———— **Alienation, suit to set aside**—*Variance between case in plaint and evidence—Raising ground not taken in plaint.* The plaintiff a Hindu, sued to set aside a certain alienation, on the ground that the alinor was an illegitimate son of the plaintiff's grandfather, and, therefore, had no interest in the property. Not being able to substantiate this ground in the first Court, the plaintiff, on appeal, raised a new ground, *viz.*, that the alienation was bad, because under the Mitakshara law the owner of a share in a joint ancestral estate is not competent to alienate his share without the consent of the other heirs. *Held*, that such variance could not be allowed, and that the plaintiff must prove his case as laid in the plaint. SRI PRASAD *v.* RAJ GURU TRIAMBUKNATH DEO **6 B. L. R. 555 : 14 W. R. 386**

4. ———— **Alleged inconsistency in pleadings**—*Construction of solehnama—Estoppel—Objection taken for first time on appeal.* After the death of a Hindu widow, a suit was brought to have a sale of a portion of her husband's estate made by her set aside on the ground that the sale was invalid except in so far as it affected the rights of the widow herself therein. The plaintiff, who was a collateral relation, alleged himself to be the heir, and sued as such, but was not so in fact. It appeared, however, that a solehnama had been entered into between him and the heir by virtue of which he had acquired all the rights of the heir in the property in suit. It did not appear that any objection had beent aken in the lower Courts to the framing of the suit on the ground that the plaintiff was not the heir, and the defendant was allowed to raise the same objection to the suit as he might have taken had it been brought by the heir. On

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2. SPECIAL CASES—*contd.*

appeal it was contended on behalf of the defendant that the plaintiff, having sued as heir, could not be allowed to succeed on the basis of the solehnama, as this would be contrary to the rule laid down in *Eshan Chunder Singh* v. *Shama Churn Bhutto, 11 Moo, I. A. 7. Held*, that, if this objection had been taken in the first Court, the plaint and issues might and ought to have been amended, but as it was not so taken, and the substance of the case in the plaint was that sale by the widow was invalid beyond her own interest, under the circumstances of the case there was no weight in the contention of the appellant. NURUL HOSSEIN *v.* SHEOSAHAI LAL . . . . . **I. L. R. 20 Calc. 1 L. R. 19 I. A. 221**

5. ——— *Failure to prove case—Raising fresh case on appeal.* In a suit to set aside a sale of ancestral property by a minor's father and guardian as made without necessity and for the father's profligate expenditure, and without inquiry by the purchasers as to whether it was for the infant's benefit, the defendants alleged that the sale was made under pressure of a foreclosure suit on account of a demand under a former mortgage for an ancestral debt. Plaintiff, having failed to establish his case, sought to go back and open the consideration for the mortgage made so long as twenty years ago, but the Privy Council, agreeing with the High Court, refused to allow him to do so. HUMEEDA *alias* KHAJOO *v.* AMATOOL MEHDEE BEGUM . . **17 W. R. P. C. 106**

6. ——— **Company**—*Contributories, list of—Amendment of plaint.* Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devji Bhanji, cotton merchant," and as being sued "in his own right :"—*Held*, that the plaintiff's company could not be allowed to give evidence that the shares were in fact held by a firm consisting of two individuals named respectively Bhanji Zutani and Devji Hemraj ; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners, with a view to making the firm liable for the amount of the calls, so as to sue Bhanji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Debji Bhanji, and to make him personally liable as the holder of the shares. *Weikersheim's Case, L. R. 8 Ch. Ap., 831*, distinguished. LONDON, BOMBAY AND MEDITERRANEAN BANK *v.* BHANJI ZUTANI **I. L. R. 2 Bom. 116**

7. ——— **Compromise**—*Failure to prove case—Right to succeed on ground not alleged.* Where the plaintiff sued to have a deed of compromise set aside as having been fraudulently entered into behind his back and without his knowledge, and failed to prove any fraud or collusion :—*Held*, that he was not entitled to a decree on the ground taken on appeal that the document was invalid as being unregistered, declaring that it did not affect his interests. MADHUB ALI KHAN *v.* HOSSAIN REZA KHAN . . . **4 C. L. R. 52**

8. ——— **Contract**—*Assumption of facts, decision on.* The determinations in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made. Therefore, where the relief sought by the plaint is grounded on a contract, the case must not be determined upon an alleged equity resulting from a different state of facts and inconsistent with that alleged by the plaintiff. ESHAN CHUNDER SINGH *v.* SHAMACHURN BHUTTO **2 Ind. Jur. N. S. 87 : 6 W. R. P. C. 57 11 Moo. I. A. 7**

Followed in DOSS RAM DOSS *v.* MOHENDRO ROY DECHA . . . . . **18 W. R. 274**

9. ——— *Issues—Amendment of plaint—Variance between case in plaint and evidence.* The plaintiffs sued the defendants for damages for breach of contract, alleging in their plaint that they had agreed to sell, and the defendants to purchase, certain indigo seed, but that the defendants had refused to take delivery, although the plaintiffs were ready and willing to deliver the same. Upon the evidence of the plaintiffs, it appeared that there was no contract as alleged in the plaint, but the contract, as stated by them, was that they (the plaintiffs) were to purchase seeds as agents for the defendants. The Judge dismissed the suit on the ground that the plaintiffs were bound to prove their case as stated in the plaint. *Held*, that the suit ought not to have been dismissed on that ground. The issues raised admitted of the true question being tried, *viz.*, whether, under the circumstances, the defendants were liable to pay the price of the seed ; and if they did not, the Court ought to have amended the issues, or framed additional ones. The object of the plaint is merely to bring the matter in dispute before the Court, but it is for the Court, upon the statements before it, to determine the real issue between the parties. ARBUTHNOT *v.* BETTS **6 B. L. R. 273 : 14 W. R. 181**

10. ——— **Ejectment, suit for**—*Failure to prove lease—Reliance on general title, right of—Case stated in plaint.* Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title as though he had not set up and failed to prove the alleged lease. A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise. LAKSHMIBAI *v.* HARI BIN RAVJI **9 Bom. 1**

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VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*contd.*

11. ——— *Suit for ejectment against defendant as tenants and on failure as trespassers—Case set up in appeal which was not that set up in the Court of first instance.* The plaintiff came into Court on the allegation that she was the owner of a certain house, and that the defendants were her tenants at a certain rent, and she sought to eject the defendants for non-payment of rent. The Court of first instance having found her allegations of tenancy to be untrue, she then in appeal endeavoured to support a plea that the defendants were trespassers, such plea having formed no part of the original case. *Held*, that the plaintiff could not under the circumstances be heard in support of a new plea of which the defendants had had no notice until the case was in appeal. *Lakshmibai* v. *Hari bin Raoji, 9 Bom. 1*, referred to. NAIKU KHAN *v.* GAYANI KUAR
I. L. R. 15 All. 186

12. ——— *Suit for ejectment of defendants as trespassers—Decree declaring right to rent as landlord.* In a suit to eject the defendants as trespassers, although it was found that the latter were not so, the lower Appellate Court notwithstanding gave a decree declaring the plaintiff's title to receive rent from the defendants. *Held*, that the entire suit ought to have been dismissed, inasmuch as the defendants were not found to be trespassers on the allegations made in the plaint, and on the suit as framed the plaintiffs were not entitled to get any other relief than the particular relief which they asked for. KALI KISHORE CHOWDHRY *v.* GOPI MOHUN ROY CHOWDHRY . . . **2 C. W. N. 166**

13. ——— *Title to relief completed pending a suit—Amendment of plaint.* *A* having leased land to *B*, sold it to *C*. Persons having trespassed, *B* offered no objection, and it was alleged that he was in collusion with them. *C* now sued before the expiry of the lease to eject the trespassers; the lease expired while the suit was still pending. *Held*, that the plaintiff was not entitled to the relief sought, and could not be permitted, on appeal, to amend the plaint by adding a prayer for a declaration of his reversionary right, although the acts of the defendants were such as to be prejudicial to his rights as reversioner. RAMANADAN CHETTI *v.* PULIKUTTI SERVAI
I. L. R. 21 Mad. 288

14. ——— **Encroachment, suit to prevent.** Where the plaintiff suing to prevent an encroachment on certain land alleged that the land was set apart for recreation, but the evidence established that it wat set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes):—*Held*, that the plaintiff ought not on that account to fail altogether and be left to a fresh action. The defendant had not been misled or induced to refrain from calling evidence to rebut the plaintiff's case. RANCHORDAS AMTHABHAI *v.* MANEKLAL GORDHANDAS . . **I. L. R. 17 Bom. 648**

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2. SPECIAL CASES—*contd.*

15. ——— **Fraud**—*Failure to prove specific case of fraud.* Where the plaintiff in his pleadings pledged himself to prove a specific case of fraud, and made his cause of action entirely dependant on that, he was not allowed to succeed, when he failed to prove fraud, on a collateral matter. SAHEB ROY *v.* GUJADHUR PERSHAD NARAIN SINGH
22 W. R. 221

16. ——— *Compromise by official assignee—Insolvency Act, 11 & 12 Vict., c. 21, ss. 28 and 29—Charges with a view to establish fraud—Practice—Pleading—Amendment of pleading—Restriction of power to amend.* The account of an estate formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected under which a suit brought in 1858 by the Official Assignee, representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over upon the passing of the consent-decree, with the knowledge of the assignee, but without notice to, or the sanction of, the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed repayment. The plaint, as presented, alleged the fraudulent concealment of the payment from the assignee. Afterwards when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that, if he did know of it, he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court. *Held*, that the amendment at the stage when it was made was not permissible. It is a well-known rule that a charge of fraud must be substantially proved as laid, and that, when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it. The High Court having decreed the claim on a finding of fraud different from either of the above:—*Held*, that on this ground alone the judgment might have been reversed. *Montesquieu* v. *Sandys, 18 Ves. Jun. 302*, followed. ABDUL HOSSEIN ZENAIL *v.* TURNER . . . **I. L. R. 11 Bom. 620**
L. R. 14 I. A. 111

17. ——— **Hathchitta, suit on**—*Hathchitta given for amount of adjusted account—Failure to prove hathchitta—Frame of suit.* Where a suit was brought to recover a sum of money due on an adjusted account, for which it was alleged that the defendant had signed a hathchitta, and the lower Appellate Court dismissed it on the ground that the defendant never signed the hathchitta, and that the plaintiffs had failed to prove their case:—*Held*, that having regard to the frame

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of the suit, the plaintiffs ought not to be allowed to ask the Court to determine whether the original debt for which the hathchitta was given had been paid off as the defendant alleged, and the suit could not be treated as a suit for the original debt. GOSSAIN RAM KISSEN *v.* MIAH JAN SHEIK
1 C. W. N. 710

18. ——— **Mortgage**—*Suit for redemption—Decree on mortgage set up by defendants and not on that alleged by plaintiff.* In a suit to redeem, the plaintiff produced a mortgage the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sudder Ameen made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. The Civil Judge reversed the decision. *Held*, on special appeal, that the Principal Sudder Ameen was justified in making the decree which he gave, it not being inconsistent with the relief prayed for by the plaint. UNICHA KANDYIB KUNHI KUTTI NAIR *v.* VALIA PIDIGAIL KUNHAMED KUTTI MARACCAR . . . . . **4 Mad. 359**

19. ——— *Suit for redemption—Evidence given of other mortgage than the mortgage in respect of which suit brought—Evidence Act (I of 1872), s. 35—Statement of a survey officer as to entry as occupant how far admissible.* The plaintiff sued to redeem certain lands alleged to have be mortgaged by his ancestor to the ancestors of the defendants in 1823. At the hearing the deed of mortgage in respect of which the suit was brought was produced, but another mortgage of about the same date was produced and proved by the plaintiff. The lower Courts passed a decree for the plaintiff. The defendants appealed. *Held* (reversing the decree of the lower Courts), that where a particular instrument is sued on as the basis of a right, it is incumbent on the plaintiff to establish his case on that particular cause of action, not on a cause of action, merely bearing the same common name, or of the same description, and so included in the same class. Under s. 35 of the Evidence Act, I of 1872, a statement by the survey officer that the name of this or that person was entered as occupant would be admissible if relevant, but it would not be admissible to prove the reasons for such an entry as facts in another case. GOVINDRAV DESHMUKH *v.* RAGHO DESHMUKH
I. L. R. 8 Bom. 543

20. ——— *Change of nature of suit.* The plaintiff sued to redeem a mortgage, alleging that it was made in the year A.D. 1821 for R25. The defendant admitted the mortgage but alleged that it was made in A.D. 1791 for R110 and contended that the suit was barred by limitation. The Subordinate Judge held that the mortgage had been made for the amount and at the date alleged by the defendant, but that the suit was not time-barred, as the mortgagor's title had been acknowledged by the mortgagee within the

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period of limitation. He accordingly made a decree for redemption on terms consistent with the plea of the defendant, but opposed to that of the plaintiff. On appeal, the Assistant Judge agreed with the first Court as to the merits of the case, but reversed its decree on the ground that the plaintiff was not entitled to succeed on a state of facts inconsistent with the case set forth in the plaint, observing that a plaintiff ought not to be allowed to change his cause of action. *Held* by the High Court, on second appeal, that the decree made by the first Court in favour of the plaintiff did not in any way proceed upon a cause of action different from that made in the plaint, and that the cause of action remained the same, namely, the right of the mortgagor to redeem from a mortgagee. A plaintiff ought not to be allowed to alter his case so as to convert a suit of one character into a suit of another and inconsistent character. LAKSHMAN BHISAJEE *v.* HARI DINKAR DESAI
I. L. R. 4 Bom. 584

21. ——— *Alteration of case from that made in plaint.* Upon a mortgage of land made little less than sixty years before the present suit, a decree followed in 1825 to the effect that an account having been taken of what was due on the mortgage, the mortgagor might at any time make a tender of such mortgage-money with interest up to date, and require that the land should be restored. The plaintiff, representing the interest of the original mortgagor, sued for redemption of the mortgage, treating the above decree as regulating the rights of the parties from the time when it was made. *Held*, that the plaintiff, not having sought by his plaint to redeem the mortgage, or alleged that there had been acknowledgment, could not in the present appeal fall back on a right to redeem such mortgage, although the latter might be within limitation, as that would be to make a case different from the one tried and decided in the Courts below. Accordingly, the suit had been properly dismissed. HARI RAVJI CHIPLUNKAR *v.* SHAPURJI HORMASJI SHET . . . **I. L. R. 10 Bom. 461**

22. ——— *Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of other mortgage than the Mortgage in respect of which suit brought—Right of plaintiff to have plaint amended and the question of latter mortgage determined.* The plaintiff as purchaser of the equity of redemption sued for redemption. He alleged a mortgage, dated A.D. 1849, for R175. The defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger sum. After the evidence was given, but before the judgment was delivered, the plaintiff applied to amend the plaint and to set up the mortgage admitted by the defendants. His application was refused, and the Court dismissed the suit on the ground that he had failed to prove the particular mortgage alleged in the plaint. The District Judge confirmed the decree, but observed

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that there probably was a mortgage for the larger sum as alleged by the defendants. On second appeal :—*Held*, reversing the decree and remanding the case, that the plaintiff was entitled to have the question of the mortgage for the larger sum inquired into. CHIMNAJI *v.* SAKHARAM
I. L. R. 17 Bom. 365

23. ——— *Cause of action set out in plaint—Burden of proof—Civil Procedure Code, 1882, s. 50—Suit for redemption of mortgage.* A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint. So, where plaintiffs came into Court alleging a mortgage of the year 1854 made by their predecessor in title in favour of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was *held* that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came into Court. *Read* v. *Brown, L. R. 22 Q. B. D., 128 ; Murti* v. *Bhola Ram, I. L. R. 16 All. 165 ; Salima Bibi* v. *Muhammad, I. L. R. 18 All. 131 ; Ratan Kuar* v. *Jiwan Singh, I. L. R. 1 All. 194 ; Parmanand Misr* v. *Sahib Ali, I. L. R. 11 All. 438 ; Zingari Singh* v. *Bhangwan Singh, Weekly Notes, All. (1889) 187 ; Krishna Pillai* v. *Rangasami Pillai, I. L. R. 18 Mad. 462; Govindrav Deshmukh* v. *Ragho Desmukh, I. L. R. 8 Bom. 543 ;* and *Eshenchunder Singh* v. *Shamachurn Bhutto, 11 Moo. I. A. 7,* referred to. *Lakshman Bhisaji Sirsekar* v. *Hari Dinkar Desai I. L. R. 4 Bom. 584,* and *Chimaji* v. *Sakharam, I. L. R. 17 Bom. 365,* dissented from. SHEO PRASAD *v.* LALIT KUAR **I. L. R. 18 All. 403**

24. ——— *Mortgage sued on not proved—Admission by defendants of mortgage right—Right of redemption.* The plaintiff sued to redeem a kanom of 1859. The kanom was not proved, but it appeared that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. The Subordinate Judge held that the kanom to which the admissions related could not have been executed before 1823, which was less than sixty years from the date of some of the admissions, and he passed a decree for redemption. *Held*, that the plaintiff, having failed to establish the kanom on which the suit was based, should not have been allowed to fall back upon some other as to which the defendants had made the admissions in question. KRISHNA PILLAI *v.* RANGASAMI PILLAI . **I. L. R. 18 Mad. 462**

25. ——— *Mortgage sued on inadmissible in evidence for want of registration—Secondary evidence—Inadmissible mortgage, consolidating two prior mortgages—Redemption, right of—Decree to redeem prior mortgages.* In a suit

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to redeem a mortgage of 1867 which had been lost and admittedly had not been registered, it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively. *Held*, that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid. ARUMUGAM PILLAI *v.* PERIASAMI . . **I. L. R. 19 Mad. 160**

26. ——— *Suit for redemption of immoveable property brought as donee—Title of plaintiff as reversioner.* In a suit for the redemption of immoveable property brought by the plaintiff as donee from a Hindu widow of the equity of redemption, the plaintiff's right to the property as reversioner cannot be inquired into notwithstanding an allegation in the plaint that he was a near relative of the husband of the donor. JAGANNATH VITHAL *v.* APAJI VISHNU
5 Bom. A. C. 217

27. ——— *Procedure.* Where a mortgagor sues to recover possession of the mortgaged property on the ground that the loan has been paid off from the assets of the estate, and that he is entitled to recover surplus collections, and the Court finds that a large balance in favour of the mortgagee still exists, the plaintiff is not entitled to a conditional decree, but the suit should be dismissed. KUNDUN LAL *v.* SASTA KOOER. SASTA KOOER *v.* KUNDUN LAL
8 W. R. 369

But *see* BOISTUB DOSS KOONDOO *v.* HURO NARAIN HALDAR . . . . **17 W. R. 408**

28. ——— *Usufructuary mortgage—Failure of claim to enforce lien—Compensation for breach of contract to give mortgagee possession.* A usufructuary mortgagee, the mortgagor having broken his agreement to give him possession of the mortgaged property, sued the mortgagor to recover the principal mortgage-money and interest by enforcement of lien. The property was not hypothecated as security for the mortgage-money. *Held*, that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled to compensation ; that although the plaintiff did not expressly claim such relief, yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief ; and that on estimating the compensation which should be awarded, the principal mortgage-money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide. MAHESH SINGH *v.* CHAUHARIA SINGH . **I. L. R. 4 All. 245**

29. ——— *Usufructuary mortgage—Suit to enforce hypothecation—Compensation for breach of contract—Money lent—Money had and received for plaintiff's use.* An instru-

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ment of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and interest, asking for enforcement of lien. The instrument of mortgage did not contain any hypothecation of the property. *Held*, that, although the suit, so far as it sought enforcement of lien wholly failed, there being no hypothecation of the property, yet it was not equitable or proper that as regards the money-claim, the mortgagee should be relegated to a fresh suit, inasmuch as a cause of action was disclosed, whether the suit was regarded as one for compensation in damages for breach of contract, or for money had and received for the plaintiff's use, or for money lent, and the suit should be determined on its merits. SHEO NARAIN *v.* JAI GOBIND . . I. L. R. 4 All. 281

30. ——— Partition—*Failure of suit—Right to declaration of share.* Where the main object of a suit framed and valued as a suit for partition of a portion of the estate fails, the plaintiff is not entitled to turn round and ask for a declaration as to the extent of his share. RUTTUN MONEE DUTT *v.* BROJO MOHUN DUTT 22 W. R. 333

Affirming s.c. . . . 22 W. R. 11

31. ——— Possession—*Moveable property—Making different case on appeal.* In a suit for delivery over to plaintiff of papers said to be in the possession of defendant, the answer of the latter was that he had made over the papers to the plaintiff's son. This plea was put in issue in the first Court, which found that some papers had been delivered as alleged, and made a decree ordering the delivery of certain other of the papers. On appeal the attention of the Judge was principally directed to the point whether the receipt of the papers by the plaintiff's son was a receipt by him as plaintiff's agent. *Held*, that this point was a departure wholly from the case made below, and ought not to have been entertained on appeal. PUNCHANUN ROY *v.* TROYLUCKHOMOHINEE DOSSEE 14 W. R. 466

32. ——— *Immoveable property—Separate acquisition. Held*, that the question of possession was not a proper one for decision when a plea of limitation was overruled, and the claim was found to be based, not on the fact of possession, but of the claimant being a member of the joint family and the property acquired by joint funds. NUND RAM *v.* CHOOTOO 1 Agra 255

33. ——— Possession, suit for—*Accrual of cause of action—Limitation.* In a suit by an execution purchaser to recover possession of landed property, where defendant pleads limitation and plaintiff proves facts from which the Court is unable to draw conclusions of law for itself, plaintiff ought not to be strictly bound to the accrual of the cause of action alleged in his plaint, so long as that arose within twelve years before commencement of the suit. MARIAM BEGUM *v.* RYE CHURN DUTT . . . . 13 W. R. 269

34. ——— *Misdescription as to situation of lands—Identification.* Where lands claimed under a certificate of sale as being in one village are found to be in another, it is open to the plaintiff to show that there has been a misdescription, and that, although the name of the former was used, the intention was to convey the lands he claimed situated in the latter. RAMGOPAL BARICK *v.* SHIB PERSHAD SIRCAR . 12 W. R. 483

35. ——— *Failure to prove pottah.* In a suit for possession by two raiyats claiming under different pottahs from the same zamindar, when the defendant's pottah fails, he still has a right to have a judicial determination of his claim to occupancy. BYDNATH SHAHA *v.* JADUB CHUNDER SHAHA . . 3 W. R. 208

36. ——— *Suit for possession on specific title—Right of occupancy.* A plaintiff who succeeds in proving the facts stated in his plaint as necessarily implying a right of occupancy may succeed in a suit for possession, even though he does not prove the title on which he specifically relied. SURJOO PERSHAD *v.* KASHEE RAWUT . . . . . 21 W. R. 121

37. ——— *Decree on ground not alleged in plaint.* The plaintiff sued for a declaration of mirasi mokurrari rights to certain lands and for mense profits, alleging that he had been wrongfully ejected by the predecessors in title of the defendant. *Held*, that the lower Courts were wrong in giving the plaintiff a decree for possession on the ground of occupancy right, he not having claimed such relief in his plaint. *Bijoya Debia* v. *Bydonath Deb*, *24 W. R. 444*, followed. BRINDABUN CHUNDER SIRKAR *v.* DHUNUNJOY NUSHKUR I. L. R. 5 Calc. 246 : 4 C. L. R. 443

38. ——— *Adverse possession—Issues.* The plaintiff sued to recover possession of certain land alleging that it was lakhiraj land, which he had purchased from a third party. The Court of first instance found that he had not proved the title he alleged, and although it had been contended at the hearing that a title by twelve years' adverse possession had been proved, the Court held that it was not proved, and that, as it was not alleged in the plaint and no issue was raised as to it, the plaintiff was not entitled to succeed, and accordingly dismissed the suit. The plaintiff appealed, and one of his grounds of appeal was that he was entitled to succeed by virtue of the title of adverse possession proved. The lower Appellate Court considered that the plaintiff had

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proved that he and his vendor had held adverse possession for a period of over twelve years and gave the plaintiff a decree on the strength of that title. The defendant appealed to the High Court, and it was contended on his behalf that the plaintiff was not entitled to succeed upon a title of adverse possession when it was not alleged in his plaint, and no issue had been laid down in respect of it. *Held*, that, as the suit was one for possession, and the defendant had express notice in the lower Appellate Court that the plaintiff relied on the title of adverse possession, and as he took no objection, on the ground that he should be allowed an opportunity to call evidence to rebut it, and as he had consequently not been prejudiced by the course adopted by the lower Appellate Court, the decree of that Court should be confirmed. *Bijoya Debia* v. *Bydonath Deb*, *24 W. R. 444*, and *Shiro Kumari Debi* v. *Gobind Shaw Tanti I. L. R. 2 Calc. 418*, distinguished. *Joytara Dassee* v. *Mahomed Mobaruck*, *I. L. R. 8 Calc. 975*, discussed. SUNDURI DASSEE *v.* MUDHOO CHUNDER SIRCAR . . . **I. L. R. 14 Calc. 592**

39. ——— *Relief granted on a different ground from that asked for.* Plaintiff's suit was that they were co-owners with *B* of a certain property as members of a joint family under the Mitakshara law ; that after *B's* death a 3½ annas share of the property was registered under the Land Registration Act in the name of *A*, the mother of *B*, although the plaintiffs were the owners in possession, and *A* was entitled only to maintenance ; that a gift was made of 1½ annas share by *A* to her daughter and daughter's son, without right, and the donees having granted a zur-i-peshgi lease in respect of that share, the zur-i-peshgidars took possession thereof. The plaintiffs accordingly prayed for recovery of possession by establishment of their alleged right of ownership, or, in the alternative, for a declaration that they were reversionary heirs to the estate of *B*, and as such not bound by the gift and the zur-i-peshgi lease aforesaid. *A* died during the pendency of the suit. It was found that plaintiffs were not co-owners with *B* as alleged ; but that, as reversionary heirs, they became entitled to possession upon *A's* death after the institution of the suit. *Held*, that, as the plaintiffs had claimed to recover possession in the suit, and as *A* died before the case was taken up for trial, the plaintiffs were entitled to the relief, although they asked it on a ground different from that on which they recovered judgment. RASUL JEHAN BEGUM *v.* RAM SURUN SINGH . . **I. L. R. 22 Calc. 589**

40. ——— *Defendant sued as a trespasser—Right to decree against him as a tenant.* Where a plaintiff brings a suit for possession, alleging that the defendant is a trespasser the moment it is shown that the defendant is not in possession as a trespasser, but holds as a tenant under the plaintiff, the suit must be dismissed, no

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matter what the character of that tenancy may be. RAM GOLAM SINGH *v.* HEET NARAIN SAHOO **2 C. L. R. 292**

41. ——— *Failure to prove allegation of defendant's tenancy—Right to treat him as a trespasser.* Where a plaintiff sued for khas possession on the ground that the defendant was his tenant and had forfeited his tenure by denying his landlord's title and it was found that there was no relation of landlord and tenant between the parties, the plaintiff was *held* not entitled to succeed on the contention that the defendant was a trespasser. LALJEE SINGH *v.* BUNWARY LALL ROY . . . . **25 W. R. 448**

42. ——— *Failure to prove permanent character of tenancy—Right to decree as tenants.* In a suit for possession of land on the strength of an alleged mirasi mokurari, one of the main issues was whether the plaintiffs were or were not tenants of the land in dispute, and upon this issue it was found that the plaintiffs had acquired a title as tenants from long possession, although they failed to establish the mirasi mokurari character of their tenure. *Held*, that the plaintiffs were entitled to a decree for possession. *Kalee Coomar Pattur* v. *Khettur Nath Baug*, *17 W. R. 47*, and *Surjoo Pershad* v. *Kashee Rawut*, *21 W. R. 121*, followed. *Bijoya Debia* v. *Bydonath Deb*, *24 W. R. 444*, and *Brindabun Chunder Sircar* v. *Dhananjoy Luskur*, *I. L. R. 5 Calc. 246 : 4 C. L. R. 443*, distinguished. SHIB CHUND LAHIRI *v.* JOYMALA DASI . . . . . **7 C. L. R. 103**

43. ——— *Suit on ground of forcible dispossession where defendant's possession is found to be permissive.* A suit to recover possession of land on the ground of forcible dispossession, in which it was pleaded by defendant and found as a fact that the defendant's holding was of a permissive character, should be dismissed at once, the defendant's possession not being a wrongful one of the kind alleged by plaintiff. The rightly mode of action in such a case would have been for plaintiff to serve the defendant with notice to quit the land, and thereby put an end to the permission relied upon by him. PHILLIPS *v.* NUNDCOOMAR BANERJEE . . . . **8 W. R. 385**

44. ——— A plaintiff's failure to prove dispossession on the particular date mentioned in the plaint is not a sufficient ground for the dismissal of the suit. HURO CHUNDER CHOWDHRY *v.* GOBIND CHUNDER MOITRO **15 W. R. 178**

BOGA KOLITA *v.* THOOLESSUR KAYASTA **24 W. R. 357**

TORAB ALI *v.* MAHOMED AMEER HOSSEIN **3 C. L. R. 105**

45. ——— *Suit for confirmation of possession—Proof that plaintiff was out of possession—Change in form of suit.* The plaintiff

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sued for an adjudication of his right to, and confirmation of possession of, certain lands, on the allegation that they had been conveyed to him by one of the defendants and that he was in actual possession thereof, and that his title thereto had been impeached by the subsequent sale of the same lands by his vendor to the other defendant. The Court of first instance found that the plaintiff's allegation of possession was false, and dismissed the suit. *Held*, on appeal, that the suit was rightly dismissed, for though a plaintiff who brings forward a *bonâ fide* case, which he proves in substance, though not in form, would be assisted by the Court, in the absence of such special circumstances no such assistance would be afforded. TERIETPUT SINGH *v.* GOSSAIN SUDERSAN DAS **I. L. R. 4 Calc. 46**

46. ——— *Failure to prove case in plaint—Right to decree on other grounds.* At a sale held under Bengal Act VIII of 1865, the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by the plaintiff for recovery of possession thereof, on the ground that the property in dispute was a lakhiraj tenure created by the Raja of Tippera, and that the plaintiff was owner thereof, partly by purchase and partly by inheritance. The lower Appellate Court found as a fact that the late shikmidar, and not the Raja, had granted the lands in dispute as bramatar, but not in favour of the person through whom the plaintiff claimed. The Court, however, passed a decree in favour of the plaintiff, as he had been unlawfully dispossessed. *Held*, that the plaintiff, having failed to prove the case as set up by him and upon which he claimed, could not be entitled to a decree upon grounds other than those stated in the plaint. ISWAR CHANDRA CHUCKERBUTTY *v.* BISTU CHANDRA CHUCKERBUTTY **3 B. L. R. Ap. 97 : 12 W. R. 32**

47. ——— *Failure to prove case—Changing case on appeal.* Each of two proprietors, *A* and *B*, separately mortgaged the whole of the joint property to different persons. *B's* mortgagee, who was prior in time, obtained a decree on his bond, sold and purchased the house. In a subsequent suit for confirmation of right and possession by *A's* mortgagee, he charged that the other bond and decree were fraudulent and collusive, and that *B* had no interest in the property. All these allegations were found to be false by the lower Appellate Court. *Held*, on special appeal, that the plaintiff could not recede from the case he had made in the lower Courts, and claim to be entitled to a decree for *A's* interest in the house. DURSUN SAHOO *v.* PRYAG RAM **2 C. L. R. 538**

48. ——— *Failure to show alternative case—Right to change case in special appeal.* Suit for possession of certain property as

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part of a joint family property sold by a widow without authority. Plaintiff applied to appeal specially on the ground, but could cite no authority in support of it, that when the eldest member and manager of the family purchases out of his own separate funds, because the family is joint, the property must be considered as joint property. Having failed in this character, the Court declined to allow him in special appeal to come in as a reversioner, and ask for a decree declaring the widow's act void as against reversioner. MADHO PERSHAD *v.* LALLA JEETUN LALL **17 W. R. 98**

49. ——— *Joint claim—Right to succeed on proof of separate title.* Where the plaintiffs in a suit put forward a joint claim, it is not enough that one of them makes out his title ; the suit should be dismissed unless the joint claim is established. RAM COMUL CHUCKERBUTTY *v.* NUND RAM COOLAL . . **10 W. R. 262**

SHEO NUNDUN PERSHAD *v.* MUKDOOM BUKSH **20 W. R. 364**

50. ——— *Joint claim—Right to succeed on proof of title to less share separately.* A plaintiff, suing on the ground that she was jointly entitled, was not allowed to succeed in the suit where it was shown she was only entitled to a less share in her own separate right. HURRO MONEE DOSSEA *v.* ONOOKOOL CHUNDER MOOKERJEE . . . . **2 W. R. 461**

51. ——— *Claim to exclusive possession—Proof of right to joint possession.* When a plaintiff in a suit asks for one thing (*e.g.*, exclusive possession), a Court ought not to give him a decree because he proves that he is entitled to another thing (*e.g.*, joint possession). BEEJOYNATH CHATTERJEE *v.* LUCKHEE MONEE DABEE **12 W. R. 248**

SREENARAIN CHUCKERBUTTY *v.* MILLER **15 W. R. O. C. 7**

52. ——— *Claim to separate possession—Proof of joint possession—alteration of claim.* When a plaintiff who claims property on the allegation that he purchased it from a person to whom it exclusively belonged, fails to prove that the property was the separate property of his vendor, he cannot have a decree for the share of the property to which his vendor was entitled as a member of a joint family. GOUR BEHAREE RAM BHUGGUT *v.* SHEORUTTUN KOONWAR **10 W. R. 243**

53. ——— *Suit for exclusive possession—Joint ownership proved at hearing—Procedure.* Exclusive possession can only be awarded on proof of exclusive title. If a case not alleged by the plaintiff is disclosed in the evidence, the Court can allow it to be set up, provided a specific issue is raised on it, and the defendant is given an opportunity of meeting it. PARAHSRAM *v.* MIRAJI . . **I. L. R. 20 Bom. 569**

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54. ——— *Suit for exclusive possession—Proof of hearing of joint ownership—Procedure.* The plaintiff sued for possession of certain land. The lower Court held that the land was the joint property of the plaintiff and defendant, but finding that the plaintiff had been in exclusive possession allowed his claim and gave him a decree. On second appeal :—*Held*, that exclusive possession could not be awarded unless exclusive title was proved. On plaintiff's application, which was not opposed by the defendant, the decree of the lower Court was varied, and the plaintiff was awarded joint possession of the property in suit. NANA *v.* APPA
I. L. R. 20 Bom. 627

55. ——— *Failure of proof of right to sole possession—Decree on admission of defendant of joint possession.* Where a plaintiff sued for sole possession and a declaration of sole title, and the defendant admitted that he was in joint possession but the plaintiff went on with his suit in order to get a decree that he was solely entitled and in sole possession, and failed to prove his case, he was *held* not entitled to a decree founded on joint possession. LUKHUN SINGH *v.* NUFFUR SING . . . . . **16 W. R. 311**

56. ——— *Suit for possession of share—Decree for joint possession.* In a suit to recover possession of a third part of a khanabari, where the first Court, considering that there never had been a partition in definite shares, ordered restoration to the sort of possession plaintiff had enjoyed previous to being dispossessed :—*Held*, that there was no objection to the decree being in that form ; and although a plaintiff does not prove the precise claim which he makes, if he is substantially right he ought to have a decree, and not be left to bring another suit. RAJKISHORE BHUDDUR *v.* HUREE MOHUN BHUDDUR
19 W. R. 195

Dissenting from BEEJOYNATH CHATTERJEE *v.* LUCKHEE MONEE DABEE . . **12 W. R. 248**

57. ——— *Claim to share of property as being partitioned—Relief inconsistent with allegations on plaint.* In a suit to recover a quantity of land alleged to have formed part of a joint estate which had descended to plaintiff and his brothers, but which was subsequently divided into separate shares :—*Held*, that upon failure of proof of the allegation of partition plaintiff might obtain relief upon the first allegation ; and the Court below was not debarred by law from framing an issue as to whether plaintiff was entitled to recover to the extent of the interest which he had in the land, if found to be joint property. FUKKER DASS POOROHEET *v.* GOPAL MOOKERJEE
12 W. R. 107

58. ——— *Suit for possession on allegation of partition—Failure to prove division—Change of case on appeal.* Plaintiffs, being members of a joint Hindu family alleging division, and a sale to them by other members of their share in the family property more than twelve years before suit, sued to eject a more recent purchaser. The plaintiffs failed to prove division as alleged. One of the members of the family who was in possession of the property to which the sale-deed related did not join in executing it. *Held*, that the plaintiffs, having failed to prove division as alleged, were not entitled in second appeal to have their suit treated as a suit for partition. MUTTUSAMI *v.* RAMAKRISHNA
I. L. R. 12 Mad. 292

59. ——— *Claim to property on separate title—Right to decree on joint title.* The plaintiff alleged in his plaint that the defendant had erected a hut, or challa, upon ground to which he, the plaintiff, was separately entitled. The lower Appellate Court found that the land in dispute was the joint property of both parties, and that the defendant was not at liberty to erect the hut without the express permission of the plaintiff, and ordered the demolition of the challa. *Held*, that the plaintiff was not entitled to a judgment upon a ground which was inconsistent with the case set out in his plaint. NABIN CHANDRA MITTER *v.* MAHES CHANDRA MITTER
3 B. L. R. Ap. 111 : 12 W. R. 69

60. ——— **Pre-emption, suit for**—*Claim to right in different ways.* In a suit to establish a right of pre-emption, where the plaint is framed on right of Shufeh Khuleet, the plaintiff ought not to be allowed to shift his ground and make out a new case as Shufeh Jah. GOBIND ROW *v.* GIRDHAREE SAHOO . . **24 W. R. 355**

61. ——— **Principal and agent**—*Suit by principal against agent—Failure of suit on grounds pleaded.* A bank sued *H*, its agent, who had appointed *N* to act in the matter of the agency, for money belonging to it which *H* had paid *N* for the purposes of the agency, and which was not accounted for by *N*, claiming the same on the ground that *N* had been appointed to act as a sub-agent without authority. The lower Appellate Court found that *N* had been appointed by *H* to act in the matter of the agency with authority, but, instead of dismissing the suit with reference to this finding, gave the plaintiff bank a decree against *H* on the ground that he had not exercised ordinary prudence in selecting *N* as an agent for his principal. *Held*, that, inasmuch as the plaintiff bank had not claimed relief on the ground that *H* had failed in his duty in naming *N* as an agent for his principal, but on the ground that *N* had been appointed without authority and had failed to prove its case, the suit should have been dismissed. HAMILTON *v.* LAND MORTGAGE BANK OF INDIA
I. L. R. 5 All. 458

62. ——— **Rent**—*Suit for arrears of rent—Failure to prove contract—Claim for use and occupation.* Where a plaintiff sued for rent and

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failed to prove any contract, express or implied, to pay it, he was *held* not entitled to change his case and ask for compensation for use and occupation. LUCHMEEPUT DOSS *v.* ENAET ALI **22 W. R. 346**

63. ——— *Suit for arrears of rent—Failure of plaintiff to prove alleged rate of rent—Ascertainment of proper rate—Duty of Court—Form of decree.* In a suit for arrears of rent at certain alleged rates in which the plaintiff fails to prove the rates alleged by him, it is not the duty of the Court to ascertain what were the fair rates, unless it is asked to do so. The case of *Punnoo Singh* v. *Nirghin Singh, I. L. R. 7 Calc. 298*, does not lay down a contrary rule. RASH DHARY GOPE *v.* KHAKON SINGH **I. L. R. 24 Calc.. 433**

64. ——— *Suit for rent on unstamped lease—Failure to prove lease—Right to recover damages for use and occupation.* The plaintiff alleged that he had given possession to the defendant of a certain estate, in consideration of the payment by the defendant of annual rent for a term of five years; that the defendant had paid the rent for the first three years of the term, but had neglected to pay any for the last two years, and that since the expiry of the term the defendant had remained in possession; and he claimed to recover possession of the property and a certain sum for its use and occupation by the defendant. He also claimed to recover the same sum as damages for the retention of the estate by the defendant, from the date up to which the defendant had last paid rent. The agreement between the parties was contained in certain letters which were unstamped. *Held*, that, although the claim to relief made by the plaintiff on the basis of the contract must fail, because there was no evidence of the contract on which the Court could act, yet he could fall back on his claim to recover damages for the use and occupation of the land, as the defendant could not defend his possession, being equally incompetent with the plaintiff to rely on the terms of a contract of which he could not give proof, and as he did not deny the use and occupation alleged, he had no answer to the claim for damages. MACGIVERON *v.* WALLACE **5 N. W. 65**

65. ——— *Suit for rent in kind—Evidence of nugdi rent.* In a suit for a balance of rent on the allegation that defendants cultivated a portion of plaintiffs' jaghir as bhowli tenants, where defendants denied that they were such tenants and pleaded a mokurari pottah:—*Held*, that, even on the defendants failing to establish their plea, the suit could not succeed as the plaintiffs failed to make out their case and it appeared that the defendants were holding the whole jaghir at a nukdi rent. LUCHMEEDHUR PATTUCK *v.* RUGHOOBUR SINGH **24 W. R. 284**

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66. ——— *Suit for declaratory decree—Suit under Bengal Rent Act, 1869.* Where the plaintiff sued under Bengal Act VIII of 1869 for a declaration that certain land was mâl, as well as for assessment of rent thereon and for arrears of rent at the rate assessed, and the suit was dismissed, and on appeal the plaintiff abandoned the two last points in his claim and asked merely for a declaratory decree:—*Held*, that the lower Appellate Court ought, notwithstanding the plaintiff had elected to sue under the Rent Act to have proceeded with that part of the case, and disposed of the appeal as to that only. ANUND MOYEE DOSSEE *v.* RAYE MONEE DOSSEE **20 W. R. 14**

67. ——— *Suit for kabuliat on allegation of holding specific quantity of land—Failure to prove allegation.* In a suit for a kabuliat, on the allegation that the defendant is holding a specific quantity of land under him, if the plaintiff's allegations are disproved, and the relation of landlord and tenant is not established, the plaintiff's suit must altogether fail. YAKOOB ALI *v.* KAERNOOLLAH . . **8 W. R. 329**

68. ——— *Suit for rent—Failure to prove kabuliat.* The plaintiff, having sued for rent upon a kabuliat and failed to prove it, is not entitled to a decree if he shows that the defendants had paid him rent for a number of years, the Court observing that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case when an issue as to the execution of such document is found against him, and there are good reasons for believing that the document is not genuine. NURROHURRY MOHONTO *v.* NARAINEE DOSSEE **W. R. F. B. 23: 1 Ind. Jur. O. S. 9 1 Hay 34**

S. C. NARAINEE DOSSEE *v.* NURROHURRY MOHONTO . . . . . **Marsh. 70**

WOODOY NARAIN *v.* DURRIAHO ROY **W. R. 1864, 187**

RAM NAFFER KHARA *v.* DEGUMBER CHATTERJEE **W. R. 1864, 259**

KUREEMOODDEEN BISWAS *v.* HUROCHUNDER GOOHO . . . . . **1 W. R. 305**

GOVIND RAMCHANDRA GOKHLE *v.* AHMED **5 Bom. A. C. 133**

BHOYRUB CHUNDER CHOWDHRY *v.* HARADHUN GHOSE . . **Marsh. 561: 2 Hay 666**

SIMROO KAREEGUR *v.* ANUND CHUNDER ROY **Marsh. 57: Hay 130**

See also JEETOO *v.* BEETUN **Marsh. 47: 1 Ind. Jur. O. S. 85: 1 Hay 112**

FATIMA BEBEE *v.* ARIF SOOKANEE **Marsh. 263: 2 Hay 106**

So also in the case of a defendant. GOOROO DOSS GHOSE *v.* SRISTEE DHUR DAY **W. R. 1864, Act X, 39**

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2. SPECIAL CASES—*contd.*

69. ——— *Suit for pottah at fixed rate of rent—Failure in proof.* In a suit brought by a raiyat to obtain a pottah at a fixed rent under s. 3 of Act X of 1859, on the ground that the lands had been held at a fixed rent which has not been changed from the time of the permanent settlement, if the plaintiff fail in proving such a holding, he is not entitled in that suit to have a decree under s. 5 for a pottah at a fair and equitable rate. DOORGA MAHTOON *v.* KANHYE LALL AJHA . . . **Marsh. 371 : 2 Hay 422**

70. ——— *Suit on kabuliat which plaintiff fails to prove.* Plaintiff sued upon a kabuliat, and filed a pottah in support of it. The pottah having been rejected, and the kabuliat not proved, he was *held* not entitled to fall back on a general statement that he has a jote pottah ; that the lands in dispute are part of the same ; and that he can oust the defendant, who was duly in possession. GOBIND CHUNDER LAHORY *v.* JARDINE, SKINNER & CO. . . . **7 W. R. 163**

71. ——— *Failure to prove right to pottah—Right to have fair and equitable rate of rent fixed as occupancy raiyats.* The plaintiffs sued as raiyats to obtain a pottah corresponding with a kabuliat which they said had been taken from them by the defendants, who were 12-anna shareholders in the land, and, according to an alleged promise, to give them a pottah. The plaintiffs failed to make out the ground on which they relied, but the lower Appellate Court, being of opinion that the plaintiffs had made out a right of occupancy under the rent law and were entitled to obtain a pottah from the zamindar at a fair and equitable rate of rent, and finding no evidence as to what such a rate would be, gave them a decree at the old rate. *Held*, that the decision was erroneous, as there was no evidence on which the question of a fair and equitable rate could be determined, and as it rested on a ground not taken by the plaintiffs, who came into Court on a special contract. If the plaintiffs' right to a pottah had rested on the ground of their being occupancy raiyats, they might claim a pottah from all the 16-anna shareholders, who ought to have been made parties and the case remanded for trial by the first Court. UTHUR HOSSEIN *v.* RAMPHAL ROY . **20 W. R. 75**

72. ——— *Suit for rent—Failure to prove kabuliat.* Where a landlord sued a raiyat for arrears of rent alleged to be due under a kabuliat, and the Court found that such kabuliat had not been executed by the raiyat, although he had occupied the land, the landlord was *held* not entitled to have a further trial of the question whether any and what amount of rent was due on account of the raiyat's occupation of the land. LUKHEE KANTO DASS CHOWDHRY *v.* SUMEERUDDI LUSKER **13 B. L. R. F. B. 243 : 21 W. R. 208**

VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*contd.*

73. ——— *No alternative claim for use and occupation—Damages for use and occupation.* In a suit for rent, when no alternative claim is made for use and occupation, no damages can be decreed for use and occupation. *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker, 13 B. L. R. 243 : 21 W. R. 208*, and *Surendra Narain Singh* v. *Bhai Lal Thakur, I. L. R. 22 Calc. 752*, referred to and followed. *Nityanund Ghose* v. *Kissen Kishore, W. R. Sp. No., Act X, 82*, and *Lalun Monee* v. *Sona Monee Dabee, 22 W. R. 334*, distinguished. RACKHEA SINGH *v.* UPENDRA CHANDRA SINGH . **I. L. R. 27 Calc. 239**

74. ——— *Suit for enhancement of rent—Suit on kabuliat—Amendment of plaint—Decree for rent on failure to prove kabuliat.* In a suit on a kabuliat, where no alternative claim for rent at an old rate is in words expressly asked for in the plaint (although it is disclosed by the plaint that the defendant had previously occupied the land in suit at a rate which the evidence proved to be lower than the rent mentioned in the kabuliat), and where the kabuliat is not proved, it is in the discretion of the Court to amend the plaint or the issues, and to allow an alternative claim to be tried ; and when the omission to make the claim in the plaint appears to have been an inadvertence, it is right that the Court should do so. *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker, 13 B. L. R. 243*, commented upon. ROUSHAN BIBEE *v.* HURRAY KRISTO NATH **I. L. R. 8 Calc. 926**

75. ——— *Suit for enhancement of rent—Statements in plaint.* Although in a suit for enhancement the plaintiff should not be tied down too strictly to his statements, yet he must to some extent be limited to the case made in the plaint. BONOMALEE CHURN MYTEE *v.* SHOROOP HOOTAIT . **14 W. R. 60**

76. ——— *Suit for enhancement of rent—Failure to prove rent as claimed.* If the plaintiff is unable to show that he is entitled to the rent exactly as he claims it, the Court is not debarred from giving him a decree for such enhanced rent as it thinks ought to be paid, *e.g.*, to divide the land into different classes and assign a separate rental to each description. BHUGWAN CHUNDER BOY CHOWDHRY *v.* JEGUR KHAN **22 W. R. 456**

77. ——— *Suit for enhancement of rent—Failure to prove notice.* In a suit originally treated by the plaintiff as a suit for enhancement of rent, he cannot, after failing to prove notice, treat the suit as one for enhancement, and say no notice was necessary. RASH BEHARY MOOKERJEE *v.* KHETTRO NATH ROY **1 C. L. R. 418**

78. ——— *Suit for enhancement of rent—Suppression of material fact.* A plaintiff must state clearly in his plaint the substance of his claim, *i.e.*, the particular mode in

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VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*contd.*

which his claim arose, as well as the amount of that claim. Thus, where a plaintiff allowed the Court below to decide the case as if his contention was an ordinary case between a landlord suing to enhance and a tenant resisting his claim, and the statement of the defendant divulged the material circumstances of the case that the plaintiff's estate was let in farm, the High Court refused to allow the plaintiff on appeal to rest upon an alleged stipulation in a farming lease, the existence of which he altogether suppressed in the Court below, reserving to him the right of collecting from the tenantry an enhanced rent during the currency of the farming lease. HURRO SOONDERY *v.* MUDDUN MOHUN DUTT . . **W. R. 1864, Act X, 34**

79. ——— **Right of suit**—*Cause of action not shown in plaint, but proved in course of case.* Where a plaintiff brought a suit for confirmation of his title to an estate, in consequence of the opposition offered by defendant to an application for partition by a vendee who had purchased a portion of plaintiff's share and the Court of first instance tried the case on its merits and gave the plaintiff a decree:—*Held*, that the lower Appellate Court was not justified in reversing the decision of the first Court on the ground that no cause of action had been disclosed, because, although the plaint itself disclosed no cause of action, yet, on the trial of the suit on its merits, a cause of action had been disclosed in the opposition which defendant had offered to the partition proceedings, and which had interfered with the enjoyment of his rights by the plaintiff. LALLAH MAHTAB ROY *v.* DEBEE DUTT SINGH . . . . . **25 W. R. 204**

80. ——— **Specific performance**—*Suit to enforce contract of betrothal—Failure to prove complete betrothal.* The plaintiff, on behalf of her infant son, sued the father and guardian of *M B* to recover possession of *M B*, alleging that *M B* had been betrothed to her son, and that under the Hindu law a betrothal was the same as marriage and could not be repudiated, and that the defendant had on demand refused to give up *M B*. *Held*, that the suit having been brought on the allegation of a perfect betrothal equivalent to marriage, it could not be tried and decided by the Court as if it were a suit for damages on account of breach of contract. NOWBUT SINGH *v.* LAD KOOER . . . . . **5 N. W. 102**

81. ——— **Title**—*Setting up different title from that alleged.* The plaintiff cannot be allowed to set up a different title from that on which he sues and fails to prove. ISHAN CHUNDER CHOWDHRY *v.* SHARODA GOOPTEAH . **12 W. R. 487**

82. ——— *Suit for recognition of adoption—Right to show title by inheritance.* A distinct suit for the recognition of an adoption having totally failed, the plaintiff is not entitled to fall back on his right by descent. SREEGOBIND SINGH *v.* ODIT NARAIN SINGH . **W. R. F. B. 4**

VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*contd.*

83. ——— *Failure to prove adoption—Right to succeed by inheritance—Civil Procedure Code, s. 146—Failure of plaintiff to prove unnecessary averments—Decree on admission of defendant.* In a suit brought by an undivided member of a Hindu family to set aside a sale made by the managing member and to recover a moiety of the land sold, the plaintiff alleged that he had been adopted by his deceased uncle and claimed as adopted son. The purchaser denied the adoption, alleged that plaintiff was the natural brother of the vendor, and justified the sale under Hindu law. The lower Courts found that the adoption was not proved, and, of the plaintiff urging that if the adoption was not proved, yet he was entitled to recover by virtue on the admission that he was the natural brother of the vendor, held that the latter claim was inconsistent with the claim as adopted son. The suit was therefore dismissed. *Held*, on appeal, that the suit was improperly dismissed, and that, if the purchaser could not justify the sale, the plaintiff was entitled to succeed. The rule that the decree should be in accordance with what is alleged and proved is intended to prevent surprise, and is not applicable to a case in which the defendant's own admission is adopted as the ground of decision against him. APPAYYA v. RAMIREDDI **I. L. R. 11 Mad. 367**

84. ——— *Title of separate acquisition by purchase—Setting up inconsistent title by joint purchase.* The plaintiff, having set up a title by sole purchase, was *held* not at liberty to change his case entirely, and to come in and set up another and inconsistent title, founded on inheritance or joint purchase. DOSS RAM DOSS *v.* MOHENDRA ROY DECHA . **18 W. R. 274**

85. ——— *Allegation of title by purchase—Failure to prove alleged title—Possession, title by.* In a suit for declaration of title to and possession of certain property on the allegation of purchase and subsequent forcible ouster it was *held* that the plaintiff, having failed to prove the purchase or the forcible dispossession, could not succeed on mere proof of twenty years' possession. A plaintiff who sues on one title cannot succeed on another entirely different. HURO SUNDUREE DEBIA *v.* UNNOPOORNA DEBIA **11 W. R. 550**

BIJOYA DEBIA *v.* BYDONATH DEB **24 W. R. 444**

86. ——— *Failure to establish particular title—Title by long possession.* Where a plaintiff brought a suit to establish his title, and the lower Court, on a trial of the issue, thought the title was not proved, yet gave plaintiff a decree on the ground of his being in possession for a long time :—*Held*, that the lower Court ought not to have given a decree upon a ground not suggested in the plaint or in the issues tried. BHAYGO MUTTY BIBEE *v.* MAHOMED WASIL **25 W. R. 315**

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VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*contd.*

87. ——— *Failure to prove particular title—Title by right of occupancy—Act X of 1859, s. 6.* In a suit for possession of land after purchase, where defendant pleaded that he had long held under a miras pottah which both the Courts below found to be false :—*Held*, that the defendant could not be allowed in special appeal to come in for the first time with an allegation of a new and separate title, *viz.*, a right of occupancy under s. 6 Act X of 1859. SOORJO KOOMAR *v.* GUNGADHUR ROY . . . **12 W. R. 80**

88. ——— *Failure to prove specific title—Title by possession—Form of plaint.* Where a plaintiff who fails to prove a specific title which he sets up, yet causes it to appear that he has had a clear *bonâ fide* possession from which the Court can infer a good title, the Court will not shut him out in consequence of the mere form of the plaint. KYLASH KAMINEE DOSSIA *v.* JUDOO BASHINEE DOSSIA . . . **22 W. R. 391**

89. ——— *Allegation of mokurari right and failure to prove it.* In a suit to recover possession of land which defendant alleged himself to have held for more than twelve years under a mokurari lease, where the lower Appellate Court, finding that defendant failed to prove his mokurari right, declared he had no title to hold as a squatter :—*Held*, that, notwithstanding the failure of the defendant to prove his mokurari lease, the lower Court ought to have found what was the nature of the occupancy, and how long it had subsisted. JORAWUR SINGH *v.* KHYRAT ALI **10 W. R. 360**

90. ——— *Suit in one capacity, proof of right to succeed in another.* A suit was brought by a Hindu widow to recover her share as heiress to her husband, in certain family property, of which she claimed a portion in her absolute right, and a portion as one of the joint shebaits of certain idols. Among other properties plaintiff claimed one-fifth share in a talukh, not as a debutter property, but, in right of her husband, as her absolute property. The first Court found that this share was the property of a certain idol, and *held* that she had not maintained the allegation in her plaint, and even if entitled to it in her right of joint shebait, she could not recover in that capacity, as she had not framed her plaint in that way and had not sued as shebait. The Privy Council held the High Court to be right in treating this objection as one rather of form than of substance, and in giving the relief prayed for. RADHA MOHUN MUNDUL *v.* JADOOMONEE DOSSEE **23 W. R. P. C. 369**

91. ——— *Amendment of plaint—Alternative relief—Ejectment suit—Failure to prove lease—General title.* Where, in an action of ejectment against a tenant holding over the lease sued on was inadmissible in evidence for want of registration, and the plaint was not amended to one containing an alternative claim for partition :—*Held*, that the plaintiff could not be allowed to fall back upon his general title and obtain a decree for partition. RAMCHANDRA BAPUJI GOKHLE *v.* VASUDEV MORBHAT KALE **I. L. R. 10 Bom. 451**

92. ——— *Right to easement in suit for right of ownership—Decision on case not made in pleadings.* In a suit brought to establish a right of ownership over certain land :—*Held*, it was not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same. A question not raised by the plaint ought not to be decided by the Court. LALJI RATANJI *v.* GANGARAM TULJARAM **2 Bom. 184 : 2nd Ed. 176**

93. ——— *Title by prescription—Making case different from that in plaint.* In a suit for the removal of a pucca building recently erected by defendant upon land lying between the premises of the two parties to the dispute, where plaintiff's claim to use the land had been put upon his title as owner :—*Held*, that, having failed to make out the case originally set forth in the plaint, plaintiff had no right to fall back upon a title by prescription. BHOOBUN MOHUN MUNDUL *v.* RASH BEHAREE PAUL .. . . **15 W. R. 84**

94. ——— *Suit by decree-holder to declare a house subject to attachment in execution as being the property of the judgment-debtor—Decree for plaintiff on ground that judgment-debtor, though not the owner of the house, had an attachable interest in it as permanent tenant—New case made on appeal.* The plaintiff's case being that a certain house was the absolute property of his judgment-debtor, and that therefore he (the plaintiff) was entitled to attach it in execution of his decree, the Subordinate Judge found that the judgment-debtor was not the owner of the house, and rejected the plaintiff's claim. The Appellate Court held that (though the judgment-debtor was not the owner) he had an attachable interest in the house as permanent tenant, and allowed the plaintiff's claim. On appeal to the High Court by the defendant :—*Held*, that the order of the Appellate Court made out an entirely new case for the plaintiff which he had not made himself at any period of the trial, and that the decree of the lower Appellate Court should not be reversed. IRANGOWDA *v.* SESHAPA **I. L. R. 17 Bom. 772**

95. ——— **Possession, suit for**—*Practice—Pleadings—Failure of plaintiff to prove the case set up by him in his plaint—Right to succeed upon a case different from that alleged.* The plaintiff came into Court alleging that the defendant had, about eight years previously, hired a house from him at a monthly rent of one rupee, but latterly had failed to pay the rent, and that the plaintiff had given the defendant notice to quit

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VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

2. SPECIAL CASES—*concld.*

the house. The plaintiff claimed possession and damages, but not arrears of rent. The defendant denied the tenancy alleged by the plaintiff, and asserted that she had been in adverse possession for a period of seventeen years. She also asserted that she had purchased the land upon which the house stood, and had herself built the house. The findings in first appeal of the Court below, after remand of issues by the High Court, were, that the plaintiff was the owner of the house, and that the defendant occupied the house as a friend, with the permission of the plaintiff; that the defendant had never before this asserted her title to the house, and that her possession was permissive. *Held*, that plaintiff was entitled, upon the facts found, to a decree for possession, notwithstanding that his case had been that the defendant was his tenant. *Bajrang Das* v. *Nand Lal, All. Weekly Notes (1884) 285*, and *Balmakund* v. *Dalu, All. Weekly Notes (1901) 157*, distinguished. ABDUL GHANI *v.* BABNI (F.B. 1902) . . **I. L. R. 25 All. 256**

3. ADMISSION OF PART OF CLAIM.

1. ——— **Suit for rent**—*Failure to prove jummabundi—Form of decree.* The plaintiff sued for rent at R22 a year on a jummabundi which he alleged was signed by all the raiyats when he came into possession; the defendant denied that he was a party to the jummabundi, but admitted, that he held some portion of the land as tenant of the plaintiff at a yearly rent of R5, and that the balance due by him to the plaintiff was R5-15. The plaintiff failed to prove the jummabundi. *Held*, that the plaintiff must, if he accepted the admission of the defendant at all, accept it as a whole and was therefore only entitled to a decree for R5-15, and not to a decree for all the years for which he claimed rent at R4-13 per annum. BONOMALEE CHURN MYTEE *v.* HAFIZUDDEEN
13 B. L. R. 247 note: 12 W. R. 317

And *see* LUKHEE KANTO DASS *v.* CHOWDHURY SUMERRUDDI LUSKER
13 B. L. R. F. B. 243: 21 W. R. 317

and ROUSHAN BIBEE *v.* HURRAY KRISTO NATH
I. L. R. 8 Calc. 926

2. ——— *Dismissal of suit on failure to prove it—Right to decree on defendant's admission.* Where the plaintiff brought a suit for rent for R185, as rent for two years, which he alleged was payable in produce, and the defendants alleged that the rent was only R29 a year and that the plaintiff had sued them on a former occasion and obtained a decree at that rate, the Judge, finding the defendant's case proved, held that, as the plaintiff had set up a false claim, he was not entitled to a decree, and dismissed the suit. *Held*, on special appeal the plaintiff was entitled to a decree for rent at the rate admitted by the defendant. KISHEN MOHUN MOOKERJEE *v.* RAJOO DEY . **13 B. L. R. 245 note: 19 W. R. 234**

VARIANCE BETWEEN PLEADING AND PROOF—*contd.*

3. ADMISSION OF PART OF CLAIM—*contd.*

ROOKHINI KANT ROY *v.* SHARIKATUNISSA BIBI
13 B. L. R. 246 note: 20 W. R. 64

RAJ COOMAR SINGH *v.* CHOTO RAJ COOMAR SINGH . . . **W. R. 1864, Act X, 12**

HULODHUR SEN *v.* SEETUL CHUNDER BHOOMICK
23 W. R. 85

3. ——— *Failure to prove case—Right to decree on admission of defendant—Dismissal of suit.* In a suit for rent, based upon an alleged settlement, the plaintiff failed to prove such settlement. *Held*, that no issue having been raised as to what was the fair and proper value of the land, the plaintiff was not entitled to have that question determined: his suit must either be decreed at the rate admitted by defendant, or dismissed. LUTF ALI KHAN *v.* FAKIRA SINGH
6 C. L. R. 208

4. ——— **Suit for arrears of rent**—*Failure to prove rate—Decree at admitted rate.* In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rent admitted by the tenant. PUNOO SINGH *v.* NIRGHIN SINGH
I. L. R. 7 Calc. 298: 8 C. L. R. 310

5. ——— *Suit on new agreement—Failure to prove agreement—Decree at admitted rate.* The defendant held lands under the plaintiff at a certain rate per bigha. The plaintiff brought a suit for arrears of rent on a new agreement alleged to have been entered into by the plaintiff and the defendant, whereby the latter agreed to pay a higher rate per bigha. The lower Appellate Court found that the new agreement had never, in fact, been entered into, and gave a decree for the old rate of rent without going into the question whether it was a fair rent or not. *Held*, that the decision was correct. SUFDAR REZA *v.* AMZAD ALI
I. L. R. 7 Calc. 703: 10 C. L. R. 121

6. ——— *Failure to prove rent in kind—Failure to prove case—Decree on admission of defendant for money rent.* In a suit for arrears of rent, as bhowli rent, where the plaintiff failed to make out his title to bhowli rent or rent in kind, the first Court, finding that the evidence established a commutation of bhowli rent into rent in money, dismissed the suit with a reservation of the plaintiff's right to sue again for nagdi rent. The lower Appellate Court, agreeing in the first Court's view of the facts, and finding that the defendant admitted that he owed rent in money, decreed the claim to the extent of the admission. *Held*, that the lower Appellate Court was right, and that the reservation of right by the first Court was of doubtful operation. BIBEEJAN *v.* BHAJUL SINGH . . . . . **21 W. R. 438**

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VARIANCE BETWEEN PLEADING AND PROOF—*concld.*

3. ADMISSION OF PART OF CLAIM—*concld.*

7. ——— **Omission to make alternative claim**—*Suit for rent—Beng. Act VI of 1862, s. 10.* In a suit for rent, where the claim was at the rate fixed by the revenue officer acting under Bengal Act VI of 1862, s. 10, and was dismissed on the ground that that officer had not the power to assess such rent as he thought proper :—*Held*, that the plaintiff, whose claim was not in the alternative, was not entitled to a decree at the rate previously paid. DWARKANATH BOSE *v.* RAM LOCHUN BOSE . . . **23 W. R. 465**

8. ——— **Suit for ejectment**—*Entry under unregistered lease—Holding over—Landlord and tenant—Proof of terms of lease—Decree for rent upon admission of different tenure by defendant.* The plaintiff sued in 1881 to recover certain land and arrears of rent from the defendant, alleging that the defendants' ancestor entered on the land as tenant in 1865, under a lease for five years, which was not registered. The defendant denied the lease of 1865, admitted that she was the tenant of the land, but denied that she could be ejected, and claimed to deduct from the rent certain emoluments. *Held*, (i) that the plaintiff could not prove the tenancy alleged in the plaint, inasmuch as the lease of 1865 was not registered, and therefore could not eject the defendant; (ii) that the plaintiff was entitled, upon the defendant's admission, to recover from the defendant, in this suit, the amount of rent admitted to be due, and no more. NANGALI *v.* RAMAN **I. L. R. 7 Mad. 226**

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I. L. R. 12 Bom. 658
I. L. R. 22 Bom. 46

1. BILLS OF SALE.

1. ——— **Effect of execution of bill of sale without delivery**—*Specific performance.* It is very questionable in any case whether the effect of the execution of a bill of sale by a Hindu vendor is to pass an estate, irrespective of the actual delivery of possession. Where the vendor sells an estate of which he is not in possession, in consideration of advances to enable him to sue for its recovery, it is not open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the recovered estate on tendering the balance of the purchase-money. PRAHLAD SEN *v.* BUDHU SING. KALIPRASAD TEWARI *v.* PRAHLAD SEN.
2 B. L. R. P. C. 111 : 12 W. R. P. C. 6

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1. BILLS OF SALE—*concld.*

S. C. PERHLAD SEIN *v.* BUDHOO SINGH. KALIPERSHAD TEWAREE *v.* PERHLAD SEIN.
12 Moo. I. A. 275 ; 482

2. ——— *Suit to compel transfer of property.* When a bill of sale, though signed and registered, has not been delivered, and no part of the purchase-money has been paid, the vendor cannot be compelled to complete the transfer. LALLA INDURJEET LALL *alias* GUJADHUR PERSHAD *v.* JUMOONA . . **5 W. R. 248**

3. ——— *Incomplete contract.* A bill of sale, though duly executed, was not delivered to the purchaser, but was deposited with a third party, to be held by him until the purchaser should perform certain acts, the performance of which was the consideration for the sale. The purchaser subsequently by a trick got possession of the bill of sale before he had performed all the acts in question. *Held*, that, under such circumstances, no effect could be given to the bill of sale as against the vendor, so that a suit for possession of the lands covered by it would not lie. RAJ CHUNDER CHOWDHRY *v.* RAJ NATH CHOWDHRY.
W. R. 1864, 222

4. ——— **Vendor under bill of sale remaining in possession**—*Allegation of fraud—Suit to set aside bill of sale.* When a person grants a bill of sale to another person absolute in its terms, he cannot sue to have it set aside on the ground that he has all along remained in possession ; and if he alleges fraud in the contract, and adduces the fact of non-payment of the consideration-money as evidence of fraud, he will be bound to show proof of non-payment. TEKAIT MEGRAJ SINGH *v.* JOYMUNGUL SINGH.
1 Ind. Jur. N. S. 78

5. ——— **Bill of sale as construed by intention of parties**—*Right of purchaser to sue.* Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognize the purchaser's right of action to eject the trespasser or to redeem the mortgage. BAI SURAJ *v.* DALPATRAM DAYASHANKAR
I. L. R. 6 Bom. 380

2. BREACH OF COVENANT.

1. ——— **Covenant to restore estate to original owner or heirs at fixed price before selling to another**—*Sale under reservation to keep in actual possession or re-sell it to vendor at fixed price—Subsequent alienation—Right of reconveyance.* Where a share in an estate had been sold under a stipulation that the purchaser should possess it himself as landlord, or, if desirous

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VENDOR AND PURCHASER—*contd.*

2. BREACH OF COVENANT—*contd.*

of parting with it, should restore it to the original owner or his heirs at a fixed price ; and the purchaser, having been restrained by this agreement from selling off this property to a third person, had, on his retirement to England, given other persons a farming lease of it for fifteen years :—*Held*, that, as the object of the original stipulation was to secure the constant possession of the share to some one with whom the original owner or his heirs, who still retained the residue of the estate, could keep up friendly relations, the grant of the farmer's lease was a violation of the covenant ; and that the heirs of the original owner were entitled to have the share in suit conveyed to them at the stipulated price. RAMNATH SEN LUSHKUR *v.* WISE.
25 W. R. 378

2. ——— **Covenant repugnant to interest created**—*Contemporaneous "ikrarnama"—Condition restraining alienation. M*, a co-sharer in a village, transferred to *A*, another co-sharer, a 2 annas share by deed of sale. Upon the same date *A* executed an ikrarnamah, in which he agreed that he would not collect the rents of the 2 annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the 2 annas share should re-vest in *M*. *Held*, that the deed of sale and the ikrarnamah must be regarded as recording one single transaction, *i.e.*, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which on the face of it professed to be a sale of a 9 annas share to the other by the former ; and that, in this view, it was clear from the ikrarnamah that the proprietary title created by the sale-deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right. *Situl Purshad* v. *Luchmi Purshad, I. L. R. 10 Calc. 30*, referred to. MAHRAM DAS *v.* AJUDHIA.
I. L. R. 8 All. 452

3. ——— **Implied covenant for title**—*Transfer of Property Act (IV of 1882), s. 55, sub-s. 2—English Conveyance Act of 1881 (44 & 45 Vict. c. 41), s. 7.* In the absence of any contract to the contrary, there is, under s. 55, sub-s. 2, of the Transfer of Property Act, an implied covenant for title on the part of the vendor. BASARADDI SHEIKH *v.* ENAJADDI MALEAH . **I. L. R. 25 Calc. 298**
2 C. W. N. 222

4. ——— *Breach of implied covenant for title—Transfer of Property Act (IV of 1882), s. 55 (2)—Covenant for title, waiver of—Fraud.* When a vendee, who sues to cancel a sale on the grounds of fraud, misrepresentation, or concealment by his vendor, fails to establish these grounds of relief, he is not entitled to set up in second appeal a case founded on the implied covenant for title under the Transfer of Property Act, s. 55, sub-s. (2). MAHOMED *v.* SITARAMAYYAR
I. L. R. 15 Mad. 50

5. ——— *Breach of covenant for title—Measure of damages.* A purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of the eviction. NAGARDAS SAUBHAGYADAS *v.* AHMEDKHAN.
I. L. R. 21 Bom. 175

6. ——— *Transfer of Property Act (IV of 1882), s. 55—Suit for damages for breach of covenant implied in registered sale-deed.* On 8th February 1889, the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase-money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase-money and the amount of costs incurred by him in the previous litigation. *Held*, that the plaintiff was entitled to the relief sought by him. KRISHNAN NAMBIAR *v.* KANNAN
I. L. R. 21 Mad. 8

7. ——— **Covenant for quiet enjoyment**—*Sale of property—No title in vendor to part of property sold—Suit by purchaser for damages—Failure of consideration—Cause of action—Limitation Act (XV of 1877), Sch. II, Arts. 83 and 97.* On the 22nd November, 1880, the first and second defendants, for themselves and for the third defendant, sold a certain house to the plaintiff's father. The sale-deed, which was duly registered, contained the following clause : "We (vendors) are in enjoyment of the house as its owners, and, if any one were to obstruct you in the enjoyment of the house, we would remove the obstruction so as to put you to no trouble." In the year 1892 the plaintiff brought a suit to recover possession of the house. Both the lower Courts awarded the claim, but on the 26th August, 1896, the High Court, in second appeal, varied the decree, holding that the one-third share of the house which belonged to the third defendant did not pass by the sale ; and the plaintiff was awarded only two-thirds of the house, of which he was put in possession. On the 24th August, 1899, the plaintiff brought the present suit, claiming *inter alia* from defendants 1 and 2 to recover R225 as damages sustained by him by reason of his being deprived of the one-third share of the house. *Held*, that the claim for damages was a claim to recover money upon an existing consideration that had failed, and that it fails under Art. 97, Sch. II, of the Limitation Act (XV of 1877), and not Art. 83, and was therefore time-barred, not having been brought within three years from the failure of consideration. The clause in the sale-deed was not a contract of indemnity. It was at most a covenant for title and quiet enjoyment. The failure of consideration took place when the

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VENDOR AND PURCHASER—*contd.*

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plaintiff endeavoured to obtain possession of the property and, being opposed, found himself unable to obtain it. *Bassu Kuar* v. *Dhum Singh, I. L. R. 11 All. 47*, distinguished. TULSIRAM *v.* MURLIDHAR CHATURBHUJ MARWADI (1902)
I. L. R. 26 Bom. 750

8. _____ **Covenant to pay arrears of rent**—*Contract by vender to pay arrears of rent—Default—Sale of part of the property, effect of—Damages.* Plaintiff purchased certain *jotes* from defendants Nos. 1 and 2, and there was a stipulation that the arrears which were due to the landlord up to the time of sale were to be paid by the vendors, failing which, if the vendee should have to make the payment, he would be entitled to recover the amount as a loss sustained by him. Subsequent to the plaintiff's purchase, the landlords brought suits for rent due for the period anterior to the date of plaintiff's purchase, and also for a period subsequent thereto. In execution of decrees obtained in these suits, property to the extent of 51 *bighas*, covered by the deed of sale was sold. *Held*, that the plaintiff was entitled, if not under the strict words, at all events under the spirit of the terms, of the *kobala*, to recover from the defendants the sum which was due as arrears from them, to pay off which property of the plaintiff had been sold, the sale having been due mainly, if not entirely, to the defendants' failure to comply with the stipulation in the *kobala*. KUTAB ALI SHAH FAKIR *v.* AZIBULLA MONDUL (1903).
7 C. W. N. 905

3. BREACH OF WARRANTY.

1. _____ **Suit on warranty**—*Knowledge by purchaser of title being doubtful.* A purchaser, aware of the doubtful character of the title to the estate he is about to purchase, is justified in taking a guarantee from the seller, who cannot successfully plead to a suit on the guarantee that the purchaser was aware of the facts which induced him to stipulate therefor. PATHOO LAL *v.* RADHIKA DOSS . . . **3 N. W. 106**

2. _____ *Sale of whole title—Failure of title—Suit for money had and received.* A vendor legally conveying all his title cannot be sued for money had and received, although the title prove defective. Accordingly, where the plaintiff bought two kanam claims, and sued upon them unsuccessfully:—*Held*, that he could not recover purchase-money from his vendor's representatives, on the ground that the consideration for the payment had failed. MUHAMMAD MOHIDIN *v.* OTTAYIL UMMACHE . . . **1 Mad. 390**

3. _____ **Implied warranty**—*Warranty of title by vendor or mortgagor—Right to sue for damages.* A seller or mortgagor must always be held impliedly to warrant the title of the property sold or mortgaged; and if it be found that the title is defective, the vendee or the mortgagee can sue for damages or loss on the breach of implied

VENDOR AND PURCHASER—*contd.*

3 BREACH OF WARRANTY—*contd.*

contract, although there may be no express agreement for title. DWARKA DASS *v.* RUTTUN SINGH
2 Agra 199

4. _____ *Description published in advertisement—Warranty of title—Misrepresentation—Fraud, proof of.* A zamindar (*A*) gave certain villages in patni to *B* and received consideration-money and rent from him, but *B* never got possession of them, nor derived any benefit from the patni, it having been found that the villages belonged to a third party as lakhirajdar, who obtained a decree against *A* in a suit to which *B* was made a party. *A* had published and advertisement setting forth a description of the property, and calling upon intending purchasers to com forward. *Held*, that the advertisement published by *A* setting forth a description of the villages was substantially an implied warranty of title and would make him responsible to purchasers deceived by such misrepresentation; and fraud having been shown, the absence of a stipulation to refund would not protect *A* from refunding. *Held*, also, that, in cases like this, it would be a sufficient proof of fraud to show that the fact (of ownership) as represented was false, and that the person making the representation had a knowledge of the fact contrary to it. NILMONEE SINGH *v.* GORDON STUART & Co. . . **9 W. R. 371**

See KHELUT CHUNDER GHOSE *v.* KRISTO GOBIND DEB . . . **18 W. R. 276**

5. _____ **Right to sue on warranty of title**—*Right to refund of consideration.* A buyer may at once sue on a warranty of title if he can show that the seller has not a good title in accordance with his undertaking and that he has sustained loss in consequence. *Semble:* It does not follow as a matter of course that on proof of breach of warranty the buyer is entitled to receive back the whole of the consideration-money, or that on its being ascertained that the seller had no title the conditional sale is nullified. SAYEF ALI *v.* MAHOMED JOWAD ALI . . **7 W. R. 196**

6. _____ **Covenant against disturbance of possession**—*Loss of property by third person enforcing right of pre-emption—Disqualification of purchaser from buying—Covenant for good title to convey—Construction of covenant.* An instrument of sale contained the following condition: "Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I (vendor), my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and costs of litigation." The purchaser, having lost the property by reason of a person having a right of pre-emption having sued him to enforce such right and obtained a decree, sued the vendor to recover the costs in-

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VENDOR AND PURCHASER—*contd.*

3. BREACH OF WARRANTY—*concld.*

curred by him in defending such suit, basing his claim upon the condition set forth above. *Held*, that the suit was not maintainable, as such condition referred to flaws or defects in the vendor's title, and was not applicable to a loss accruing to the purchaser from his disqualification to buy. GOLAM JILANI *v.* IMDAD HUSAIN.

I. L. R. 4 All. 357

7. ——— **Condition that purchaser shall take such title as vendor can give where vendor has no title at all**—*Auction-sale by mortgagee of mortgaged property—Condition of sale—Implied possession of some title in vendor.* *R* having stolen from *N* the title-deeds relating to a certain property in Bombay in which he had no interest, but which belonged to *N*, deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction-sale under the power of sale contained in the mortgage. The property was put up to action under certain conditions of sale, of which the following was one: "The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him." Before the sale commenced, a notice on behalf of *N* was read out to the persons then present, which stated that she claimed the property as absolute owner, and that *R* (who had mortgaged it to the vendors) had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of *N's* claim. He was told nothing to make the above condition of sale misleading. He bid for the property and ultimately became the purchaser for R1,075. He immediately paid R275 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that *R* had no interest in the property, and thereupon he called upon the plaintiffs (the mortgagees) to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase; and he having failed to do so, they filed this suit against him, to recover the balance of the purchase-money. *Held*, that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance, and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be, and he had received at the auction no information which could be regarded as giving him notice to the contrary. MOTIVAHOO *v.* VINAYAK VEERCHAND.

I. L. R. 12 Bom. 1

VENDOR AND PURCHASER—*contd.*

4. CAVEAT EMPTOR.

1. ——— **Right of purchaser**—*Warranty of title—Hindu law—Contract—Sale of land in Bombay.* In England the law gives to the purchaser of land a right to have a good title to it shown by the vendor. No such rule appears to exist in the Hindu law, and in contracts between Hindus for the purchase and sale of land in Bombay the intention of the parties must be ascertained from the terms of the agreement without regard to any implication. DEVSI GHELA *v.* JIVARAJ MUKUNDAS . . **2 Bom. 430 : 2nd Ed., 406**

2. ——— *Conditions of sale—Defect in title previous to title shown by vendor.* When it is provided by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and if it be proved to exist may rescind the contract and recover back earnest-money, interest, and expenses. MANCHARJI PESTANJI *v.* NARAYAN LAKSHUMANJI.

1 Bom. 77

3. ——— **Land sold without warranty**— *Purchaser with invalid title—Liability of vendor.* In the absence of fraud or express warranty of title in a sale of land, the vendee cannot recover from the vendor the expenses incurred in defending a suit for possession brought against him by a third party having a better title. NEELMONEE SINGH DEO *v.* GORDON STUART & Co.

1 Ind. Jur. N. S. 356 : 6 W. R. 152

4. ——— **Liability of purchaser**—*Inquiry as to title—Eviction after purchase.* By the rule of *caveat emptor*, the buyer is bound by law to take care of himself and to see that he buys after satisfying himself that there is a good title. The purchaser is bound to look not only to his own title, but to see that he is properly indemnified by the covenants in his deed of purchase; and if he does not choose to protect himself in this manner, he has no remedy: for if a deed of purchase has been once executed, unless there is an eviction by the vendor or some person claiming under him, the purchaser has no right of action against the vendor. GOUR KISHORE SHAHA *v.* CHUNDER KISHORE DUTT MOJOOMDAR . . . **25 W. R. 45**

5. ——— **Sale of shares deposited with bank for advance**—*Depreciation of security—Objection to disclose position of shares.* Where a contract has been made for the sale of shares deposited with a bank as security for an advance, the vendor is not bound to disclose the fact to the purchaser when there can be no reason to anticipate such a depreciation of value in the shares as would entitle the bank to refuse to transfer. NARAYAN SUCCARAM *v.* BHAWOO DAJEE.

1 Ind. Jur. N. S. 154

6. ——— **Fraudulent concealment by vendor of defect of title**—*Absence in sale-deed as covenant for title of purchaser—Right to damages.* In 1881 a Hindu executed a sale-deed of a house in

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VENDOR AND PURCHASER—*contd.*

4. CAVEAT EMPTOR—*concld.*

the mofussil. The deed contained no covenant for title. The purchaser, having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree, holding that, as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks. *Held*, that, if there had been fradulent concealment as alleged, the purchaser was entitled to damages. GAJAPATHI *v.* ALAGIA.
I. L. R. 9 Mad. 89

5. COMPLETION OF TRANSFER.

1. ——— **Oral transfer**—*Hindu vendor and purchaser.* Land may pass by mere parol between Hindu vendor and purchaser. MOHESH CHUNDER CHATTERJEE *v.* ISSUR CHUNDER CHATTERJEE . . **1 Ind. Jur. N. S. 266**

2. ——— **Want of registration**—*Sale complete without payment of purchase-money on registration of deed.* A sale might be complete, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annal a sale if, by mutual agreement, a sale had already been made. KALEE CHURN GIREE GOSSAIN *v.* LALLA MUDDUN KISHORE
7 W. R. 317

3. ——— *Transfer of Property Act (IV of 1882), s. 54—Transfer of immoveable property by unregistered deed—Deed of which registration is optional—Suit by purchaser for possession when vendor is out of possession.* S. 54 of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property of less than R100 should be made only by one of the modes there stated so as to confer a valid title. Where the plaintiff brought from the heirs of *M*, who were out of possession, their right, title, and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than R100) not being compulsory, —*Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on the plaintiff, though not made by registered deed or by delivery of the property. The dictum of Garth, *C.J.*, in *Narain Chunder Chuckerbutty* v. *Dataram Roy, I. L. R. 8 Calc. 597, 612*, dissented from. KHATU BIBI *v.* MADHORAM BARSICK . **I. L. R. 16 Calc. 622**

4. ——— *Transfer of Property (IV of 1882), s. 54, para. 3—Transfer of Property Amendment Act (III of 1885), s. 3—Immoveable property of value less than ₹100,*

VENDOR AND PURCHASER—*contd.*

5. COMPLETION OF TRANSFER—*contd.*

Transfer of—Suit by purchaser for possession where vendor is out of possession. The transfer by sale of tangible immoveable property of a value less than one hundred rupees can be effected only by one of the two modes mentioned in s. 54, para. 3 of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession. *Khatu Bibi* v. *Madhoram Barsick, I. L. R. 16 Calc. 623* overruled. MAKHAN LALL PAL *v.* BUNKU BEHARI GHOSE . . **I. L. R. 19 Calc. 623**

5. ——— *Transfer of Property Act (IV of 1882), s. 54—Oral sale with possession land worth more than ₹100.* The plaintiff entered into an oral contract to sell certain land to the defendant for R2,500, and he put him into possession. The defendant made default in payment of the purchase-money. The plaintiff, having professed to cancel the sale on the ground of this default, sued to recover possession of the land with mesne profits. *Held*, that the sale was not complete under s. 54 of the Transfer of Property Act, and the plaintiff was entitled to the relief sought by him. PAPIREDDI *v.* NARASAREDDI.
I. L. R. 16 Mad. 464

6. ——— **Transfer of ownership of property**—*Decree for specific performance of contract of sale—Conveyance.* In the mofussil of the Bombay Presidency, the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself does not wait for the execution of a conveyance,—even if the vendor is required, as he seldom is, to execute such a conveyance,—but is effected by the passing of the decree itself, coupled with the payment of the purchase-money. DHONDIBA KRISHNAJI PATEL *v.* RAMCHANDRA BHAGWAT **I. L. R. 5 Bom. 554**

7. ——— *Possession given in execution of decree.* The formal possession given by a Civil Court under an execution operates, in point of law and fact, as between the parties, as a complete transfer of possession from one party to the other. LOKESSUR KOER *v.* PURGUN ROY.
I. L. R. 7. Calc. 418

8. ——— *Execution and registration of conveyance—Failure to pay purchase-money and return of conveyance.* *D* sold a house to *P* and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by *P*, who consequently never obtained possession. Shorlty after the conveyance had been registered, *P* returned it to *D* with an endorsement thereon to the effect that it was returned because *P* was unable to pay the purchase-money. The right, title, and interest of *P* in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued *D* for possession. The lower Courts threw out the claim, on the ground that the property had not passed to *P*, the sale to him being incomplete. *Held*, that the

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sale of the house by *D* to *P* was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to *P*, and *P* accordingly became the owner of the house. The endorsement on the conveyance, not having been registered, could not affect the property. The plaintiff therefore, as purchaser of the right, title, and interest of *P*, became legal owner of the house, but subject to all *P's* liabilities ; and as *D* had a lien upon the house for the amount of the unpaid purchase-money, the plaintiff could not obtain possession without paying off this charge. UMEDMAL MOTIRAM *v.* DAVU BIN DHONDIBA
I. L. R. 2 Bom. 547

9. ——— *Execution of deed of sale—Failure of purchaser to perform preliminaries to possession.* The vendor of certain immoveable property agreed to sell such property, and the purchaser agreed to purchase it on the understanding that the purchaser should retain a part of the purchase-money, and therewith discharge certain bond-debts due by the vendor, for the payment of which such property was hypothecated in the bonds. On such understanding the vendor executed a conveyance of such property to the purchaser. *Held*, in a suit by the purchaser for the possession of such property in virtue of such conveyance, that the purchaser not having paid such bond-debts or done anything to account for such part of the purchase-money according to such understanding, the contract of sale had not been completed, and the suit was therefore not maintainable. IKBAL BEGAM *v.* GOBIND PRASAD.
I. L. R. 3 All. 77

10. ——— *Part payment of purchase-money—Execution, registration, and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Transfer of Property Act (IV of 1882), s. 54.* Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser ; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions, or conditions as the nature of the case may require. *Mohun Singh* v. *Shib Koonwer, 1 Agra 85 ; Goor Parshad* v. *Nunda Singh, 1 Agra 160 ; Heera Singh* v. *Ragho Nath Sahai, 3 Agra 30 ;* and *Umedmal Motiram* v. *Dawa, I. L. R. 2 Bom. 547*, referred to. The difference between an executed contract of sale and an executory contract to sell, observed on. *Ikbal Begam* v. *Gobind Prasad, I. L. R. 3 All. 77*, dissented from. A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors:—*Held*, with reference to s. 54 of the Transfer of Property Act (IV of 1882), that these facts amounted to a full transfer of ownership, and the purchaser to maintain a suit for possession of the property sold notwithstanding that he had not

VENDOR AND PURCHASER—*contd.*

5. COMPLETION OF TRANSFER—*contd.*

paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed. SHIB LAL *v.* BHAGWAN DAS.
I. L. R. 11 All. 244

11. ——— *Sale of immoveable property—Transfer of Property Act (IV of 1882), s. 54—Delivery of possession—Registration of sale-deed.* Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. *Narain Chunder Chuckerbutty* v. *Dataram, I. L. R. 8 Calc. 597*, followed. PONNAYYA GOUNDAN *v.* MUTTU GOUNDAN . . **I. L. R. 17 Mad. 146**

12. ——— *Sale of immoveable property—Transfer of Property Act (IV of 1882 , s. 54—Delivery of possession under deed of sale unregistered where registration is optional—Delivery of property—Share in a tank—Registration Act (III of 1887), ss. 17 and 18—Intention of parties—Question of fact—Second appeal.* The defendants purchased a share in a tank in 1884, and the consideration being of a less amount than R100 and registration therefore optional, the deed of sale was unregistered. In 1886 the plaintiff purchased the same share from the same vendor under a registered deed of sale. It was found on the facts that the plaintiff purchased with notice of the defendants' previous purchase, and that the defendants had possession of the purchased share from the date of their purchase. *Held* (on appeal under the Letters Patent of the High Court) by TREVAELYAN, *J.*, upholding the decision of BEVERLEY, *J.* (HILL, *J.*, dissenting), that the possession obtained by the defendants was a sufficient "delivery of the property" within the meaning of s. 54 of the Transfer of Property Act. *Makhan Lall Pal* v. *Bunku Behari Ghose, I. L. R. 19 Calc. 623*, referred to. *Per* TREVELYAN, *J.*—It is not necessary that there should be any formal making over of possession. *Per* HILL, *J.*—When the owner of immoveable property of a value less than R100 has executed to the intending buyer an instrument purporting to transfer the ownership of the property and the instrument has not been registered, but the intending buyer has been placed in possession, the effect to be attributed to the delivery of possession depends on the intention of the parties, which is a question of fact that cannot be determined on second appeal. GUNGA NARAIN GOPE *v.* KALI CHURN GOALA **I. L. R. 22 Calc. 179**

13. ——— *Transfer of Property Act (IV of 1882). s. 54—Vendor and purchaser—Deed of sale—Completion of sale—Registration—Non-payment of consideration—Delivery of deed of sale.* Mere registration of a deed of sale, unaccompanied by delivery of the deed to the vendee, does not make the transaction a completed one. Although under the Transfer of Property Act the sale of a tangible immoveable property of the value of one hundred rupees and upwards can be made only by a registered instrument, yet mere

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VENDOR AND PURCHASER—*contd.*

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registration should not be taken as conclusive that the title has passed. If it was intended by the parties that the title should pass only upon the consideration money being paid, such intention should be given effect to. *Sheo Narain Singh* v. *Darbari Mahton, 2 C. W. N. 207,* approved. MAULADAN *v.* RUGHUNANDAN PERSHAD SINGH
I. L. R. 27 Calc. 7

14. ——— *Contract of sale—Delivery of possession—Payment of the whole of the purchase-money—Registered conveyance not executed—Transfer—Attachment—Vendor having no attachable interest—Transfer of Property Act (IV of 1882), ss. 40, 54, 55 (6) (b)—Trusts Act (II of 1882), s. 91.* Under a contract of sale with respect to certain fields, possession was delivered to the vendee, and the whole of the purchase-money was paid to the vendor, but the transfer was not effected, as the necessary registered conveyance had not been executed. Subsequently a judgment-creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment-debtor. Before the case was decided by the Court of first instance, a registered conveyance had been executed. *Held,* that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property. *Hormasji Manekji Dadachanji* v. *Keshav Purshotam, I. L.R. 18 Bom. 13,* distinguished. KARALIA NANUBHAI MAHOMED OHAI *v.* MANSUKHRAM VAKHATCHAND.
I. L. R. 24 Bom. 400

15. ——— *Transfer of Property Act (IV of 1882), s. 54—Sale of land—Non-payment of consideration—Delivery of deed—Completion of purchase.* Under s. 54 of the Transfer of Property Act, though no title passes except upon registration of the conveyance where such registration is compulsory, yet mere registration may not be sufficient to pass a good title ; if the parties intend that no title shall pass upon registration till the consideration-money has been paid and the deed delivered, the law will give effect to such intention. Registration is *primâ facie* proof of intention to transfer the title, and the party who alleges the existence of a collateral agreement must strictly prove it. SHEO NARAIN SINGH *v.* DARBARI MAHTON . . **2 C. W. N. 207**

16. ——— **Default in completing contract of sale**—*Partial performance.* In suits arising out of the default on both sides to complete a contract for the purchase and sale of land in the mofussil, the Court should proceed as a Court of equity, and should look to the acts and conduct of the parties subsequent to the making of the contract as well as the language of the contract itself ; and where the contract has been partially performed and the purchaser put into possession of a portion of the land and allowed by the vendor so to continue long after the period fixed for completion of the contract has elapsed,

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further time should be given by the Court for the performance of the contract in specie. (TUCKER, *J., dissentiente*). BALA VALAD SANKIA *v.* GABAJI BALVANT KULKARNI.
2 Bom. 175, 2nd Ed. 168

17. ——— **Conditional contract "subject to approval of title by purchaser's solicitors"**—*Rescission—Registration Act (III of 1877), s. 17, cl. (b).* An agreement for the purchase and sale of certain immoveable property provided that the completion of the contract should be "subject to the approval of the purchaser's solicitors" (naming them), and that, if they should not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title. The purchaser's solicitors disapproved of the title, and the purchaser rescinded the contract. The agreement was not registered. *Held,* in a suit to recover the amount of the earnest-money and costs, that, assuming the objections to be reasonable, the purchaser was entitld to rescind the contract. *Held,* further, that the agreement did not require registration. SREEGOPAL MULLICK *v.* RAM CHURN NUSKUR **I. L. R. 8 Calc. 856 : 12 C. L. R. 125**

18. ——— **Specific performance**—*Approval of title by purchaser's solicitor—Contract.* In a suit for specific performance of a contract for the sale of a house, the entire contract being contained in letters which provided that entry was to be given to the purchaser by a fixed date, and that the title-deeds were to be sent to the purchaser's solicitors, and "on approval of the same the purchase-money to be paid prompt:"—*Held,* that the carrying out of the contract was in no way conditional upon the approval of the solicitors, but that their approval was a condition precedent to the prompt payment of the purchase-money without waiting for a conveyance, and that the title was to be investigated and approved in the ordinary way. This case distinguished from *Sreegopal Mullick* v. *Ram Churn Nuskur, I. L. R. 8 Calc. 856.* COHEN *v.* SUTHERLAND
I. L. R. 17 Calc. 919

6. CONDITIONAL SALES.

1. ——— **Land sold on condition of re-purchase**—*Absolute sale.* Where land was sold on a condition of re-purchase, and no time was mentioned in the instrument of sale :—*Held,* that the sale had not become absolute, and that the plaintiff, having bought the original vendor's rights, was entitled to maintain a suit for recovery of the land. GURUSAMY AIYAN *v.* SWAMINADHA AIYAN . . . **2 Mad. 450**

2. ——— **Deed of conditional sale**—*Beng. Reg. XV of 1793—Beng. Reg. XVII of 1806—Usufruct.* A deed of sale executed in 1201 (1794) was subject to the condition that if the vendors, "from the year 1202 to the year 1203,

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VENDOR AND PURCHASER— *contd.*

6. CONDITIONAL SALES—*concld.*

should repay the whole of the consideration-money they should receive back the deed of sale, which shall then become null and void ; and if within the said period they fail to pay the said consideration-money, this conditional sale shall become absolute and be considered irrevocable." *Held*, that Regulation XV of 1793 did not operate to prevent the assignment becoming absolute after the expiration of the time limited for repayment of the consideration, and that Regulation XVII of 1806 had not a a retrospective effect, and therefore did not apply ; and that, even if the entire amount of the purchase-money were satisfied out of the proceeds of estate before the time for the conditional sale becoming absolute, the vendees would acquire a perfect title. BULDEO SINGH *v.* DHUKRUN SINGH **Marsh. 632**

3. ——— **Purchaser under conditional sale**—*Incumbrances.* A purchaser under a conditional sale takes the property with all *boná fide* incumbrances created by his vendor previous to the sale. RADHA MOHUN DEB *v.* NUND LAL DEY . . . **7 W. R. 363**

4. ——— **Mortgage by conditional sale**—*Sale with subsequent agreement for re-purchase—Suit for pre-emption—Limitation.* On the 6th of June 1887 one *R K* sold a certain zamindari share to *S*. On the 18th of May 1888 *B* brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1888 the vendor, the vendee, and the pre-emptor entered into an agreement, by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June 1891, the vendor, affecting to treat the transaction of the 6th of June 1887 as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act, accompanied by payment of the price of the property into Court and prayed for redemption. The vendee refused to take out the money deposited by the vendor, and subsequently on the 13th of November 1891 *R K* applied for repayment to him of the said money, stating that he wished the vendee to remain in possession, and asking that the agreement of the 6th of July 1888 might be considered null and void. On the 1st of September 1892 one *R S* filed a suit for pre-emption of the said property. *Held*, that the original transaction of the 6th of June 1887 was an out-and-out sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale ; and in consequence that the suit brought by *R S* was barred by limitation. RAM DIN *v.* RANG LAL SINGH . . **I. L. R. 17 All. 451**

7. CONSIDERATION.

1. ——— **Validity of contract of sale**—*Agreement without consideration—Right to sell*

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7. CONSIDERATION—*contd.*

afterwards to another. A mere agreement to sell a certain property, without any consideration passing, cannot bar the right of the vendor on the same day to sell a portion of the property to a third party, or invalidate the third party's purchase. BHYUNKUREE DABEE *v.* TARINEE CHURN CHUCKERBUTTY . . . **7 W. R. 38**

2. ——— *Non-payment of purchase-money—Intention to pass subject of sale—Failure to pay consideration, effect of.* Although ordinarily, in a transaction of sale, it may be reasonable to suppose that the seller does not intend to pass the property to the purchaser until the purchase-money has been paid or secured, it is not an absolute rule of law that the non-receipt of the consideration-money in full entitles a vendor to make void a sale which is otherwise complete. MOHUN SINGH *v.* SHIB KOONWER. **1 Agra 85**

HEERA SINGH *v.* RAGHO NATH SUHAI. BHURTH SINGH *v.* RAGHO NATH SUHAI. . **3 Agra 30**

3. ——— *Intention of parties—Failure to pay consideration, effect of, after execution and delivery of deed.* The intention of the parties from their acts should be ascertained ; and when a deed is executed and delivered to the purchaser, a subsequent default by the purchaser in the due payment of the purchase-money would not, in the absence of fraud, make void the sale, or give any other right to the vendor than a right to sue for the money. Further, if it be proved that the vendor intended to retain possession until full payment, the Court may pass a decree establishing the purchaser's right subject to execution or payment of consideration. MOHUN SINGH *v.* SHIB KOONWER. **1 Agra. 85**

4. ——— **Plea of valuable consideration**—*Allegation of seisin of vendor and sale of absolute title.* A pleading setting up a defence a purchase of valuable consideration should aver the seisin of the vendor and the sale of his absolute title for good consideration. RADHANATH DAS *v.* ELLIOT . . **6 B. L. R. P. C. 530**

S. C. RADHANATH DOSS *v.* GISBORNE & CO. **15 W. R. P. C. 24 : 14 Moo. I. A. 1**

5. ——— **Failure of consideration**—*Bonus paid for talukh not in existence—Right to refund of bonus.* When a bonus is paid for a patni talukh not in existence, there is an entire failure of consideration, and the person paying the bonus is entitled to arefund of it. The principle of *caveat emptor* does not apply to such a case. KRISTO LALL MOITRO *v.* NOBBO COOMAR ROY. **5 W. R. 232**

6. ——— **Proof of payment of consideration**—*Non-payment of consideration-money—Burden of proof.* In a suit for possession of land to have been purchased under a registered deed of alleged sale, the defendant-vendor admitted the execution and registration of the deed, but denied

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VENDOR AND PURCHASER—*contd.*

7. CONSIDERATION—*contd.*

receipt of consideration. The deed was dated in January 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration. *Held*, that although, under ordinary circumstances, the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. *Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed. ACHOBANAIL KUARI *v.* MAHABIR PRASAD . **I. L. R. 8 All. 641**

7. ———— **Part payment of consideration**—*Right to sue for possession. Held*, that non-payment of the consideration-money can be pleaded by the seller, and inquired into by the Court, the admission of the seller at the time of registration before the Registrar being no conclusive proof of payment of the consideration-money, with reference to the practice which obtains of preparing the sale-deed of registering it before payment. Under the ordinary rule of law, a purchaser has a right to sue for possession when a portion of the consideration-money has been paid, unless the contrary be shown to be the intention of the parties, and the seller has a right to sue for the balance of price. GOOR PERSHAD *v.* NUNDA SINGH . **1 Agra 160**

8. ———— **Right to refund of earnest-money**—*Agreement for sale of ship—Failure of consideration.* Plaintiff and defendants entered into an agreement for the sale by the defendants, who were thereby stated to be the absolute owners of a certain ship, to the plaintiff of the said ship. The defendants agreed with the plaintiff that they would, immediately upon payment of the purchase-money, execute to the plaintiff and another a proper bill of sale of the ship. The defendants were unable to get a properly registered bill of sale of the ship made out owing to infirmity of their own title, but were willing, so far as they could, to convey. The plaintiff had made part payment in respect of the price of the ship. *Held*, that the consideration had failed, and that the plaintiff was entitled to a refund of the money paid by him in part payment, and of sums disbursed by him under the agreement on account of the expenses of the ship. JASSIM BINSAFF *v.* ESAU AHMED **2 Ind. Jur. N. S. 13**

9. ———— **Valuable consideration, question of**—*Assignment of chose in action.* The question whether an assignment of any equity of redemption admitted by the assignor was made

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7. CONSIDERATION—*contd.*

for a valuable consideration or not, is no materia in determining the rights of the assignee against a party who holds adversely to the assignor. KACHI BAYAJI *v.* KACHOBA VITHOBA . **10 Bom. 49**

10. ———— **Sale of sir land with co venant to relinquish ex-proprietary right**—*Non-performance of illegal contract—Suit t recover consideration-money.* A deed of sale whic purports to convey to vendees the ex-proprietary rights of the vendors in sír lands is an illegal contract and void as being in violation of ss. 7 and 9 of Act XII of 1881. Where, therefore, along with some zamindari land, certain sir lands were sold, and the vendors purported by their sale-deed to relinquish their ex-proprietary rights in the sír lands, but failed to put the vendees into possession of either the zamindari of the sír lands, it was *held* that the vendees could not recover from the vendors, as compensation, the consideration-money which they had paid in respect of the sír lands. BHIKHAM *v.* HAR PRASAD . **I. L. R. 19 All. 35**

11. ———— If a zamindar sells his zamindari rights and includes in the sale the right to cultivatory possession of the sír land, and agrees to relinquish his ex-proprietary rights in respect of the sír land, the vendee, in the event of such possession not being delivered or ex-proprietary rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. *Bhikham Singh* v. *Har Parsad, I. L. R. 19 All. 35*, approved. MURLIDHAR *v.* PEM RAJ. **I. L. R. 22 All. 205**

12. ———— **Deed of sale set aside for want of consideration**—*Contract Act (IX of 1872), s. 25.* On the 18th November 1892 *A* executed to *B* a deed of sale of certain land. The deed was duly registered, and it recited, that the consideration-money, R90, had been duly paid. *B* got into possession of the land. *A* subsequently brought a suit to set aside the deed of sale, and to recover possession, alleging that he had been induced to execute the deed when incapacitated from illness, and that the consideration-money had not been paid. Both the lower Courts found that the consideration-money had not been paid. The lower Appellate Court dismissed the suit, holding that *A's* remedy was to sue for the consideration-money if it was unpaid, and that he had a lien on the land for the amount, but that he could not set aside the deed. *Held*, that the deed should be set aside, and the plaintiff should recover possession. *Per* FULTON, *J.*—The sale was void for want of consideration. S. 25 of the Contract Act applied to the transaction. *Trimalrao Raghavendra* v. *Municipal Commissioner of Hubli, I. L. R. 2 Bom. 172*, distinguished. *Per* FARRAN, *C.J.*—The facts serve to show that there was no sale at all, and that the plaintiff was tricked into executing and registering the conveyance. Conveyances of lands in the mofussil perfected by possession or registration where the consideration expressed in the

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VENDOR AND PURCHASER—*contd.*

7. CONSIDERATION—*concld.*

conveyance to have been paid has notin fact been paid, should not, however, be put in the same category as contracts void for want of consideration. TATIYA *v.* BABAJI **I. L. R. 22 Bom. 176**

13. ——— **Want of consideration for deed of sale**—*Evidence that a deed is not intended to have the ordinary operation.* The plaintiffs sued for certain land which they claimed in succession to *R*, deceased. The defendant who was in possession had executed a sale-deed comprising the property now in question in favour of the deceased. But it was pleaded by him and found by the Court of first appeal that the sale-deed was benami, and no consideration had passed, and a decree was passed dismissing the suit. *Held*, on second appeal, that the decree should be reversed. *Per curiam.*—When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed. RANGA AYYAR *v.* SRINIVASA AYYANGAR.
I. L. R. 21 Mad. 56

8. FRAUD.

1. ——— **Evidence of fraud**—*Inadequacy of purchase-money.* In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. SREEMUNCHUNDER DEY *v.* GOPAL CHUNDER CHUCKERBUTTY . **7 W. R. P. C. 10 : 11 Moo. I. A. 28**

2. ——— *Notice of facts implying bad title—Malâ fides—Questions of bonâ fides.* Notice of fact from which the infirmity of the vendor's title might be inferred is evidence of *malâ fides*, but is not itself *malâ fides*, and the question of *bonâ fide* purchase is one of fact. SITHA UMMAL *v.* RUNGASAMI IYENGAR . **5 Mad. 385**

3. ——— **Effect of fraud**—*Goods obtained by fraud—Right of vendor.* Where goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract so as to re-vest the property in himself, and this even if the property had passed to the vendee with the consent of the vendor. Where a vendee purchased cotton, with the preconceived design of not paying for it, the sale did not pass the property : although the cotton may have been, with the vendor's consent, allowed to be placed on the vendee's boat, still the vendee must be considered as the agent of the vendor, and his possession as that of the vendor, and the cotton as still the property of the vendor, as long as the price was not paid. DURSUN LALL PANDEY *v.* INDUR CHUNDER . . . **6 W. R. 81.**

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4. ——— *Contract Act ss. 17, 19—Contract induced by fraud—Right to rescind.* If a vendor has been guilty of fraud within the meaning of s. 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to s. 19 of the Contract Act. MORGAN *v.* GOVERNMENT OF HAIDRABAD . . **I. L. R. 11 Mad. 419**

5. ——— *Fraudulent misrepresentation—Sale of immoveable property—Misdescription of area sold—Suit for damages—Nature of proof required.* A purchaser of certain immoveable property sued his vendors to recover compensation or damages on account of a deficiency in the actual area of land purchased by him as compared with the area stated in his sale-deed. There was no covenant in the sale-deed to make compensation in case of misdescription. *Held*, that the plaintiff, in order to succeed, must make out a fraudulent misrepresentation which he accepted as true, and which induced him to enter into the contract, and which caused him damage. *Derry* v. *Peek, L. R. 14 Ap. Cas. 387*, referred to. ABDULLAH KHAN *v.* ABDUL RAHMAN BEG.
I. L. R. 18 All. 322

9. INVALID SALES.

1. ——— **Fraudulent concealment**—*Knowledge of defect in title, or of incumbrance.* Where a vendor, knowing that he had no right or title to property, or being cognizant of the existence of incumbrances, or of latent defects materially lowering it in value, sold it and neglected to disclose such defects to the purchaser :—*Held*, that there was a fraudulent concealment vitiating the contract. PEAREE MOHUN SOOR *v.* ABDOOL SOBHAN CHOWDHRY . . . **7 W. R. 258**

2. ——— **Misrepresentation**—*Right to recover purchase-money.* Wilful misrepresentation by a vendor regarding property sold, practised in a matter within his knowledge, and concerning which the purchaser had no adequate means of knowledge, held to vitiate a sale and to entitle the purchaser to recover the purchase-money actually paid by him. MAHOMED SHARE KHAN *v.* BAHOO BEGUM . **1 N. W. Part II, 26 : Ed. 1873, 84**

3. ——— *False representation alleged against vendor by purchaser—Inducement not proved—Shareholder buying shares from a Director of the Company.* To maintain a suit for damages upon a false representation alleged by purchaser against vendor, it must be established that the plaintiff was induced by the misrepresentation to enter into the contract. Shares in a banking company which shortly afterwards went into

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liquidation were sold by a Director to the plaintiff, a shareholder. The latter now sued the vendor, alleging inducement to buy the shares by the vendor's false representations as to the state of the Bank's affairs. Both the Courts below concurred in finding that oral representations as to the latter alleged to have been made by the defendant to the plaintiff were not proved. Those Courts, however, had concurred in finding that the defendant, though he was not responsible for false balance-sheets issued before 1890, was well aware of the falseness of the one issued for the half-year ending on the 30th June 1890. The Judicial Committee saw no reason for interfering with these concurrent findings. The plaintiff, in this appeal, relied on the issue of the false balance-sheet of 1890, the issue of a false report by the Directors, and a wrongful payment of dividend for the period above-mentioned, acts in which the defendant had taken part; these acts, as a series, constituting false representations, the bank having in fact been insolvent at the time. But it was not shown by the evidence that the plaintiff had been induced to buy the shares, which he had contracted to buy in two sets, one in September, the other later on in 1890, by any of the representations so made; regard being had to the dates respectively and to his own knowledge. The dismissal of the suit was therefore maintained. MACAULIFFE *v.* WILSON.
I. L. R. 21 All. 209
L. R. 26 I. A. 6

4. ——— **Undue influence**—*Fiduciary relationship—Attorney and client—Onus probandi.* A contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust is liable to be called in question by the vendor, and to be set aside at his instance, if it be found that the other party made an unfair use of his advantages. This rule of equity applies strongly in a case where any person acting as an attorney, or as a legal adviser, enters into contract with his client in respect of the subject of litigation or advice. Undue influence is presumed to have been exerted until the contrary is proved, and the purchaser is bound to show that all the terms and conditions of the contract are fair, adequate, and reasonable. PUSHONG *v.* MUNIA HALWANI.
1 B. L. R. A. C. 95 : 10 W. R. 128

5. ——— *Fiduciary relationship—Trustee and cestui que trust.* *J* and *M* were named executors of the will of *H*, who died in 1844. *M* alone proved the will, but *J* did not renounce probate until nine years after the death of *H* and the commencement of litigation. The only act as an executor of *H* proved against *J* was that, in a deed executed by him for the conveyance of the share of *H* in a certain estate in which *J* was also interested in another capacity, he was described as executor of *H*, and the deed recited that probate had been granted to him. *Held*, that he was by this reason, as well as on the ground of having an unfair advantage in respect of certain property in litigation, precluded from purchasing the interest of *H's* sons under a decree. DHONENDRO CHUNDER MOOKERJEE *v.* MUTTY LOLL MOOKERJEE. SREEMANCHUNDER MOOKERJEE *v.* MUTTYLOLL MOOKERJEE . . . Cor. 57

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6. ——— **Purchase by agent or other person on fiduciary position**—*Fiduciary relationship—Onus probandi—Consideration.* An agent or person in a fiduciary position towards the owner of property purchased by him is bound to prove that the sale was made for good and sufficient consideration, and must not only prove that the agent had authority to sell, and that the consideration alleged was in fact paid, but also that the consideration paid was a fair price for the property. If the purchase be made by a stranger, such a purchaser need not show that the consideration paid by him is a consideration equal to the value of the property; it will be sufficient for the purchaser to show that the sale was made by a person who had authority from the owner to sell; and, unless the seller can establish a fraudulent connivance between the agent employed to sell and the purchaser, the sale will be binding on the seller on proof of authority of the agent to sell. RUTTA BEBEE *v.* DUMREE LAL . . . 2 N. W. 153

7. ——— **Deed of sale executed by man of weak intellect**—*Ground for setting aside sale by Court of equity.* A Court of equity will not set aside the voluntary deed of a weak man who is not absolutely *non compos*, unless the weakness as well as the facts surrounding the transaction and the nature of the transaction itself be such as to satisfy the Court that the person had not at the time a mind adequate to the business, and that he might have been imposed upon, or unless the Court is not satisfied of the good faith of all the parties to the transaction. RAJENDER CHUNDER NEWGEE *v.* BHOOBUN KALEE DEBEA . W. R. 1864, 65

8. ——— **Sale by old and illiterate woman without professional advice**—*Fraud—Undue influence—Inadequate consideration—Terms on which deed will be set aside—Purchase-money declared a charge—Funeral expenses of Hindu widow declared a charge—No allowance for repairs and improvements.* *C* was the widow of one *R*, deceased, and from the death of *R* until her own death remained in occupation of a house and chawl which had belonged to him. *D* was a sister of *C's*, and, shortly after *R's* death, *D* and her son *B*, the first and second defendants, went to live with *C* on the said property, and lived with *C* and were her only companions until *C's* death. While so living with *C*, *D* and *B* advanced to *C* at various times, on joint account, various sums of money, amounting to R3,500, for purposes such as would have justified *C* in pledging the property of her late husband to secure the repayment of the same. *C* became very ill, and *D* and *B*, fearing she might be going to die, requested her to take some steps to secure to them the repayment of the sums they

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9. INVALID SALES—*contd.*

had advanced to her. *C* thereupon offered to give *D* and *B* an absolute deed of sale of the said house and chawl in consideration of the said sum of R3,500 already advanced to her and of an additional sum of R500 then to be paid to her to defray her funeral expenses and the costs of the said conveyance. *D* and *B* consented, and called in their solicitor to take *C's* instructions and draw up the deed in question, which he accordingly did ; and within three days of the said agreement the deed was executed. At that time *C* was very ill, and twelve days after the execution of the deed *C* died. *C* was an illiterate woman over sixty years of age, and had in this matter no independent professional or other advice. The additional sum of R500 agreed to be paid to see *C* was never so paid to her, but after her death *D* and her son expended moneys in and about her funeral ceremonies amounting, as they alleged, to upwards of R400. The property in question so pledged to them for R4,000 was worth at least R5,200. The plaintiff, one of the heirs of *R*, sued to set the deed aside and for possession of the said property. *Held*, that the deed of sale must be set aside as obtained under circumstances which amounted to fraud. *Held*, also, that the advances, amounting to R3,500, made to *C* by *D* and her son *B*, being made for purposes for which *C* would have been justified in pledging the said property, the deed of sale should be set aside only on the terms that the property in question should stand charged with the repayment of the sums so advanced. *Held*, also, that the property must stand charged with the repayment to *D* and *B* of such a sum as, having regard to her position and station in life, should be found to be a reasonable sum for the funeral expenses of *C*. After *C's* death, *D* and *B* remained in possession of the said property under the deed of sale, and expended considerable sums of money in and about repairs and improvements to the same ; and they now claimed that, if the sale was to be set aside, the sums so expended should be repaid to them. *Held*, that no allowance could be made to *D* and *B* for sums so expended by them such sums having been expended at a time when *D* and *B* must be taken to have known that they were fraudulently in possession of the property in question. SADASHIV BHASKAR JOSHI *v.* DHAKUBAI.

I. L. R. 5 Bom. 450

9. ———— Inadequacy of consideration—*Actual or constructive fraud—Cancelment of sale—Sales by expectant heirs of reversionary interests.* In the case of a sale by a person, young indeed and in distressed circumstances, but not without advice or means of information, of an estate actually vested in him, but not to be obtained without litigation, the party seeking to set aside the sale must establish the fraud, actual or constructive, which entitles him to relief. It is not sufficient for him to show that he did not receive the full value of the estate to which the result of the litigation might ultimately show him

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9. INVALID SALES—*contd.*

to be entitled. The difference between that value and the purchase-money, if not too disproportionate, may be legitimately taken to represent the difference between certainty and immediate enjoyment on the one hand, and risk, worry, expense, and delay on the other. The exceptional equitable principles which, in a sale by an expectant heir of a reversionary interest, throw upon the purchaser the onus of showing that he gave a fair price, and which, on failure of such proof, entitles the expectant heir to have the sale set aside, have no application in the above case, or in that of every ignorant and improvident person. AZIMUDIN KHAN *v.* ZIA-UL-NISSA . **I. L. R. 6 Bom. 309**

10. ———— Omission to register—*Fraud—Registration Act (XVI of 1864) s. 18.* Where the sale-deed was executed, and consideration paid, but the deed was not registered within four months owing to the seller's fraud :—*Held*, that such fraudulent vendor could not benefit himself by pleading the provision of law (s. 18, Act XVI of 1864) as bar to the purchaser's claim. PURGAS RAI *v.* JUGGUN SINGH . . **2 Agra, Pt. II, 20**

11. ———— Alienation to defeat execution of decree—*Rights of creditor without specific lien against purchaser—Fraud.* On the 3rd October 1865 the plaintiff filed a suit against *D* to recover certain lands and money. While the suit was pending—*viz.*, on the 13th October 1866, —*D* mortgaged part of his immoveable property to defendant *R*, and on 21st August 1871 executed a deed of sale to defendant *R* of all the immoveable property of which he (*D*) was then possessed, for the price of R4,000. On 30th April 1872 the plaintiff obtained a decree against *D*, and in execution thereof attached certain immoveable property other than the land mentioned in the decree. The defendant *R* applied under s. 246 of the Civil Procedure Code (Act VIII of 1859), and on the 21st August 1873 procured the removal of the attachment, whereupon the plaintiff brought the present suit to set aside the order of 21st August 1873 and to obtain a declaration that the attached property belonged to *D* and was liable in execution. *Held*, that, inasmuch as neither the decree of the 30th April 1872, nor the plaint on which it was founded, established or sought to establish any claim against a specific lien upon the immoveable property, the subject of the present suit, it was perfectly competent for *D*, at any time previously to an attachment of the property to alienate it, and the question for decision as to that property was whether *D* had alienated it or not. If the deed of sale by which *D* conveyed the property on the 21st August 1871 were merely colourable, and the change of ownership ostensible only and not real,—*i.e.*, if it was the intention of the parties that the alienee should be merely a trustee for *D* to shield the property from execution, and that *D* should continue to be the beneficial owner of it,—there would not be any alienation, and the deed of sale would be void as against an attaching creditor of

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VENDOR AND PURCHASER—*contd.*

9. INVALID SALES—*contd.*

D. If, on the other hand, the sale were a real transaction,—*i.e.*, if it was the intention of the parties that the full ownership should pass from the vendor to the vendee,—then the sale would be valid, even though it might have been in the contemplation of the parties that future attempts to attach the property by a creditor of the vendor (not having any specific lien on the property) should be defeated by the sale. Until attachment the creditor has no right to interfere with the power of his debtor to deal with his property. RAJAN HARJI *v.* ARDESHIR HORMUSJI . **I. L. R. 4 Bom. 70**

SAKHARAM MAHIPAT *v.* DAWUD VALAD JAWABHAI . . . **I. L. R. 4 Bom. 76 note**

BALVANTRAV *v.* JIVANJI HORMASJI. **I. L. R. 4 Bom. 77**

12. ——— Sale to two successive purchasers—*Non-payment of purchase-money—Right of first and second purchasers.* The proprietor of certain immoveable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it, but had been ousted by the second purchaser. *Held*, that the first sale was not void by reason of the non-payment of the purchase-money, and that the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase-money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money. RAM LAKHAN RAI *v.* BANDAN RAI. **I. L. R. 2 All. 711**

13. ——— Sale of property not belonging to vendor—*Loss sustained by purchaser on being dispossessed.* Where a party sells property to others, and it afterwards appears that he had not the right to do so, and the purchasers are in consequence dispossessed, the loss ought to fall on the vendor, and not on the vendees who put faith in his act of selling. AMANOOLAH *v.* MAHOMED NASIR **22 W. R. 442**

14. ——— Deed of sale set aside as being fraudulent and void—*Right of purchaser to compensation for improvements.* A party in possession under a deed of sale conveying real estate, the property of a defendant in a pending suit, *held* not entitled to any allowance for sums expended by him for improvement upon the estate, when the deed was found to be fraudulent and void as against the creditors of the vendor, and to have been executed to defeat a sequestration. MUSADEE MAHOMED CAZUM SHERAZEE v. ALLY MAHOMED SHOOSTRY . . . **6 Moo. I. A. 27**

15. ——— Purchaser with notice of prior contract to sell—*Trusts Act (II of 1882), s. 91—Specific Relief Act (I of 1877), s. 27.* In a suit for land it appeared that the plaintiff had obtained a registered sale-deed, comprising the property in question, from defendants Nos. 1 and 2 who had already (to the plaintiff's knowledge) contracted to sell it to another, and that the plaintiff had paid no consideration for the sale-deed, which in fact represented a collusive transaction entered into to defeat the prior contract. *Held*, that the plaintiff was not entitled to recover. NAMASIVAYAM PILLAI *v.* NELLAYAPPA PILLAI. **I. L. R. 18 Mad. 43**

16. ——— Execution of sale-deed without consideration—*Subsequent transfer for value—Transfer of Property Act (IV of 1882), s. 54.* In a suit for land it appeared that in 1887 *A* had executed in favour of *B* a registered conveyance of the land in question, which purported to be a sale-deed, but that no consideration was in fact paid; and that *A*, who had retained possession, sold and delivered the land to *C* and *D*, and that they then discharged a mortgage which was to have been paid off by *B*. In the interval between the two transactions above referred to, the plaintiff had purchased the land from *B*, and he now alleged that the persons in possession had executed a rent agreement, in fact found to be a forgery, under the terms of which he claimed to eject them. *Held*, that the plaintiff's claim, founded on the transaction of 1887, did not prevail against *C* and *D*. SANGU AYYAR *v.* CUMARASAMI MUDALIAR. **I. L. R. 18 Mad. 61**

17. ——— Colourable sale—*Sale of property to defraud creditors—Indicia of fraud.* Where in a suit to establish plaintiff's right to property purchased by him it was found that his vendor, who had many debts to pay, had sold to the plaintiff all his property, reserving nothing to himself; that the plaintiff bought the property without seeing it or valuing it; that the consideration for the sale consisted of time-barred debts or debts which were not payable at the time; that the property sold remained in the possession of the vendor, who paid its assessment; and that the consideration was grossly inadequate:—*Held*, that there was no *bonâ fide* or valid sale, but a mere colourable transaction without consideration not intended to transfer of the property to the plaintiff. NANA MANSARAM SHET *v.* RAUTMAL TARACHAND SHET. **I. L. R. 22 Bom. 255**

18. ——— Notice of prior agreement to sell to another—*Agreement to sell to A—Subsequent sale of same land to B under registered conveyance—Notice of prior agreement—Priority—Trusts Act (II of 1882), s. 91—Specific Relief Act (I of 1877), s. 27.* On 25th June, 1895, the first defendant entered into a agreement to sell certain land to the plaintiff, and, six months later (19th December, 1895), he sold the same land to the second defendant and conveyed it to him by a registered deed. In 1896 the plaintiff sued the first defendant for specific performance of his agreement, and on the 8th March, 1897, obtained a decree, in execution of which a conveyance of the land was executed

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9. INVALID SALES—*contd.*

to him by the Court under s. 261 of the Civil Procedure Code (Act XIV of 1882). The plaintiff then attempted to take possession, but was resisted by the second defendant. He thereupon filed this suit. It was found that the second defendant bought in December, 1895, with notice of the earlier agreement with the plaintiff of June, 1895. *Held*, that the plaintiff was entitled to possession. The second defendant having bought with notice of the plaintiff's contract, he held the property for the benefit of the plaintiff, to the extent necessary to give effect to that contract. *Held*, also, that the form of the decree should be as follows :—There should be a declaration that the second defendant holds the property for the benefit of the plaintiff to the extent necessary to give effect to the contract of the 25th June, 1895 ; there should be a decree that the second defendant do execute to the plaintiff a proper conveyance of the *thikam ;* and a decree for possession. GAFFUR VALAD IBRAHIM FAKI *v.* BHIKAJI GOVIND (1901).

I. L. R. 26 Bom. 159

19. ——— Purchaser with knowledge of liability to partition—*Purchase by a co-sharer of part of joint property from his co-parcener—Subsequent partition of whole property—Part of property sold allotted to third person—Suit by purchaser—Covenant for title—Damages.* The plaintiff and the defendant (with other persons) were co-sharers in certain land. In 1890 the plaintiff purchased a part of this land from the defendant by a registered sale-deed, and took possession. In the following year, in a partition suit brought by the defendant against his co-sharers (of whom the plaintiff was one), a part of the land bought by the plaintiff was allotted to a third co-sharer, and another part was allotted to the plaintiff himself, and in March, 1896, in execution of the partition decree, the plaintiff was deprived of the part allotted to the third co-sharer. In 1899 the plaintiff filed this suit, praying that the defendant might be ordered to make over to him other land in place of that of which he (the plaintiff) had been deprived, and also claiming damages. The first Court dismissed the suit. On appeal, the District Judge reversed that decree and awarded the plaintiff the defendant's share of the land, together with R62 as damages. *Held*, that the plaintiff was not entitled to damages. There was no title, express or implied, given by the defendant. The interest of the defendant in the land was well known to the plaintiff when he bought. The liability to partition as regards the land could not be removed by the seller (defendant), as was well known to the buyer (plaintiff). SHIVRAM GOVIND DESAI *v.* BAL DAJI DESAI (1902).

I. L. R. 26 Bom. 519

20. ——— Auction sale under power of sale in a mortgage—*Condition of sale depreciatory of mortgagor's title—Solicitor of mortgagee acting for purchaser in preparation of deed of conveyance—Constructive notice—Conduct of*

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mortgagees at 'sale inducing bidders to leave—Knowledge of purchaser of such circumstances—Notice—Proviso in mortgage to protect purchaser—Transfer of Property Act (IV of 1882), s. 69. At an auction sale under a power of sale in a mortgage on conditions one of which both the lower Courts found to be a depreciatory condition wholly unwarranted by the state of the mortgagor's title, the mortgaged property was knocked down to the appellant who the same day signed a written contract to purchase. In a suit by the purchaser against the mortgagor for possession of the property to which suit the mortgagees were made parties : *Held*, that the purchaser was not affected with constructive notice of the true state of the title by reason of the fact that some days after the contract of sale was completed, he instructed the mortgagees' solicitor to act for him in the preparation of the deed of conveyance, and that the solicitor knew that the condition of sale was unjustifiable. The knowledge of the solicitor as to the title was not acquired in the matter for which he was the purchaser's agent and could not be used to upset a transaction of a date before that agency commenced. The sale was therefore not invalid on that ground. The mortgage which was in the English form contained a proviso that upon the exercise of the power of sale "the purchaser, shall not be bound to see or inquire whether any default has been made, or otherwise as to the necessity or expediency of such sale, or that the sale is otherwise improper or irregular, and notwithstanding any such irregularity, such sale shall, as far as regards the safety and protection of the purchaser, be deemed to be within the aforesaid power, and be valid and effectual accordingly, and the remedy of the mortgagor shall be in damages only." It was found by the first Court on the facts that at the sale the mortgagee defendants by themselves or their agents so conducted themselves with reference to the sale that bidders were induced to leave, and that the purchaser was present and had notice of those circumstances. *Held*, that the purchaser was affected with notice of the impropriety of the sale, and bought at his own risk, notwithstanding the proviso in the mortgage and the provisions of s. 69 of the Transfer of Property Act (IV of 1882), and that these circumstances invalidated the sale. CHABILDAS LALLUBHAI *v.* DAYAL MOWJI (1907). **I. L. R. 31 Bom. 566**
L. R. 34 I. A. 179

10. LIEN.

1. ——— Creation of lien—*Title—Notice of charge—English law as to right of bonâ fide purchaser for value without notice.* By contract and deposit of title-deeds *B* charged certain land in favour of *A* as a security in respect of the non-delivery of the title-deeds of an estate bought by *A* from him. After the creation of this charge, the land was transferred by *B* to *C*. The Sudder Court having decided that the contract was not operative as an hypothecation or pledge, even between

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the parties to it, and that *A* had no right of suit against *C*, to whom the land had been transferred: —*Held*, by the Privy Council, reversing that decision, that the agreement created a lien on the land and that no positive law was shown to forbid the giving effect to such agreement. The owner of property subject to a lien or charge can in general convey to another no title higher or more free than his own ; it lies always on a succeeding owner to make out a case to defend such prior charge. The law in India does not enable a purchaser of land to look only to the apparent title in the Collector's books, or the presumed title of the owner in possession ; and it is beyond the province of a Court of justice to give effect to the title of such a purchaser to the extent of defeating a prior lien or charge. Conceding that a purchaser for value *bonâ fide*, and without notice of the charge, would have an equity superior to *A's* right :—*Held*, that a purchase in good faith by *C* had not been proved. If the English doctrine on this subject be adopted, as the rule prescribed by justice, equity, and good conscience, its qualifications and restrictions should not be rejected. VARDEN SETH SAM *v.* LUCKPATHY ROYJEE LALLAH.

Marsh. 461 : 9 Moo. I. A. 303

2. ——— **Purchaser, Right of**—*Produce of land, Sale of—N.-W. P. Rent Act, (XVIII of 1873) s. 56—Hypothecation.* The purchaser of the unstored produce of land in the occupation of a cultivator, with notice of the lien created on such produce by s. 56 of Act XVIII of 1873, takes such produce subject to such lien. S. A No. 1393 of 1870 decided on the 4th February 1871, and *Achul* v. *Gunga Pershad, 2 Agra 73*, followed. KINLOCK COLLECTOR OF ETAWAH. KINLOCK *v.* COURT OF WARDS . . . **I. L. R. 3 All. 433**

3. ——— *Lien by deposit of title-deeds—Subsequent purchase by another.* In 1865 *C* gave *H* a lien on his property by a deposit of title-deeds. In 1867 *B* purchased the same property *bonâ fide* and without notice of *H's* lien. *Held*, that *B* took the property free of the lien. BUNSEE DHUR *v.* HEERA LALL.

1 N. W. Pt. VI, 74 : Ed. 1873, 166

4. ——— *Priority—Inchoate agreement to purchase—Deposit of earnest-money.* The claimant entered into an agreement for the purchase of certain property, and on the execution of the agreement deposited R15,000 as earnest-money of the contract and in part payment of the purchase-money. The claimant was not satisfied at that time with the title-deeds supplied by the vendor, but afterwards entered into fresh negotiations for the purchase upon different terms. The vendor died, and the present claim was filed in a suit to administer his estate. *Held*, that the claimant was entitled to be paid in full the R15,000 in priority to all other creditors, and that his lien was not lost by the failure either of the original contract or the subsequent negotiations. KENNY *v.* ADMINISTRATOR-GENERAL OF BENGAL . . **3 B. L. R. O. C. 75**

VENDOR AND PURCHASER—*contd.*

10. LIEN—*concld.*

5. ——— *Lien, concealment of—Estoppel.* In execution of a money-decree, the decree-holder caused the right, title, and interest of the judgment-debtor in a certain property which had been mortgaged to him by a registered bond to be sold, but without notice of the existence of such lien. He afterwards obtained a decree upon the bond, and sold it to the defendants, who caused the same property to be attached. The purchaser intervened under s. 246, but without success. In a suit by the purchaser to establish his absolute right :—*Held*, that as the defendants' vendor has suppressed the fact of the charge, and thereby induced the plaintiff to purchase as the absolute property of the judgment-debtor, they were now precluded from setting up his lien. DULLAB SIRKAR *v.* KRISHNA KUMAR BAKSHI.

3 B. L. R. A. C. 407 : 12 W. R. 303

6. ——— **Right to enforce lien**—*Sale subject to decree declaring lien on property.* If a decree declares a lien over *A's* property for a certain sum in favour of *B*, and subsequently *A* sells part of this property to B and part to *C*, *B* cannot sue to enforce his lien against *C's* purchase without bringing his own into contribution. RAM LOCHUN SIRCAR *v.* RAM NARAIN.

1 C. L. R. 296

7. ——— **Lien on land created by agreement**—*Sale to stranger without notice—Purchaser, right of.* *D* mortgaged certain land to *S* to secure repayment of a loan, and covenanted that in a certain event *S* might realize the money from the house of *D*. *D* sold this house to *C*, who purchased without notice of the covenant. *Held*, that *C* could not resist the claim of *S* to have the house sold under the covenant. COOLING *v.* SARAVANA.

I. L. R. 12 Mad. 69

11. NOTICE.

1. ——— **Necessity of notice of title**—*Equitable doctrine of secret ownership.* It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances which ought to have put the purchaser on an inquiry which, if prosecuted, would have led to a discovery of the real title. RAMCOOMAR KOONDOO *v.* MCQUEEN.

11 B. L. R. 46 : 18 W. R. 166
L. R. I. A. Sup. Vol. 40

2. ——— **Purchaser without notice**—*Secret ownership—Fraud.* A vendee who purchases for valuable consideration, and without notice of benami, from the ostensible owner of the property held by him under an apparently good title will be protected from subsequent acts of the owner or his heir both of whom were parties to the fraud ; and his purchase will hold good against

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11. NOTICE—*contd.*

any subsequent sale made by them. RENNIE *v.* GUNGANARAIN CHOWDHRY . . **3 W. R. 10**

3. ——— *Equitable relief against forfeiture.* Remarks on the doctrine of equity as to the applicability of the defence of purchase for valuable consideration without notice. The defence does not apply where the Court of Chancery is exercising a jurisdiction concurrent with that of the Courts of the law. Where *A* sold land to *B*, reserving a right to re-purchase by payment of a certain sum at a specified time, and before such time, had arrived *B* re-sold to *C* for valuable consideration without notice, and *A* failed to make the payment and forfeited his right to re-purchase :—*Held*, that he had no title unless relieved against the forfeiture, and that such relief could not be given as against *C*. SAMAKKAUNDAN *v.* PERUMAL CHETTI . . **2 Mad. 14**

4. ——— *Assignment of equitable estate—Notice to holder of legal estate—Hindu law.* In order to complete assignment of an equitable estate in immoveable property, it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate. Nor is there any rule of Hindu law which requires notice to be given to the person in possession whose position may be considered annalogous to the holder of the legal estate in English law. GOVINDRAV *v.* RAVJI . **I. L. R. 12 Bom. 33**

5. ——— *Purchase from joint Hindu family—Presumption. Semble :* That considering the state of Hindu families, a purchaser would be affected with notice by much slighter evidence than a purchaser in other countries. KOYILOTHPUTENPURAYIL MANOKI KORAN NAYAR *v.* PUTHENPURAYIL MANOKI CHANDA NAYAR . . . **3 Mad. 294**

6. ——— *Bonâ fide purchaser—Fraud in vendors.* A *bonâ fide* purchaser should not be deprived of the benefit of an honest purchase, even though, the sale to his vendors was fraudulent if he had no notice of the fraud. GOLAM AHEA *v.* DIGUMBUR SINGH. **W. R. 1864, 225**

7. ——— *Sale of whole interest—Subsequent purchase without notice by another.* The plaintiff purchased from the first defendant who purchased from the person admitted to be the owner in 1856. The resisting defendants claimed under a subsequent sale by the same person. *Held*, reversing the decree of the lower Court, that on the simple principle that after the conveyance to the first defendant the owner of the land had nothing more to convey, the resisting defendants took nothing, and the plaintiff was entitled to recover. VIRABHADRA PILLAI *v.* HARI RAMA PILLAI. **3 Mad. 38**

See (*contra*) CHIDAMBARA NAVINAN *v.* ANNAPPA NAYAKKAN . . . **1 Mad. 62**

8. ——— *Bonâ fide purchaser—Omission to make proper inquiries into title.* In order that a purchaser of immoveable property from a Hindu in the Island of Bombay may be entitled, as against the beneficial owner of such property, to set up the defence of being a *bonâ fide* purchaser without notice, he must show that he has made all proper inquiries into the title and as to the state of the family of his vendor's and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase. SAVAKLAL KARSANDAS *v.* ORA NIZMUDDIN **8 Bom. O. C. 77**

9. ——— *Notice of possession of rent—Notice of tenancy—Purchaser how far affected with notice of lessor's title.* Notice of possession of the rents of property is notice of the tenancy, but does not of itself affect a purchaser with notice of the lessor's title. *Barnhat v. Greenshields, 9 Moo. P. C. 18*, referred to. GUNAMONI NATH *v.* BUSSUNT KUMARI DASI **I. L. R. 16 Calc. 414**

10. ——— **Purchaser, obligation of—** *Joint Hindu family, Purchase from.* When a person has notice that another has or claims an interest in property for which he is dealing, he is bound to inquire what that interest is ; and if he purchases without doing so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest where the notice is given by the person himself who claims an interest in the property, and it is afterwards proved that he had such an interest. *Quære :* Whether any amount of inquiry can discharge the purchaser from liability ? A purchaser, therefore, from one member of a joint Hindu family is affected with notice of the claims of the other members. On the facts :—*Held* (reversing the decision of the Court below), that no sufficient inquiry had been made in this case. GOBIND CHUNDER MOOKERJEE *v.* DOORGAPERSAD BABOO **14 B. L. R. 337 : 22 W. R. 248**

11. ——— **Incumbrance—***Fraud—Equitable mortgage—Purchaser for valuable consideration without notice.* The reason for the rule of equity that a purchaser of property, though for valuable consideration, yet with notice of a prior incumbrancer, purchases subject to such incumbrance, is that such purchaser is acting *malâ fide* in taking away the right of the prior incumbrancer by getting the legal estate, while knowing that a prior purchaser has the right to it. But a purchaser for valuable consideration without notice of the prior right of a third person, is not guilty of or party to a fraud upon the rights of a prior purchaser. The Courts of equity therefore will not interfere with his right to the possession, enjoyment, and disposal of the property ; and though subsequently to his purchase he may become aware of the prior incumbrance, yet he has the right to convey to a subsequent purchaser, who, at the time of such subsequent conveyance, has notice of the prior right of the third person ; and such subsequent purchaser will take the property free from the incumbrance, for neither is he guilty of any

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11. NOTICE—*contd.*

fraud in accepting what his vendor had a right to convey, nor would the *bonâ fide* purchaser without notice be able otherwise freely and completely to dispose of the property which he innocently acquired. On the same principles, any subsequent purchaser, however remote, though having notice must be protected. Where, therefore, the second defendant, having notice of the plaintiff's equitable mortgage, purchased from one who, also with such notice, had purchased from a *bonâ fide* purchaser for value without notice:—*Held*, that the second defendant held the property free from the equitable mortgage. *Carter* v. *Carter*, *3 K. & J. 617*, distinguished. DAYAL JIVRAJ *v.* JAIRAJ RATANSI **I. L. R. 1 Bom. 273**

12. ——— *Bonâ fide transferee for value of mortgaged property—Ignorance of existing incumbrance. Held*, that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that at the time of the purchase he was aware of the mortgage and believed that it had been satisfied, was no proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of an existing incumbrance. SHEO DAYAL MAL *v.* HARI RAM **I. L. R. 7 All. 590**

13. ——— *Purchaser for value—Notice of prior mortgage.* The plaintiff in 1867 obtained a decree against one Ramzan Mohidin for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immoveable property situated in Gujarat on which the debt had been secured under a sankhat. On the attachment of the immoveable property in execution of that decree, the defendant objected under s. 246 of the Civil Procedure Code, and alleged that he had purchased the property in 1865. The attachment having accordingly been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the lower Courts threw out the plaintiff's claim. On special appeal the decrees of the lower Courts were reversed, and the case remanded for the trial of the issue whether the defendant was a *bonâ fide* purchaser for valuable consideration, without notice of the plaintiff's sankhat or lien on the property in dispute at or before the time of his purchase. GRIDHAR RANCHODDAS *v.* HAKAMCHAND REVACHAND **8 Bom. A. C. 75**

14. ——— *Priority—Registration—Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgage.* The plaintiff sued to recover land purchased by him in 1886 from the first defendant, and which was in possession of defendants 2, 3, and 4. The conveyance to the plaintiff was duly registered. The third defendant claimed part of the land under a previous sale to him in 1885 by the first defendant. The conveyance to him being also duly registered. The fourth defendant claimed the rest of the land under a sale to him by the first defendant subsequent to the sale to the plaintiff, of which he had no notice. He relied upon the fact of his having got possession, and he alleged that the purchase-money which he had paid for the land had been applied by the first defendant in paying off a mortgagee who at the date of his purchase was in possession. He claimed, at all events, the repayment of this sum. *Held*, (i) that the plaintiff was not entitled to the lands in the hand of the third defendant, the latter being a prior purchaser with a deed of conveyance duly registered. (ii) That the plaintiff was entitled to the land in the possession of the fourth defendant, who must be taken to have purchased with notice of the plaintiff's prior purchase, inasmuch as the deed of conveyance to the latter was registered. (iii) That, if the fourth defendant's purchase-money was applied to pay off a mortgage which plaintiff would otherwise have had to pay, the plaintiff could not equitably recover the land without paying the fourth defendant so much of the purchase-money as was so applied. NARAYAN LAKSHMAN *v.* BAPU VALAD HAIBATRAV . . **I. L. R. 17 Bom. 741**

15. ——— **Transfer of property subject to trust**—*Purchaser for value—Constructive notice—Tenant in possession as object of charitable trust.* If the purchaser of an estate for value takes with notice, actual or constructive, of a trust, he is bound by such trust to the same interest and in the same manner as the person from whom he purchased. A person purchasing an estate where there is a tenant in possession is bound to inquire into the title of such tenant, and if he neglects to do so he takes subject to such rights as the tenant may have. The equities are the same where there is a person in possession as the object of a charitable trust and under the trust. MANCHARJI SORABJI CHULLA *v.* KONGSEOO . . **6 Bom. O. C. 59**

16. ——— *Sale by landlord subject to rights of tenants—Notice to purchaser of rights—Suit by tenants to enforce rights against purchaser—Limitation.* In 1806 the East India Company granted a village to *A*, subject to the raiyats' customary rights and privileges which were embodied in Regulation I of 1808, but the deed of conveyance was not passed until 1819, and it was then executed to the executors of *A*, who had died in the meantime. This deed made no reference to the rights and privileges of the raiyats. In 1868 the defendant purchased the village from its legal owners. In 1889 plaintiffs sued defendant for themselves and on behalf of the other raiyats of the village to enforce their rights. The defendant pleaded that, as the deed of conveyance of 1819 made no mention of these rights, he was not bound by them. *Held*, that, as at the time of the conveyance of the village to the defendant the lands were in the occupation of the raiyats, the defendants ought to have made inquiry as to their rights. Having failed to do this he was bound

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VENDOR AND PURCHASER—*contd.*

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y the rights of the tenants as much as if they ad been specially mentioned in the conveyance o him. *Mancharji Sorabji* v. *Kongseoo, 6 Bom. H. C. Rep. 59* followed. *Held*, also, that, as there had been no denial of plaintiff's rights until shortly efore the suit, it was not barred by limitation. AHMEDBHOY HABIBBHOY *v.* BALKRISHNA MUKUND
I. L. R. 19 Bom. 391

17. _____ *Notice—Right of purchaser.* *B*, having been sentenced to transportation for life, presented a petition in the Revenue Court, in which stating that he owned a certain zamindari estate, and that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue register and that of *P* recorded in its stead. *P* sold the property for consideration, his vendee purchasing without notice of any trust, and it was subsequently put up for sale in execution of a decree against *P*'s vendee, and was purchased without notice of any trust. *Held*, that the property could not be followed into the hands of the purchaser at the execution-sale. *Durga Prasad* v. *Asa Ram, I. L. R. 1 All. 361*, observed on. HAITRAM *v.* DURGA PRASAD . . I. L. R. 5 All. 603

18. _____ Constructive notice—*Person in possession of subject of sale.* Where there is a person in possession of an estate other than the nominal owner,—*i.e.*, the person in whose name the title-deed is,—a purchaser, although he may be a purchaser for value is bound to inquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession. HAKEEM MEAH *v.* BEEJOY PATNEE
22 W. R. 8

MASSIM MEAH *v.* SHAM DOSS . 22 W. R. 189

19. _____ *Sale in execution of decree—Sale of property on which there is a lien, —Per* KENNEDY, *J.* An execution-purchaser takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser. *Kinderly v. Jervis, 22 Beav. 1*, and *Brewer* v. *Lord Oxford, 6 De G. M. & G. 507*, cited and followed. RAM LOCHUN SIRCAR *v.* RAM NARAIN 1 C. L. R. 296

20. _____ *Doctrine of constructive notice—Secrecy in transaction.* The Court will not apply the doctrine of constructive notice where the party seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser. HORMASJI TEMULJI *v.* MANKUVARBAI
12 Bom. 262

21. _____ *Notice to agent of purchaser.* Notice to a purchaser's agent was held to be constructive notice to his principal, so as to fix the latter with a trust, or a burden relative to the subject of purchase which without notice he would have escaped. SEEDEE NAZEER

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11. NOTICE—*contd.*

ALI KHAN *v.* OJOODHYA RAM KHAN. MUNSOOR ALI KHAN *v.* OJOODHYA RAM KHAN
8 W. R. 399

22. _____ *Liability of land purchased from Hindu devisee for debts of his testator—Onus probandi. Per* PONTIFEX, *J.* The question how far lands purchased from a Hindu devisee are liable in the hands of the purchaser for the testator's debts stands on the same footing as a similar question would under the present English law. The creditors of the ancestor or testator may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (i) that there were debts of the ancestor or testator left unsatisfied, and (ii) also that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser ignorant on either of these points has a safe title, for no duty is cast upon the purchaser from the heir or devisee to inquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money, even when there is an express charge of debts by the testator on the devised estate—at least when the devisee in also executor; and in such a case the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money. For a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice. GREENDER CHUNDER GHOSE *v.* MACKINTOSH.
I. L. R. 4 Calc. 897 : 4 C. L. R. 193

23. _____ *Specific Relief Act (I of 1877), s. 27—Specific performance of a contract, suit for—Whether registration of an ekrarnamah was sufficient notice of the contract.* Mere registration of an ekrarnamah is not sufficient notice of a contract within the meaning of s. 27 of the Specific Relief Act. PREONATH CHATTOPADHYA *v.* ASHUTOSH GHOSE
I. L. R. 27 Calc. 358
4 C. W. N. 490

24. _____ The question whether registration is notice or not is a question of fact, and as each case arises, it should be determined whether the omission to search the register together with other facts amounts to such gross negligence as to attract the consequence which results from notice. *Tomb* v. *Rand, 2 Bro. C. C. 652; Evans* v. *Bicknell, 6 Ves. 174; Martinez* v. *Cooper, 2 Russ. 198; Farrow* v. *Rees, 4 Beav. 18; Hunt* v. *Elmes, 2 DeG. F. & J. 578;* and *Agra Bank* v. *Barry, L. R. 7 H. L. 148*, referred to. MONINDRA CHANDRA NANDY *v.* TROYLOKHONATH BURAT
2 C. W. N. 750

25. _____ *Fraud—Registration Acts, effect of.* When a person is proved to have had a knowledge of certain facts, or to have been in a position the reasonable consequence of

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VENDOR AND PURCHASER—*contd.*

11. NOTICE—*contd.*

which knowledge or position would be that he would have been led to make further inquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. There may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title, but not to the same extent where a Registration Act is in operation, as it would where no Registration Act prevails. *Agra Bank* v. *Barry*, *L. R. 7 H. L. 135*, followed. If an agent authorized to sell property commits a fraud against his principal, the principal is the person who ought to suffer, and not a stranger. DOORGA NARAIN SEN *v.* BANEY MADHAB MOZUMDAR
I. L. R. 7 Calc. 199

26. ——— *Registration—Possession—Registration Acts, effect of—English Registry Acts, Stat. 7 Anne, c. 20, s. 1; 2 & 3 Anne, c. 4, s. 1; 6 Anne, c. 35, s. 1; 8 Geo. 2, c. 6, s. 1—Irish Registry Act, 6 Anne, c. 2, s. 4 (Ireland).* Neither in England nor in Ireland has mere registration been held to amount to notice to subsequent mortgagees or purchasers. In Bombay the Courts have adopted the rule which prevails in America, and have held that registration does amount to notice to all subsequent purchasers of the same property. Possession has been deemed by Hindu and Mahomedan law, as interpreted in the Presidency of Bombay, to amount to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon immoveable property without ascertaining the nature of the claim of him who is in possession does so at his own risk. This is the rule in England also. The Indian Registration Acts prior to the year 1864, like the Middlesex Registry Act (Stat. 7 Anne, c. 20, s. 1); the Yorkshire Registry Acts (Stat. 2 & 3 Anne, c. 4, s. 1; 6 Anne, c. 35, s. 1; 8 Geo. II, c. 6, s. 1), and the Irish Registry Act (Stat. 6 Anne, c. 2, s. 4, Ir.) gave priority of rank to priority of registration. The later Indian Registration Acts—*viz.*, Acts XVI of 1864, XX of 1866, VIII of 1871, and III of 1877—proceed upon a different principle. Under them a registered instrument operates from the time at which it would have commenced to operate if no registration had been required or made, and not from the time of its registration, which rule applies both to compulsory and optional registrable instruments. The earlier decisions, by which registration has in India been permitted to supply the want of possession, may be attributed to this absolute preference so accorded by the earlier Registration Acts to priority of registration. In the reported case under the

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Indian Registration Acts passed in, and subsequently to, 1864, which have not (like the previous enactments) given priority of rank to priority of registration, the Courts have also regarded registration as an equivalent for possession where the instrument earlier in date has been registered, but unaccompanied by possession. The Courts have gone a step further, and have held registration under Act XVI of 1864 and the subsequent Acts to amount to notice, and therefore to atone for the absence of, and to be a sufficient substitute for, possession in the validation of title. The rule, however, that registration is equivalent to possession, cannot be applied to cases where the registration of the instrument earlier in date has been effected subsequently to the execution of the instrument set up against it. LAKSHMAN DAS SARUPCHAND *v.* DASRAT . **I. L. R. 6 Bom. 168**

27. ——— *Priority—Possession—Vendor and purchaser—Purchaser without possession—Subsequent purchaser with possession and without notice of prior purchase.* The plaintiff purchased the land in dispute on the 28th February 1878, and on the same day lodged his deed of purchase with the Registrar together with the registration fee. It was registered on the 29th April 1878. He was not put in possession of the property. The defendant purchased the same property on the 1st April 1878, and on the following day lodged his deed of purchase with the Registrar together with the registration fee. It was registered on the 26th May 1878. His purchase was accompanied with possession. In a suit brought by the plaintiff against the vendor and the subsequent purchaser for possession of the property:—*Held*, that the registration of the plaintiff's deed of purchase, not having been effected until after the execution of the defendant's deed, could not have operated as notice of the plaintiff's deed to the defendant, and therefore could not be equivalent to possession. *Held*, also, that, as the defendant was a purchaser without notice, either actual or constructive, of the plaintiff's prior purchase, and had taken the precaution of obtaining possession, both parties being Hindus and innocent purchasers, the defendant could not be deprived of the benefit of his possession. HASHA *v.* RAGHO
I. L. R. 6 Bom. 165

28. ——— **Priority—** *Notice of prior contract—Specific Relief Act, 1877, s. 27—Oral agreement—Sale to third person in contravention of agreement—Civil Procedure Code, 1882, ss. 261, 262.* Where a *bonâ fide* contract whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under his purchase. CHUNDER KANT ROY *v.* KRISHNA SUNDER ROY
I. L. R. 10 Calc. 710

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See NEMAI CHARAN DHABAL *v.* KOKIL BAG
I. L. R. 6 Calc. 534 : 7 C. L. R. 487

29. ——— *San-mortgage in Gujarat—Priority—Priority as between a purchaser at execution-sale and prior mortgagee by unregistered san-mortgage—Plea of purchase without notice.* The general rule in the Presidency of Bombay is that amongst Hindus possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchases. The main ground of this rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession. It is, however, the established and judicially recognised custom of Gujarat that possession is not necessary in the case of a san-mortgage to validate it as against subsequent mortgagees or purchasers. The necessity of possession being thus dispensed with, it seems to follow that a san-mortgage, in other respects good, is valid as against a subsequent mortgagee or purchaser, whether or not such mortgagee or purchaser has notice of the san-mortgage. To hold that a subsequent mortgagee or purchaser for valuable consideration and without notice of a san-mortgage is entitled to priority over it would be tantamount to depriving the san-mortgagee of the benefit of the custom that possession is unnecessary. *Per* MELVILL, *J.*—Such perfect security is now afforded by registration that there appears to be hardly room for the plea of purchase without notice. Seeing that a purchaser may secure himself against all unregistered mortgages without possession by simply taking possession or registering his conveyance, he is, if he omit to do so, in *pari delicto* with the prior mortgagee, and it is difficult to see how he is entitled to any relief. SOBHAGCHAND GULABCHAND *v.* BHAICHAND . I. L. R. 6 Bom. 193

12. POSSESSION.

1. ——— **Vendor remaining in possession**—*Presumption.* Where a deed was executed conveying a man's entire property to his son, only two years old and reserving to himself one rupee a day for his subsistence, and after execution the conveying party remained in possession :—*Held*, that, in the absence of explanation, no other inference could be drawn than that the deed was merely intended to be used as a blind. SREENATH SINGH CHOWDHRY *v.* HUREEPREA . 10 W. R. 449

2. ——— *Condition of sale—Acceptance of security by vendor—Suit to realize security.* The defendant purchased certain jewels at a sale by auction subject to a condition that, if not paid for in three days, the goods should be sold at the risk of the purchaser. Being unable to pay within the time stipulated, he gave a promissory note for the price, upon an agreement that the vendor should retain the jewels for him, but should not exercise the power of sale within three days. *Held*, that the vendor could sue on the note

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12. POSSESSION—*contd.*

though he retained the jewels in his possession under the lien so created. ALLEN, HAYES & Co. *v.* ANUNDO CHUNDER MUNDLE
Bourke O. C. 156

3. ——— **Absence of change of possession**—*Hindu law—Incomplete sale.* According to Hindu law, a change of possession is necessary to complete a sale of corporeal property, in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was really sold. A purchaser from a Hindu vendor, who buys, corporeal property without possession, does not thus obtain a title which in a suit for specific performance against the vendor, he can enforce against a person actually in possession under a title adverse to the vendor by joining that person as a defendant. KACHU BAYAJI *v.* KACHOBA VITHOBA
10 Bom. 491

4. ——— **Necessity of change of possession**—*Hindu and Mahomedan laws—Priority.* It is a general but not an invariable rule that possession in the grantee or assignee is deemed essential amongst Hindus and Mahomehans to the complete transfer of immoveable property, either by gift, sale, or mortgage. Exceptions to the above rule pointed out. LAKSHMANDAS SARUPCHAND DASRAT . . I. L. R. 6 Bom. 168

SOBHAGCHAND GOLABCHAND *v.* BHAICHAND
I. L. R. 6 Bom. 193

5. ——— *Hindu law—Delivery of possession—Notice.* Delivery of possession of property sold is, under the Hindu law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction. The rule prevails as between competing conveyances both of which have been registered. Authorities and Hindu law texts on the subject reviewed. LALUBHAI SURCHAND *v.* BAI AMRIT
I. L. R. 2 Bom. 299

6. ——— **Sale when vendor is not in possession**—*Hindu law—Necessity of possession—Ejectment.* A Hindu whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage ; but a bill of sale by a Hindu vendor purporting to convey the estate itself, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment. *Prahlad Sen* v. *Budhu Singh, 2 B. L. R. P. C. 111*, and *Bhobosoonduree Dasseah v. Issur Chunder Dutt, 11 B. L. R. 36*, followed. *Bikan Singh* v. *Parbutty Koer, 22 W. R. 99 ; Gungahurry Nundee* v. *Raghubram Nundee, 14 B. L. R. 307 ;* and *Lokenath Ghose* v. *Juggobundhoo Roy. I. L. R. 1 Calc. 297*, referred to. BAI SURAJ *v.* DALPATRAM DAYASHANKAR.
I. L. R. 6 Bom. 380

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7. ——— **Possession, delivery of**—*Hindu law—Sale.* Possession is not essentially necessary by Hindu law to give validity to a transfer by sale of immoveable property. BHUKAN BHAIBAVA *v.* BHAIJI PRAG . **1 Bom. 19**

8. ——— *Title—Hindu law.* Delivery of possession is not necessary to the transfer of ownership among Hindus. *Per* MARKBY, *J.*—As a general rule of law, when a vendee has got a document which in terms professes to make over property, and the document is registered (in case registration is necessary), he becomes at once the owner without actual delivery of possession. GUNGAHURRY NUNDEE *v.* RAGHUBRAM NUNDEE.
14 B. L. R. 307 : 23 W. R. 131

9. ——— *Hindu law—Per curiam :* Delivery of possession is not, under the Hindu law, essential to complete the title of a purchaser for value. NARAIN CHUNDER CHUCKERBUTTY *v.* DATARAM ROY
I L. R. 8 Calc. 597 ; 10 C. L. R. 241
NAGUBAI *v.* MOTIGIR GURU . . **1 Bom. 5**

10. ——— *Hindu law.* Under the Hindu law current in the Madras Presidency, possession is not necessary to complete a sale. VASUDEVA BHALLU *v.* NARASAMMA
I. L. R. 5 Mad. 6

11. ——— **Want of possession**—*Hindu law—Sale before Transfer of Property Act—Possession.* Under the law administered in the Madras Presidency in the case of sales of land between Hindus made before the date of the Transfer of Property Act, 1882, where all has been done that the parties contemplated to complete a sale, the title of the purchaser cannot be defeated in favour of a second purchaser merely by reason that the latter obtained and the former did not obtain possession. RAMASAMI AYYANGAR *v.* MARIMUTTU BHATTAN . . **I. L. R. 6 Mad. 404**

12. ——— *Sale of land by a Hindu—Vendor without possession—Conveyance of right of action.* Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession ; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority ; and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits :—*Held,* that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents the vendor professed, in terms, to convey the property itself. *Held,* further, that the purchaser acquired the same right of action which his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale. VASUDEV HARI *v.* TATIA NARAYAN . . **I. L. R. 6 Bom. 387**

VENDOR AND PURCHASER—*contd.*

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13. ——— *Transfer of property by a person not in possession—Validity such transfer—Hindu law.* The plaintiffs soug to recover possession from the defendants of certa land, claiming under a kararnama executed to the by one *M*. The defendants contended that *M* ha never been in possession of the land. The low Appellate Court held that, as *M* was not in posse sion at the time, when the kararnama was execute the plaintiff's claim was not maintainable. O appeal to the High Court :—*Held,* reversing th decree of the lower Appellate Court, that the ci cumstance of *M's* not having been in possession a the time the kararnama was executed did no prevent the plaintiffs from recovering possessio from the defendants. *Kalidas v. Kanhaya Lal I. L. R. 11 Calc. 121 : L. R. 11 I. A. 219,* referre to and followed. UGARCHAND MANACKCHAND *v* MADAPA SOMANA . . **I. L. R. 9 Bom. 32**

14. ——— *Hindu law—Sal of land.* Though by Hindu law on a sale of lan it is not absolutely necessary that the purchase should be put in possession, it is requisite that th vendor should at the time of sale be in possessio of the property sold. GIRDHAR PARJARAM *v.* DAJ DULABHRAM . . **7 Bom. A. C. 4**

15. ——— *Mahomedan law—Sale when vendor is out of possession.* A sal among Mahomedans, unlike a sale between Hindus is valid as against a third party, even though the vendor was not at the time of the sale in possession of the property sold. ADAMKHAN *v.* ALARAKHI
I. L. R. 6 Bom. 645
See also MOHINUDIN *v.* MANCHERSHAH
I. L. R. 6 Bom. 650

13. PURCHASE OF MORTGAGED PROPERTY.

1. ——— **Bonâ fide purchase without notice of prior charge.** *Per* PEACOCK, *C.J.*, NORMAN and PUNDIT, *JJ.* (BAYLEY and CAMPBELL, *JJ.*, dissenting).—The fact of a purchase of land under a deed of sale being *bonâ fide* and without notice of a prior charge does not pass the land free from the prior charge. MAHESWAR BAX SINGH *v.* BHIKHA CHOWDHRY
B. L. R. Sup. Vol. 403
1 Ind. Jur. N. S. 122 : 5 W. R. 61

2. ——— **Obligation of purchaser**—*Inquiry by intending purchaser.* An intending purchaser of property which has been previously mortgaged, who has no reason to suppose it to be joint family property, or the vendor to be a member of a joint family, and who has inquired of and learnt from the mortgagee that there was no frauds is not bound to make any further inquiry. KYLASH KAMINEE DOSSEE *v.* TARINEE CHURN BOSE
20 W. R. 100

3. ——— **Priority**—*Mortgage—Possession—Registration.* A registered mortgagee, though without possession, is entitled to priority over

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13. PURCHASE OF MORTGAGED PROPERTY—*contd.*

a subsequent purchaser. SUNDAR JAGJIVAN *v.* GOPAL ESHVANT . . . **4 Bom. A. C. 68**

But an unregistered mortgage without possession is not valid against a purchaser with possession. GANPAT BAJASHET *v.* KHANDU CHAUGSHET **4 Bom. A. C. 69**

4. ——— **Mortgage by member of joint Hindu family**—*Surrender of equity of redemption—Purchaser for valuable consideration—Pleading.* A member of a joint Hindu family granted a usufructuary mortgage; he subsequently without the knowledge of the co-partners, released the equity of redemption. On hearing of this, the co-partners contested the validity of the release. *Held*, that the parties claiming from the person to whom the release was made, took, so far as the co-partners were concerned, a title only as mortgagees. RADHANATH DAS *v.* ELLIOT **6 B. L. R. 530**

S. C. RADHANATH DAS *v.* GISBORNE & Co. **15 W. R. P. C. 24 : 14 Moo. I. A. 1**

5. ——— **Purchase by mortgagee**—*Possession—Priority—Registration.* A registered mortgage without possession has priority over a subsequent registered sale and conveyance with possession. By a duly registered deed, *D* mortgaged land to the plaintiff with power of sale. On default made by *D*, the plaintiff brought a suit for a sale of the mortgaged land; but pending the suit, *D* sold the land to the defendant, who registered his conveyance and entered into possession. The plaintiff subsequently obtained a decree, and at the execution-sale became himself the purchaser. In the present suit he sought to recover possession from the defendant. *Held*, that the plaintiff was entitled to recover. His rights as mortgagee included the right of bringing to sale the property as it subsisted at the date of the mortgage. The property having been so brought to sale, the purchaser acquired a right free from any created subsequently to the mortgage and subject to it. SHRINGARPURE *v.* PETHE. **I. L. R. 2 Bom. 662**

6. ——— **Rights of mortgagee**—*Mortgage sale without disclosing—Estoppel.* The three senior members of an undivided Hindu family—the remaining members of which had disappeared—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate. Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided son purchased it, and in 1872 re-sold his right, title, and interest in it to defendant's father, without disclosing the fact of his father's mortgage, but without any active fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser. In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land. In a suit by the plaintiff to establish his right as against all the land included in his mortgage:—*Held*, that the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was stated in the deed of sale to the new purchaser, who, by the facts of its being a sale of a share, was put upon inquiry. The mere want of disclosure by the plaintiff's undivided son of his father's mortgage was not enough to create an estoppel against his father seeking to establish his claim under the mortgage. JOSHI *v.* JOSHI . . . **I. L. R. 2 Bom. 650**

7. ——— *Sale of equity of redemption—right of purchaser—Parties.* By two deeds dated respectively the 22nd February 1868 and 7th September 1872, and duly registered, *A* mortgaged the lands in dispute to *B* for a term of years which expired in 1880. On 10th October 1873, *A* executed a razinama in favour of *B* relinquishing all his right in the said lands, and *B* next day executed a kabuliat to Government for the lands, which thenceforward were entered in *B's* name. Previously to the second mortgage and razinama to *B*,—*viz.*, on 21st March 1870—*A* had, by a duly registered deed, mortgaged the same lands to the plaintiff, who in 1874 brought a suit against *A* upon his mortgage and obtained a decree under which he sold the mortgaged property, and became himself the purchaser thereof. Before and at the time of the institution of this suit, *B* was in possession of the mortgaged land, but was not made a party to the suit. In 1877 *B* sold the land to *C* by a duly registered deed. In a suit brought by the plaintiff against *B* and *C* to recover possession of the land so purchased by him as abovementioned, at the sale in execution of his own decree:—*Held*, that *B's* possession at the date of the plaintiff's suit upon his mortgage was sufficient to put the plaintiff on inquiry, and to constitute legal notice to him that the equity of redemption was at that time vested in *B*, and it was therefore the plaintiff's duty to have made *B* a party to the suit brought by him against *A*, who had then alienated the equity of redemption to *B*; and not having done so, the plaintiff could not rely, in support of his own title, upon a purchase under his own irregularly-obtained decree, and could not therefore stand in a better position as against *B* than if his original suit had been properly constituted,—*i.e.*, he was bound to give *B* an opportunity of redeeming his mortgage. NARU *v.* GULABSING . . . **I. L. R. 4 Bom. 83**

8. ——— **Purchase subject to mortgage**—*Right to redeem—Good title at time of hearing of suit—Certificate of sale.* The property in dispute was mortgaged by its owner to the defendant with possession on the 3rd October 1847. On the 3rd December 1841 *A* obtained a money-decree

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against the son and heirs of the mortgagor. In execution of that decree, the property was sold subject to the mortgage, and purchased by *B* on the 12th August 1864. Before confirmation of the sale, *B*, on the 1st September 1864, sold it to *C*, who, on the 30th March 1877, conveyed it by deed to the plaintiff. On the 27th September 1877 the plaintiff brought a suit for redeeming the property, and at the hearing produced a certificate of sale, dated the 27th October 1877. The certificate was applied for in May 1877, and issued to *C*, reciting the sale to *B*, and the sale by *B* to *C*. The Court of first instance allowed the plaintiff to redeem on payment of a certain sum of money to the defendant. The Assistant Judge, on appeal, reversed the decree of the first Court on the ground that the certificate of sale was not in existence at the date of institution of the suit, and that therefore the plaintiff had then no complete title. On appeal to the High Court :—*Held*, that the plaintiff, having purchased and paid for the equity of redemption, was entitled to redeem, although the certificate of sale was not issued until after the suit had commenced. If a party, whose title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title at the hearing of his cause, he should have a decree for redemption. *Harkisandas Narandas v. Bai Ichha, I. L. R. 4 Bom. 155*, and *Lalbhai Lakhmidas* v. *Naval Mir Kamaludin Husen Khan, 12 Bom. 247*, explained and distinguished. KRISHNAJI RAVJI *v.* GANESH BAPUJI . . . . **I. L. R. 6 Calc. 139**

9. ——— Purchaser of mortgagor's interest—*Priority—Purchaser of value without notice of a prior san-mortgage—Suit by mortgagee against purchaser to establish right to attach property—Right to purchaser to redeem—Parties—Form of decree.* On the 23rd March 1869 a house was mortgaged by its owner, *P*, to *J*, by a san-mortgage. After the death of *P*, his heirs, *D* and *T*, on the 9th July 1869 executed to the plaintiff a san-mortgage of the same house for R62. That mortgage was neither registered nor accompanied with possession. On the 27th July 1869 *D* and *T* sold the house to the defendant. The deed of sale was not registered. A part of the purchase-money was applied to the payment of the first san-mortgage, which was then delivered up to the defendant, with a receipt on it by *J*, who acknowledged to have received from the defendant the amount due on his mortgage. The defendant, however, omitted to take an assignment of that mortgage to himself. The plaintiff sued *D* and *T* on his san-mortgage of the 9th July 1869, and in 1872 obtained a decree for the recovery of the mortgage-debt out of the mortgaged property. The defendant was not made a party to that suit. The plaintiff attached the house in execution of his decree, but the attachment was raised on the application of the defendant under s. 246 of the Civil Procedure Code, Act VIII of 1859. The

plaintiff then sued the defendant to establish his (plaintiff's) right to attach and sell the house under his san-mortgage. The defendant answered that he was a purchaser for value, within notice of the plaintiff's mortgage. The plaintiff's claim was dismissed by the first Court, but allowed by the Appellate Court. On special appeal :—*Held*, that the defendant's plea that he was a purchaser for valuable consideration, and without notice of the plaintiff's san-mortgage, would not avail to defeat that mortgage under the established usage of Gujarat in favour of san-mortgages. *Held*, further, that the defendant, having become entitled by his purchase at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on his mortgage, and was not bound by the decree in that suit, and was entitled to a reasonable time to redeem the house from the plaintiff's mortgage. *Sobhagchand Gulabchand* v. *Bhaichand, I. L. R. 6 Bom. 193*, followed. NARAN PURSHOTAM *v.* DOLATRAM VIRCHAND. **I. L. R. 6 Bom. 538**

10. ——— *Assignment of the equity of redemption by the mortgagor—No notice to mortgagees of such assignment—No change of name in Collector's books—Further advances by mortgagees to original mortgagor on same security—Suit by assignee of equity of redemption to redeem—Liability of assignee to pay off the further advances to mortgagor—Standing by—Allowing original mortgagor's name to remain in Collector's books.* In order to complete an assignment of an equitable estate in immoveable property, it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate. Nor is there any rule of Hindu law which requires notice to be given to the person in possession whose position may be considered analogous to the holder of the legal estate in English law. By a registered mortgage-deed *P* in 1869 mortgaged certain property with possession to the defendants. In 1871 *P* sold his equity of redemption to the plaintiffs, who allowed it to remain in *P's* name on the Collector's register. Subsequently in 1873 the defendants made further advances to *P* on the securtiy of the same mortgaged property. The plaintiffs sued to redeem. The Court of first instance rejected the plaintiffs' claim, being of opinion that their purchase was not proved. On appeal, the District Judge reversed the decree, holding that the sale to the plaintiffs was proved. He held further that the plaintiffs could not redeem without paying off the further advance made by the defendants in 1873, on the ground that the plaintiffs had given no notice of their purchase to the defendants, and had allowed *P's* name to remain on the Collector's register as the ostensible owner. The plaintiffs appealed to the High Court. *Held*, that the plaintiffs' title as assignee of the equity of redemption was complete, although no notice of the assignment had been given to the defendants. But

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although such notice was not necessary to complete, the plaintiffs' title, it was plain, upon general principles of equity, that if the plaintiffs' conduct was such as to amount to a standing by and allowing the defendants to make further advances to *P* under the supposition that he was still the owner of the equity of redemption, such conduct would give the defendants a better equity. If the property was standing in *P's* name in the Collector's books, the allowing it so to remain after the assignment would be sufficient for the purpose. GOVINDRAV *v.* RAVJI **I. L. R. 12 Bom. 33**

11. ——— *Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.* In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgaged premises to him, that part of the purchase-money had been acknowledged as paid, and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered. *Held*, that, though the agreement was not admissible in evidence as creating an interest in land, still it might be used for the purpose of obtaining specific performance, and the plaintiff having purchased the equity of redemption with notice as above was not entitled to redeem. *Per Curiam:* The plaintiff having knowledge of the agreement was put upon enquiry to ascertain whether the tender had been made, and whether there was any objection to his purchase on that ground. ADAKKALAM *v.* THEETHAN . . . **I. L. R. 12 Mad. 505**

14. PURCHASE-MONEY AND OTHER PAYMENTS BY PURCHASER.

1. ——— **Non-payment of purchase-money**—*Tender—Payment into Court—Suit for specific performance.* Plaintiff had entered into a contract with one of the defendants for the purchase of certain immoveable property, and after he made a small advance the contract was written out and registered. The purchaser refusing to pay up the purchase-money unless the vendor paid the costs, or half the costs, or registration, the latter resold the property to a third person. The present suit was to compel the completion of the contract and delivery of the property. *Held*, that the Court was bound to see whether it was or was not the intention that a complete and binding sale should take place, although the purchase-money was not paid. *Held*, also, that in bringing such a suit the plaintiff was bound, if he had not previously tendered the money to the defendant, to pay it into Court. MAHADOO BEGUM *v.* HUBEEBOOL HOSSEIN **15 W. R. 44**

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2. ——— **Advance of purchase-money**—*Lien on purchase—Repayment—Suit for possession.* *B* advanced money to *A* for the purchase of an estate. The estate was purchased by *A*, but it was conveyed to *B*. *Held*, that, before *A* could maintain a suit to obtain possession of the land, he was bound to pay or tender the money advanced by *B*. BHOYRUB CHUNDER SEIN *v.* ANUNDMOYE CHOWDHRAIN . . **Marsh. 494**

3. ——— **Right to refund of purchase-money**—*Failure to give possession—Suit for purchase-money.* A purchaser of property of which possession was contracted to be given, but the vendor is unable to fullfil the contract, is at liberty to sue for repayment of the purchase-money, and is not obliged to sue for possession of the property. MOHUN LAL *v.* BEHAREE LAL **3 N. W. 336**

4. ——— *Bonâ fide purchaser—Refund of purchase-money.* A *bonâ fide* purchaser was held to be entitled to a refund of the purchase-money in a case where some dispute having arisen as to the purchase, the matter was referred to arbitration; and it was *held* that the vendor had no authority to sell. The principle of *caveat emptor* does not apply to such a case. KISHEN MOHUN SHAHA *v.* RAM CHUNDER DEY **3 W. R. 28**

5. ——— *Refusal to perform contract—Omission to repudiate sale—Suit for recovery of purchase-money.* The defendants had sold certain property to the plaintiff. They afterwards refused to effect mutation of names in favour of the plaintiff, on the ground that he had not paid off a certain mortgage on the property, which he had promised in the contract of sale to do. They did not repudiate the sale or the plaintiff's title under it. *Held*, that the refusal was not tantamount to a rescission of the sale, and that a suit for the recovery of the purchase-money would not lie. SIRAJ-OOD-DOWLAH *v.* NOOR AHMUD **5 N. W. 194**

6. ——— *Suit to recover deposit of purchase-money—Obligation to tender conveyance for execution.* In a suit by a purchaser of immoveable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer, the vendor having refused to convey to the purchaser, save by a deed which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice:——*Held*, that the purchaser was not bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit. ESSAJI ADAMJI *v.* BHIMJI PURSHOTAM. **4 Bom. O. C. 125**

7. ——— *Illegal sale—Sale by co-parceners without assent of others.* Where a sale by two co-parceners in favour of another

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VENDOR AND PURCHASER—*contd.*

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was set aside, on the ground that the sale by a co-parcener without the consent of the others was illegal :—*Held*, on the suit of the vendee to recover the purchase-money from the descendants of the vendors, that the purchase-money was like a debt, and payable by the heirs, in proportion to the shares inherited by each. OOMEDEE *v.* CHEDA LALL
2 Agra 264

8. ——— *Refund of purchase-money by heir taking after widow. Held*, that a party succeeding as heir to an estate, the sale of which, by the widow of the person from whom he inherits, has been set aside, is bound to refund the purchase-money paid to the widow for the purpose of discharging liabilities on the estate. ROOSTUM SINGH *v.* ALUM SINGH . **1 Agra 291**

9. ——— *Failure to register—Suit for refund of purchase-money—Set-off.* The plaintiff agreed to purchase land and paid down the purchase-money, taking from the vendor an agreement that if he did not register the conveyance he would return the purchase-money. The plaintiff entered into possession, but the vendor failing to register the conveyance, he sued to recover back his purchase-money. *Held*, that he was entitled to a refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstance of the case, be liable to pay the vendor a reasonable amount for the occupation of the land ; but when no set-off is pleaded, the vendor could only claim such amount by a separate action. COURT OF WARDS *v.* NITTA KALI DEBI
3 B. L. R. A. C. 353 : 12 W. R. 287

See GURU PRASAD ROY *v.* DHANPAT SINGH
5 B. L. R. Ap. 46 : 14 W. R. 20

PRABHURAM HAZRA *v.* ROBINSON
3 B. L. R. Ap. 49 : 11 W. R. 398

10. ——— *Purchaser at revenue sale afterwards set aside—Suit to recover purchase-money— Voluntary payment.* A person who, with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase-money merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be, available for his benefit. RAMTUHUL SINGH *v.* BISSESSUR LAL SAHOO . **15 B. L. R. 208 : 23 W. R. 305**
L. R. 2. I. A. 131

Reversing the decision of the High Court in BISSESSUR LAL SAHOO *v.* RAMTUHUL SINGH.
11 B. L. R. 121 : 19 W. R. 351

11. ——— *Right of vendor to interest claimed in part of purchase-money left unpaid by arrangement—Tender.* By an agreement between vendor and vendee part of the purchase-money was retained by the latter, but not as a mere deposit by the vendor. The money was

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to be retained as security, that the property sold should be cleared of incumbrances and good title made. The vendee was not liable for interest unless he should refuse, or omit, to pay the money so retained when the vendor should have shown readiness to clear off the incumbrancer. Till then the vendee was not bound to pay or to tender to the vendor the money retained. MUHAMMAD SIDDIQ KHAN *v.* MUHAMMAD NASIRULLAH KHAN.
I. L. R. 21 All. 223
L. R. 26 I. A. 45
3 C. W. N. 201

12. ——— *Deposit by purchaser under contract—Contract going off through default of purchaser—Vendor's right to retain deposit. Held*, that where a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. *Ex parte Barrell : In re Parnell, L. R. 10 Ch. Ap. 512*, and *Howe* v. *Smith, L. R. 27 Ch. D. 89*, referred to. BISHAN CHAND *v.* RADHA KISHAN DAS . . . **I. L. R. 19 All. 489**

13. ——— *Right of purchaser to return of deposit—Lien of purchaser for the part of the purchase-money paid by him.* A purchaser of land who has paid part of the purchase-money, by way of deposit but who afterwards unjustifiably repudiates the contract of purchase, or is guilty of any default by reason of which the sale is not carried out, is not entitled to recover the deposit from the vendor. The vendor is not necessarily entitled to retain the deposit merely because under the circumstances the Court refuses to grant specific performance against him. From the moment part of the purchase-money is paid, the purchaser has a lien upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his part of the contract. BALVANTA APPAJI *v.* WHATEKAR BIRA
I. L. R. 23 Bom. 56

14. ——— *Unsuccessful denial of contract by defendant—Dismissal of suit by purchaser for specific performance for non-payment of the balance of the consideration-money within the stipulated period—Right of plaintiff to return of deposit of the part of the consideration-money paid where specific performance is refused —Equity and good conscience—Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887), s. 37.* In a suit for specific performance of a contract, the defendant denied the contract *in toto*. The lower Appellate Court, while finding that there was a contract between the parties, refused to grant specific performance on the ground that the plaintiff failed to pay the balance of the consideration-money on the stipulated day, but made a decree for the refund of the deposit. On appeal by the defendant to the High Court :—*Held*, that, inasmuch as the defendant unsuccessfully denied the contract *in toto* and as there was no repudiation of the contract

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by the plaintiff, he (the plaintiff) was entitled to a refund of the deposit made by him. ALOKESHI DASSI *v.* HARA CHAND DASS

I. L. R. 24 Calc. 897
1 C. W. N. 705

15. ——— *Contract to purchase property in cantonment—Rights of Government in such property—Contract making no mention of Government rights—Knowledge of purchaser—Suit by purchaser for specific performance or return of earnest-money—Earnest-money when repayable—Amendment of plaint so as to claim refund of earnest-money.* On October 12th, 1887, the first defendant executed the following agreement in favour of plaintiff with respect to certain property situated in the Poona Cantonment: "I have agreed to sell to you . . . both my bangalows described above, including the sites and buildings together with the compounds, rooms for servants, stables, outhouses . . . . . and I have this day received from you R5,000 as earnest-money. After the sale-deed in regard to the said bungalows is executed, I will get them transferred to your name in the Brigade-Major's office." On the same day the first defendant received from the plaintiff R5,000 as earnest-money. A notice of the proposed sale was published in the newspapers, upon which the Poona Cantonment wrote to the plaintiff stating that Government possessed certain rights over the property. Plaintiff then demanded that the first defendant should obtain from Government and transfer to him a full and complete title in the property. The defendant refused, and prepared a draft deed transferring the ordinary cantonment tenure, which was a mere occupancy, and sent it to plaintiff. Plaintiff declined to accept it, and brought this suit to compel the first defendant to execute a deed transferring to him a full and complete title for possession of the property, and for rent and damages. Although apparently not arising upon the pleadings, an issue was raised by the parties as to whether by his conduct the plaintiff had forfeited his right to have the earnest-money returned to him. This issue was, however, struck out at the trial by the Subordinate Judge, who also refused to allow the plaint to be amended by inserting a claim for the payment of the earnest-money, on the ground that it would change the character of the suit from being one based on the contract of the 12th October 1887 into a suit based on the fact that there had never been a contract at all between the parties. He dismissed the suit. The plaintiff appealed, and contended that the contract was that the defendant should give an absolute title to the property, and that, as he was unable to carry out this contract, he should return the earnest-money to the plaintiff. *Held* (i) upon the evidence, *per* FARRAN, *C.J.*, and FULTON, JARDINE and RANADE, *JJ.* (CANDY, *J.*, *dissentiente*), that the knowledge that the property in question was held upon cantonment tenure

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was not brought home to the plaintiff, and that the Courrt could not impute such knowledge to him; that the terms of the contract itself were calculated to induce the plaintiff to believe that the defendant was selling not a mere revocable license to occupy the land, but the land itself. The defendant agreed to sell the land, and, having done so, the onus lay upon him to show not only that he intended to sell only cantonment occupancy rights, but also that the plaintiff understood that he was purchasing the same. (ii) That the defendant, being in default and being unable to give the title contracted for, should return the earnest-money to the plaintiff. *Held*, by the Full Bench, that the amendment of the plaint so as to make it include a claim for the refund of the earnest-money ought to have been allowed, although not asked for until a late stage of the case. The right to specific performance of a contract, or, in the alternative, to a return of the earnest-money should be determined in one and the same suit, and the plaintiff failing to obtain a decree for specific performance should not be driven to a separate suit to recover back his deposit if he is entitled to relief in that form. The circumstance that a purchaser is not entitled to specific performance is by no means conclusive against his right to a return of the deposit. If, having regard to the terms of the contract, he is justified in refusing to accept the title, which the vendor is able to give, he is entitled to a refund of the deposit. IBRAHIMBHAI *v.* FLETCHER

I. L. R. 21 Bom. 827

16. ——— **Voluntary payment**—*Payment to prevent sale.* A payment of money to prevent a sale about to be effected in execution of a decree cannot be called a voluntary payment, whether it is made by the judgment-debtor or by a third party claiming the property. OMRITO LALL SIRCAR *v.* RAMDHUN CHAKEE . . .

18 W. R. 503

17. ——— *Payment by purchaser at execution-sale—Purchaser looking to application of money to pay debts on estate.* A purchaser was *held* entitled to recover the amount paid by him on account of previous mortgages, when, in making these payments, he merely acted for the debtor who had borrowed the money from him, and what he did was to see that money so borrowed was properly applied in clearing off the debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognizant. WAJED HOSSEIN *v.* AHMED REZA . . . **17 W. R. 480**

18. ——— *Sale whilst under attachment—Caveat emptor—Fraud.* *T* sold a mouzah, of which he was owner, to *Z*. At the time of sale the mouzah was under attachment in execution of a decree obtained against *T* by *R*. *Z* paid the amount of that decree to prevent the property which she had purchased being sold in execution.

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Z was under no obligation otherwise to pay the amount of the decree. *Held*, that *Z* was entitled to recover against *T* the amount so paid. ZAHURAN *v.* TAYLER . . . . . **2 B. L. R. A. C. 86 : 10 W. R. 380**

19. ——— *Purchase from Hindu widow—Alienation set aside by heir—Suit by purchaser to recover money paid on mortgage.* The plaintiff purchased an estate from a Hindu widow in possession, and after his purchase he paid a debt for which the property sold had been mortgaged by the late husband of his vendor. Subsequently the daughter of the vendor claimed the property as heir of her father, and recovered possession of it from the purchaser by suit. The purchaser then sued the heir for a refund of the amount of the mortgage-debt paid by him. *Held*, that the purchaser was entitled to recover. PORAN MISRA *v.* HARSARAN MISRA . **8 B. L. R. Ap. 55**

15. PURCHASERS, RIGHTS OF.

1. ——— **Right to good title**—*Immoveable property.* A purchaser of immoveable property is entitled to receive, and the vendor is bound to give, a title free from reasonable doubt. PITAMBAR SUNDARJI *v.* CASSIBAI **I. L. R. 11 Bom. 272**

2. ——— **Purchaser from Hindu executor**—*Inquiry by purchaser. Semble :* A purchaser from a Hindu executor is not bound to see to the exact amount of the debts which the testator has directed the executor to pay or even to inquire if any such debts actually existed ; he need not look further than the will itself. ROOPLALL KHETTRY *v.* MOHIMA CHURN ROY **10 B. L. R. 271 note**

3. ——— **Specific performance, right to**—*Sale bonâ fide, but not of final character—Priority over attaching creditor.* A deed of sale, though not strictly of a complete and final character yet, if genuine and duly attested, may be sufficient to bind the property and to give the purchaser the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete title to the property. Such a deed would necessarily prevail over any intermediate attachment of the property for debts due from the original proprietor. LALLA CHOONEELAL NAGINDAS *v.* SAWAECHUND NAMEDAS **5 W. R. P. C. 111**

4. ——— **Validity of sale**—*Sale for valuable consideration—Intention to transfer. Held*, that the mere fact that the sale to the plaintiff was instigated by some discharged mortgagee does not of necessity make void the plaintiff's right as purchaser, if it be found that the vendor to the plaintiff had some right or interest in the property by inheritance, and transferred it for valuable consideration, with the intention that it should take effect as a transfer of his rights as heir. MAHOMED FAIZALI KHAN *v.* GUNGA RAM **1 Agra 112**

5. ——— *Conveyance by mortgagee with power of sale. Absence of confirmation by mortgagor. B & Co.* mortgagees with power to sell sold the mortgaged property to the defendants. No deed was executed until some years afterwards, when the mortgagor was dead. The deed was in the form followed when a mortgagee is the vendor and the mortgagors join in the conveyance ; but the words of conveyance were by the mortgagees alone, and without any confirmation by the mortgager. *Held*, that the purchaser did not by the deed acquire an indefeasible estate. DOUCETT *v.* WISE . . **3 W. R. 157**

6. ——— **Effect of sale**—*Purchase of rights of Mahomedan widow—Failure to take actual possession.* By an order passed under Act XIX of 1841, *A* was declared entitled to take possession of a fourth share of her deceased husband *B's* estate which devolved upon her according to Mahomedan law. *B's* nephew *C* sued to recover this share on the ground that *A* had been divorced and this suit was pending when the present suit was brought by the purchasers of *A's* rights. It being found that *A* never took actual possession of her share under her decree and that *C* was in possession of the whole estate :—*Held*, that *A's* vendees could not be placed in a higher position than their vendor was when *C's* suit was brought against her, and all that they were entitled to was the right to present her in the pending suit. MAHOMED GOWHUR ALI KHAN *v.* AZEEMOODDEEN. MAHOMED GOHUR ALI KHAN *v.* SHURUFUNISSA BEGUM . . **W. R. 1864, 93**

7. ——— **Purchaser of fractional share of estate**—*Right to cultivate land—Rate of rent.* In the absence of any reservation or restriction, the purchaser of a fraction of a share of an estate acquires a right either to cultivate a proportionate share of the lands cultivated by his vendors on the same conditions as to favourable rents as those under which they, as proprietors, cultivated it, or to claim his share of the rents of these lands just as he would from any raiyat of the estate, but without any other sum as mesne profits. CHYTUN SINGH *v.* KAYESSUR KOONWUR **5 W. R. 117**

8. ——— **Specification of land sold**—*—Purchase of specified land with description of amount.* A party who buys a specified talukh with the additional description that that talukh contains so much land, gets the whole land which the specification of his vendor covers and which was intended to be sold, although it may be more than was contained in the description. AMEEROONISSA KHATOON *v.* KUMOLA KANT ROY **14 W. R. 117**

9. ——— *Omission to specify area sold—Misdescription—Compensation for smaller*

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VENDOR AND PURCHASER—*contd.*

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area. The specification in a deed of sale of land of the area of the land sold *primâ facie* implies that the area was regarded as material by the parties, and, unless it is clear that the precise area was not regarded as material, proportional compensation will be awarded to the purchaser of land the real area of which is found to fall short of the area specified in the deed of sale. SULEMAN VADU *v.* TRIKAMJI VELJI . . **12 Bom. 10**

10. ——— *Specification in sale certificate—Sale by purchaser at execution sale who has obtained possession under a certificate of sale more extensive than the decree.* Where a decree-holder obtains an order for the sale of his judgment-debtor's interest in certain property, and becoming purchaser at the sale which follows, receives a sale-certificate going beyond the order, he cannot avail himself of anything in the certificate beyond the order. If, however, he obtains possession according to the certificate, and sells to a *bonâ fide* purchaser without notice of the difference between the certificate and the order of sale, the latter has a good title. GOWREE KUMUL BHUTTACHARJEE *v.* SURUTH CHUNDER DOSS BISWAS . . . . **22 W. R. 408**

11. ——— **Non-registration, effect of** *—Proof of actual contract of sale and possession on payment of purchase-money. Held,* that it does not follow from the non-registration within the time fixed or registration of a deed which was executed before the Registration Act came into operation that the purchaser has acquired nothing by his purchase, or that the vendor is to resume possession of the property, if it be shown that there was a contract of sale, and that in pursuance of that contract the purchaser paid the money and obtained possession. RAM SURUN DASS *v.* RAM CHUND . . . **1 Agra 283**

12. ——— **Non-registration**—*Sale of decree—Decree on mortgage-bond—Registration—Right to execute decree.* A decree-holder purported to sell to *A*, by private sale, all his right, title, and interest in a mortgage-decree obtained by him in a suit on a mortgage-bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale, *A* conveyed all his right, title, and interest in the same decree to *B*. *Held*, that the right to execute the decree as a mortgage-decree did not pass to *B*. KOOB LALL CHOWDHRY *v.* NITTYA NUND SINGH . **I. L. R. 9 Calc. 839**

s. c. HUB LAL CHOWDHRY *v.* NITTYANUND SINGH . . . . **12 C. L. R. 393**

13. ——— **Assignment of indigo factory**—*Right to rent and to indigo manufactured.* Where a plaintiff sued on the alleged purchase by him of the rights and interests of certain parties in an indigo concern, it was *held* that the rents collected and appropriated, and the indigo manufactured and taken away before the date of the purchase, could not form part of the stores and

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assets sold to the plaintiff, unless the sale of the assets, etc., had been as from some date prior to the date of purchase. CHUNDER COOMAR ROY *v.* WILKINS . . . **10 W. R. 311**

14. ——— *Assignee, liability of, to creditor of the factory—Creditor, rights of—Dena powna, contract to take over.* *A*, by deed duly registered, assigned his interest in an indigo factory to *B*. In the deed was a recital that it had been agreed that *B* should take over the *dena powna* account of the factory as the same stood on the 30th September 1856. *C* sued *A* and *B* jointly to recover rent in respect of lands which had been occupied under a lease from *C* with and for the use of the factory, and which was due on the 30th September 1856. *B* raised the defence that the debt was not included in a schedule, dated 30th September 1856, signed by *A*, and which he alleged had been furnished to him by *A* as containing a list of the liabilities of the factory. *Held*, that if a trader or other person in this country assigns his stock in trade and effects to another, and such other person enters into a contract with the first to pay the debts of the concern, or a certain portion of such debts, the contract and assignment create a liability to the creditors in whose favour such contract is made, which they may enforce by suit; nor is the creditor bound to elect between his original debtor and the assignee, but he may join them as co-defendants in the same suit. *Held*, also, *per* PEACOCK, *C.J.*, and NORMAN and KEMP, *JJ.* (STEER and SETON-KARR, *JJ.*, *dissenting*), the case must be remanded to the lower Court to try what was the agreement between *A* and *B* as to *B* taking over the *dena powna* account of the factory, whether the schedule was an essential part of the contract or not. KEARNES *v.* BHAWANI CHARAN MITTER
B. L. R. Sup. Vol. 54 : W. R. F. B. 167

PHOOL KOONWAR *v.* CHARDON
6 W. R., Act X, 89

15. ——— *Liability of assignee to creditor—Bond given by former proprietor.* When the holder of a bond from the former proprietor of an indigo factory had made no demand on it for twelve years, nor apprised the assignee of its existence as a debt due by the factory, it was *held* that he could not come down on the present proprietors, but must look to the obligor of the bond personally for satisfaction. HUBEEBUNISSA *v.* COX **W. R. 1864, 266**

16. ——— **Right of purchaser to trees standing on land**—*Sale of land—Transfer of Property Act (IV of 1882), s. 8.* Trees being attached to the earth are included in the legal incidents of the land and pass to the transferee under a deed of sale of the land in which they stand, unless a different intention is expressed or necessarily implied. No such intention is necessarily implied because the trees are mortgaged prior to the sale and no mention of the mortgage is

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made in the sale-deed. PANDURANG SHESHAGIR *v.* BHIMRAV KESHAV HIRALIKAR **I. L. R. 22 Bom. 610**

17. ——— **Right to rescind sale**—*Concealment of defect in title—Transfer of Property Act (IV of 1882), s. 55—Meaning of words "material defect in property."* The expression "material defect in property" in s. 55 of the Transfer of property Act (IV of 1882) includes a defect in the title to an estate. Such a defect, if concealed by the vendor, gives the purchaser the right to rescind the sale. ESSA SULIEMAN *v.* DAYABHAI PARMANANDAS . . . **I. L. R. 20 Bom. 522**

16. SETTING ASIDE SALES.

1. ——— **Ground for setting aside sale**—*Stipulation to have mutation of names—Refusal of revenue authorities to register name of purchaser.* Where a person purchased certain lands under a deed of sale, in which the vendor undertook to apply to the revenue authorities for the transfer of the lands to the name of the vendee, and did so, and both persons clearly understood what they were doing:—*Held*, that the refusal of the revenue authorities to enter the purchaser's name in the mutation register did not constitute a ground for cancelling the sale and recovering the purchase-money. GEDEERA KOLITA *v.* DEBENDRO NARAIN KONWAR . **25 W. R. 352**

2. ——— *Bonâ fide purchase from guardians of Hindu widow acting collusively.* The plaintiff was entitled, in right of her deceased husband, to the equity of redemption in a mortgaged estate. Her guardian, in collusion with the mortgagee, instituted a foreclosure suit, in which she was represented by the guardian, who submitted to a decree; and under that decree the property was sold, and the defendant became the purchaser. *Held*, that, the defendant being a *bonâ fide* purchaser, the sale was not liable to be set aside. KHETERMONEE DASSEE *v.* KISHENMOHUN MITTER . . . . **Marsh. 313**

S. C. KISHEN MOHUN MITTER *v.* KHETERMONEE DASSEE . . . . **2 Hay 196**

17. TITLE.

1. ——— **Implied contract for good title**—*Suit by vendor for specific performance—Specific Relief Act (1 of 1877), s. 25—Title derived through will of former owner—Necessity for probate—Succession Act (X of 1865), s. 187—Notice to complete contract—Rescission of contract—Clause in contract requiring vendor to hand over deeds relating to property, construction of.* By an agreement in writing, dated the 20th June 1888, the defendant purchased a certain house in Bombay from the plaintiff for R6,000. By this agreement the plaintiff agreed that at the time of the execution of the deed of sale he would hand over

VENDOR AND PURCHASER—*contd.*

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to the defendant "the title-deeds, vouchers and bills, whatever there may be relating to the said property." The agreement further provided: "The time in respect of this bargain is fixed at two months; within this time we are duly to have everything cleared." In September 1890 the plaintiff filed this suit for specific performance of the agreement. The defendant pleaded: 1st, that the plaintiff had failed to show a good title to the property; 2nd, that the plaintiff had not handed over to him all the deeds and documents relating to the property; 3rd, that he (the defendant) had lawfully rescinded the contract on the 30th August 1890. It appeared that in 1880 the then owner of the property, one *N*, had mortgaged it to one *V*, and that on the 26th October 1882 both mortgagor and mortgagee had joined in conveying it to one *C*. This deed, however, had not been registered and was consequently inadmissible in evidence, and was rejected at the hearing. *C* had, however, after his purchase taken possession of the property and had held it until 1885. On the 6th May 1885 he sold it to *H*. Prior to his sale, *viz.*, in 1883, *N* had died, and left a will appointing *V* his executor, but no probate of this will had ever been obtained. In the sale-deed, however, to *H* of the 6th May 1885 *V* had joined as a conveying party both in his own right and as executor of *N*. On the 29th September 1887 *H* sold the property to the plaintiff, who, as already mentioned, sold it to the defendant on the 20th June 1888. *Held*, that the plaintiff was bound to give the defendant a good title, or, in other words, a title free from reasonable doubt (s. 25 of the Specific Relief Act I of 1877). In the absence of a contract providing that the plaintiff should show only such title as he could give, or of some other special contract as to title, the general law laid down in s. 25 of the Specific Relief Act I of 1877 must prevail. *Held*, further, dismissing the suit, that the title shown by the plaintiff was not a good title. The conveyance of the 26th October 1882 by the mortgagor and mortgagee to *C* not being registered was not admissible, and could not be referred to, so that it was necessary to regard *N* as still the mortgagor and *V* as still the mortgagee of the property, while *C* had, in some capacity or other, the actual possession. That being the state of things, *N* died in 1883, and it was alleged that he had left a will appointing *V* his executor, but no probate of that will had been obtained. The equity of redemption remaining in *N* as mortgagor passed on his death to his executor *V*. On the 6th May 1885 *C* sold the property to *H* (the plaintiff's predecessor), and *V* joined in the deed of conveyance as executor of *N*. But it was necessary for the plaintiff to show not merely that he joined as executor, but that he had right, as executor, to convey to *H* the equity of redemption which had come to him from *N*. By s. 187 of the Succession Act (X of 1865) the only mode of doing this was by the probate

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VENDOR AND PURCHASER—*contd.*

17. TITLE—*concld.*

of *N's* will, and this had not been obtained. If an heir of *N* sued for redemption, the defendant would have no defence, unless he could prove that he had acquired the equity of redemption. For this purpose, by s. 187 of the Succession Act (X of 1865) probate would be necessary, and he would consequently be obliged to prove the will and pay duty upon all the property included in it. That would be a liability which the Court could not impose upon a defendant resisting specific performance of a contract like the one made by the plaintiff. Where a vendee ascertained that the title of property sold to him was derived through the will of a former owner which had not been proved. *Quære:* Whether a notice given by him (the vendee) to the vendor to produce the will and give satisfactory proof, its being the last will of the said owner within four days, was a reasonable notice so as to entitle the vendee afterwards to rescind the contract. A contract of sale provided as follows for the handing of the title-deeds of the property to the purchasers: "And at the time of the execution of the deed of sale you" (*i.e.*, the vendor) "are duly to give us, the purchasers, the title-deeds, vouchers, and bills whatever there may be relating to the said property." *Held*, that this clause meant that whatever documents of title were necessary under the terms of the contract, or under the general law, should be handed over by the vendor to the vendee at the execution of the deed of sale. MAHOMED MITHA *v.* MUSAJI ESAJI **I. L. R. 15 Bom. 657**

18. VENDOR, RIGHTS AND LIABILITIES OF.

1. ——— **Unpaid vendor**—*Refusal to deliver under payment—Right after delivery.* A party selling land may refuse to give delivery until the consideration is paid; but having given delivery he has no right to retake possession and pay himself the purchase-money out of the usufruct. PREM SOONDAREE DOSSIA *v.* GRISH CHUNDER BHUTTACHARJEE . . . **10 W. R. 194**

2. ——— *Failure to pay whole of consideration-money.* When a vendor of land is not paid a portion of the consideration-money, he cannot wholly disaffirm the contract but he can establish his lien on the land as an unpaid vendor. MOHSUM ALLY *v.* BALASOO KOER . . . . . **2 Hay 576**

3. ——— *Vendor's lien for unpaid purchase-money.* In a suit claiming possession of land purchased by the plaintiff from the defendant, the Munsif threw out the claim for want of consideration; but the District Judge found that the plaintiff was entitled to have the land, and that the defendant might sue for the purchase-money. *Held*, that the equitable doctrine of the vendor's lien for unpaid purchase-money applied to the case, but as the District Judge had not decided whether the defendant had succeeded in proving that the purchase-money had not been paid, the suit should be remanded for a finding by him on that issue. YELLAPPA BIN BISAPPA *v.* MANTAPPA BIN BASAPPA **3 Bom. A. C. 102**

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18. VENDOR, RIGHTS AND LIABILITIES OF—*contd.*

4. ——— *Contract to sell land—Rescission—Re-sale by registered deed.* *A* sued to recover certian land which he claimed under a registered deed of sale executed by the owner. Prior to the date of this sale to *A*, *M* had been put in possession of the land under an agreement to purchase the land for R300. The sale-deed to *M* had not been executed because only R200 of the purchase-money had been paid to the owner. *Held*, that *A* could not recover, as it was not open to his vendor to rescind the contract with *M*. MOIDIN *v.* AVARAN **I. L. R. 11 Mad. 263**

5. ——— *Failure to pay portion of purchase-money.* The vendees of certain land, a portion of which only was in their possession by virtue of the sale, the rest being in the possession of mortgagees, sued for a declaration of their right to such land, and to have a sale of a portion of such land, made after it had been sold to them, set aside. *Held*, that, inasmuch as the sale to them had taken effect, they were entitled, notwithstanding the whole of the purchase-money might not have been paid, to a decree as claimed, and the vendors, if they had any claim in respect of the purchase-money, should be left to seek their remedy. KESRI *v.* GANGA PRASAD **I. L. R. 4 All. 168**

6. ——— *Stoppage in transitu—Lien of unpaid vendors—Agents for purchase of goods—Insolvency—Right of carriers.* A firm at Cawnpore sent an agent to Sarun, plaintiff's residence, to effect purchases in cotton, and the plaintiff, at the instance of the person so deputed, made purchases and supplied funds, both for purchase and for their carriage and insurance, the agent doing nothing but consenting to the arrangements and giving hundies on his employer's correspondents in payment. The goods were despatched and insured, but before reaching their destination the firm became insolvent, and the plaintiff proceeded to take possession of them, but was prevented on account of the goods being previously attached by the defendant, a judgment-creditor. It was *held* on plaintiff's suit that the plaintiff was an unpaid vendor, and had a lien on the goods for the price, and might detain the goods till he received or was satisfied about the payment for the said goods, a completed contract for the sale of the goods notwithstanding. An unpaid vendor, in case of the vendees' insolvency, may stop the goods sold *in transitu* Agents for the purchase of goods have a lien on the goods when purchased for the moneys paid and liabilities incurred by them in respect to such purchase, and are not bound to deliver the goods

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VENDOR AND PURCHASER—*contd.*

18. VENDOR, RIGHTS AND LIABILITIES OF—*contd.*

until they are reimbursed or secured for such advances and liabilities, and an agent in this character is in the position of an unpaid vendor. Where the vendor is not otherwise paid than by having received the insolvent's acceptance, he may, in the event of the purchaser's insolvency, stop the goods, though he may have negotiated the bills, and they are still outstanding and not yet at maturity. Whilst the goods sold remain in the hands of the carrier employed to convey them to their original destination, as between buyer and seller, no case of constructive possession arises, unless when the carrier enters expressly into some new agreement, distinct from the original contract for carriage. So also the mere acts of making or sampling the goods, or giving notice to the carrier to hold the goods for the buyer, though done with intention to take possession, do not establish a constructive possession, or affect the right to stop *in transitu*. Where the right of stoppage *in transitu* vests in the consignor, it cannot be defeated by the claims of other creditors of the consignee, the unpaid vendor having an elder and preferential lien. BHOLANATH *v.* BAIJ NATH . . . . . **2 Agra 11**

7. ——— *Stoppage in transitu—Railway receipts—Effect of endorsing railway receipts — Title of endorsee of such receipts —Contract Act (IX of 1872), s. 103.* The firm of *C D* carried on business in Bombay. *A*, the agent of the firm, bought from the first defendant *H* at Bijapur a quantity of wheat which at *A's* request was on the 28th and 29th May 1889 consigned by *H* to the firm of *C D* at Bombay, on the understanding that the consignees were not to have the wheat until they had paid the hundis drawn in respect of it. The wheat was sent to Bombay on the 28th and 29th May 1889, in three consignments, *viz.*, of 56, 104, and 181 bags respectively, and two hundis for R1,000 and R1,500 respectively payable at sight were drawn by *A* in Bijapur on the firm of *C D* in Bombay, and were given by him to *H*, who thereupon handed to *A* the three railway receipts for the three consignments which had been despatched by the first defendant's agent at Bijapur railway station. The hundis were sent by *H* to his agent in Bombay for collection. The hundi for R1,000 arrived in Bombay on the 31st May, and was paid on the 1st June. The hundi for R1,500 arrived in Bombay on the 1st June, and was dishonoured on the 2nd June by the firm of *C D*, which afterwards stopped payment and became insolvent. The railway receipts given by *H* to *A* at Bijapur were in the following form : " Received from *H* the undermentioned goods, 181 bags of wheat. This receipt must be produced by the consignee, or the goods will not be delivered ; if he does not himself attend he must endorse a request for delivery to the person to whom he wishes it made. If the consignment, or this railway receipt, is sold one or more times, the endorsement must be a distinct order to deliver

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18. VENDOR, RIGHTS AND LIABILITIES OF—*contd.*

to a certain person or firm, and this order must be on a one-anna stamp. If more than one order appear on the face thereof, each order must bear a stamp. I (we) hereby certify that I (we) am (are) aware that the Southern Mahratta Railway has received the abovementioned goods subject to the conditions noted on the back, and that I (we) agree that it should receive them subject to these conditions. (Sendor's signature.)" On obtaining these railway receipts, *A* sent them at once to the firm of *C D* in Bombay, and on the 31st May 1889 they were endorsed by *C*, a member of the firm, to the second defendant *V* to secure an advance of R2,000. The endorsement was as follows : " Signature of *C D*. I have sold the delivery, as *per* this receipt, to *V*. The handwriting of *C*." Two consignments (*viz.*, 56 bags and 104 bags) and part of the third (*viz.*, 73 bags out of 181) had arrived in Bombay by the 2nd June in bags bearing *C D's* marks. On that day *V* applied to the Railway Company for delivery, and paid full freight on all three consignments. He was allowed to remove the 55 bags and the 104 bags. After having done this, he loaded his carts with the 73 bags, which had then arrived, out of the consignment of 181 bags without any objection on the part of the Railway Company, but he was not allowed to take them out of the station yard, and the 73 bags were consequently unloaded, and together with the balance of the consignment of 181 bags, which subsequently arrived, were retained by the Railway Company. The reason given by the Company's servants for the detention was the receipt of a telegram sent by *H* from Bijapur, on hearing of the dishonour of the hundi for R1,500, directing that the 181 bags should not be delivered. At the trial the Judge found that this telegram had probably been received before all of the 73 bags had been loaded into the carts. *Held*, (i) that there was no such delivery of the 181 bags to *C D's* agent at Bijapur as to deprive *H* of his right of stoppage *in transitu*. (ii) That there was such a delivery of the 73 bags at the railway station to *V* as to determine *H's* right of stoppage *in transitu*. It was to be assumed that *H's* telegram did not arrive in time to prevent the bags being placed, with the consent of the Railway Company, on *V's* carts, for it was not until the carts had been loaded that the Company's servants interfered to prevent their leaving the station yard. Before that time the freight for the 73 bags had been paid by *V* and the railway receipt had been given up to the Company duly signed by *V's* servant. Everything had been done on the part of the Company to divest themselves of their lien as carriers ; for the mere fact that the carts were still standing in the goods compound of the railway station after the bags had been placed on them could not affect the question, there being no suggestion that the matter as between the Company and *V* had not been completely settled. (iii) That the railway receipts were not instruments of title within the meaning

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of s. 103 of the Indian Contract Act (IX of 1872), and that by endorsing and handing them over, the firm of *C D* did not assign them to *V* within the meaning of the said section. GREAT INDIAN PENINSULA RAILWAY CO. *v.* HANMANDAS RAMKISON . . . . **I. L. R. 14 Bom. 57**

8. ——— *Sale of immoveable property—Non-payment of purchase-money—Vendor's remedy.* A vendor of immoveable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession because the purchase-money is not paid. His remedy is to sue for the sum due, and he has a lien on the property for the amount. TRIMALRAV RAGHAVENDRA *v.* MUNICIPAL COMMISSIONERS OF HUBLI **I. L. R. 3 Bom. 172**

9. ——— *Non-payment of purchase-money—Suit for possession by vendee who has not paid the purchase-money—Remedy of vendor.* The plaintiffs owned land on which the defendant, with the plaintiffs' leave, built a house. Disputes arose between plaintiffs and defendant, and in February 1893 the defendant obtained an order from the Mamlatdar in a possessory suit against the plaintiffs directing the plaintiffs to give up possession of the property to him. In August 1893 an agreement was made between them, in pursuance of which the defendant executed a rent-note to the plaintiffs promising to give up the property to the plaintiffs at the end of four months on payment by the plaintiffs of R100. On the 25th November 1896 the plaintiffs brought this suit for possession, alleging that the defendant refused to give up the property. The District Judge dismissed the suit, finding that the plaintiffs had not paid the R100, and holding that the defendant was therefore justified in putting an end to the contract contained in the rent-note. *Held* (reversing the decree), that the evidence showed the transaction to be a sale of the property by the defendant to the plaintiff for R100, possession being given to the plaintiff under the lease for four months; that the sale was a completed transaction, although the R100 had not been paid, and that the only remedy of the defendant was to sue for the amount. SAGAJI *v.* NAMDEV . . **I. L. R. 23 Bom. 525**

10. ——— *Purchase-money, Suit by vendor to recover — Non-registration of bonds given for purchase-money of land.* The defendants purchased land from the plaintiff, and gave bonds for the purchase-money. These bonds were not registered, and were therefore not admissible in evidence. *Held*, that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money. Unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it falls under Art. 132, Sch. II, of the Limitation Act. VIRCHAND LALCHAND *v.* KUMAJI **I. L. R. 18 Bom. 48**

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18. VENDOR, RIGHTS AND LIABILITIES OF—*contd.*

11. ——— *Transfer of Property Act (IV of 1882), s. 55—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract — Right to recover unpaid purchase-money—Lien.* On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for R16,000, that he had paid R1,000 as an advance and taken possession, that he would pay the balance with interest at the rate of R1 per cent. per mensem within fifteen days, and obtain a sale-deed from the said Begum." The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase-money; he also executed certain repairs to the house, and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that, if the sale be not completed in the following month, the interest on the balance of the purchase-money should cease; but no evidence was given as to any appropriation of the purchase-money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase-money with interest at 12 per cent. *Held*, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase-money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount. GHOUSIAH BEGUM *v.* RUSTUMJAH **I. L. R. 13 Mad. 158**

12. ——— *Lien—Creditor of vendor, right of, to lien—Mortgage.* Although an unpaid vendor holds a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right. HARI RAM *v.* DENAPUT SINGH **I. L. R. 9 Calc. 167: 11 C. L. R. 339**

13. ——— **Conditions of sale**—*Sale by Government—Auction-sale of confiscated property—Ground for setting aside sale.* Where it was made a distinct condition of sale that the property should be sold to the highest bidder without any restriction of the purchaser being a rebel or not:—*Held*, that the Government may, like any other seller, impose any condition it pleases in reference to the property which it offers for sale, prior to sale, but is not at liberty subsequently to the sale to disaffirm or annul it on a ground not only novel but directly at

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VENDOR AND PURCHASER—*contd.*

18. VENDOR, RIGHTS AND LIABILITIES OF—*contd.*

variance with the terms on which it offered the property for sale. SEVA LALL *v.* MAHOMED
2 Agra 160

14. ——— Vendor keeping vendee out of possession—*Suit for partition—Trustee—Mesne profits.* Where, in a suit for partition, it appeared that the vendor of the portion sued for had kept the vendee out of possession, the vendor, though liable for mesne profits, was not in the position of trustee of the rents for the party kept out of possession. NILKAMAL LAHURI *v.* GUNOMANI DEBI . .
7 B. L. R. P. C. 113 : 15 W. R. P. C. 38

15. ——— Unpaid purchase-money—*—Lien for unpaid purchase-money.* Where the consideration for a sale was the immediate payment of a portion of the purchase-money and an undertaking by the purchaser as to the residue, and a part payment was made and an undertaking given in the form agreed upon :—*Held*, that the property passed, at law and in equity, to the purchaser when the conveyance and agreement were executed, and that there was no lien for the unpaid purchase-money as against the property sold. *Held*, also that, when the vendor actually receives the consideration for which he stipulates, there is no lien. *In re Brentwood Brick and Coal Co., L. R. 4 Ch. D. 562 ; Jersey* v. *Briton Ferry Floating Dock Co., L. R. 7 Eq. 409, 413 ; Winter* v. *Lord Anson, 3 Russ., 488 ; 1 S. & S. 434 ; In re Albert Life Assurance Company, L. R. 11 Eq. 164 ; Dixon* v. *Gayfere 1 De G. & J. 655 ; Parrot* v. *Sweetland, 3 My. & K. 655 ;* and *Clarke* v. *Royle, 3 Sim. 499*, referred to. WEBB *v.* MACPHERSON (1901) . . . . . **6 C. W. N. 150**

16. ——— *Transfer of Property Act, s. 55, sub-s. (4)—Vendor's statutory charge in respect of unpaid purchase-money—Effect of contract to defer payment—Certificate of appeal—Act XIV of 1882, ss. 595 (c) and 600.* Under s. 55, sub-s. (4), of the Transfer of Property Act, a vendor has a statutory charge upon the whole of property sold, in the hands both of the purchaser and of those claiming under him, for the whole of the unpaid balance of purchase-money, unless there be a clear contract to the contrary between the parties. This charge is different in its origin and nature from the vendor's lien as created by Courts of Equity. It is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, or by any contract, covenant or agreement, with respect to the purchase-money, which is not inconsistent with the continuance of the charge. So *held*, in regard to immoveable property at Darjeeling. A certificate of appeal given pursuant to ss. 595 (*c*) and 600 of the Civil Procedure Code, that the case is a fit one for appeal, is valid. *Rajah Tasadduq Rasul Khan* v. *Manik Chand, L. R., 30 I. A. 35*, distinguished. WEBB *v.* MACPHERSON (1903) . . **L. R. 30 I. A. 238**

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18. VENDOR, RIGHTS AND LIABILITIES OF—*contd.*

17. ——— *Vendor's lien for unpaid purchase-money—Transfer of Property Act (IV of 1882), s. 55, sub-s. 4, cl. (b)—" Contract to the contrary "—Sale in consideration of a particular covenant—Waiver—Charge on property sold, abandonment of—Appeal to Privy Council—Certificate of appeal, form of—" Substantial question of law "—Civil Procedure Code (Act XIV of 1882), ss. 596, 600.* The charge, which a vendor obtains under s. 55 of the Transfer of Property Act (IV of 1882) is different in its origin and nature from the vendor's lien given by the English Courts of equity to an unpaid vendor. The Indian Act gives a statutory charge upon the estate to an unpaid vendor, unless it be excluded by contract, and such a charge stands in quite a different position from a vendor's lien under the English law. Such a charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor by any contract, covenant or agreement with respect to the purchase-money, which is not inconsistent with the continuance of the charge. *Semble :* The English cases as to a a vendor's lien for unpaid purchase-money, though useful for the purpose of illustration, are not authoritative in the interpretation of the law on the subject, as laid down in s. 55 of the Transfer of Property Act. A conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money, which the purchaser covenants to pay. In this case the High Court had held on the authority of the English cases that the purchase was one in consideration of a particular covenant, and that consequently no charge on the property arose : but, *held*, by the Judicial Committee, that the conveyance was made in consideration of a sum of money part of which was paid down and the payment of the balance of which was deferred, and that there was therefore no contract excluding the operation of the charge. *Held*, also, on the evidence, that there had been no waiver or abandonment of the charge by the vendor. The certificate of the High Court that " the case was a fit one for appeal to His Majesty in Council " was held to be correct in form, and not subject to the objection that it did not state that a substantial question of law was involved in the case. *Tassaduq Rasul Khan v. Kashi Ram, I. L. R. 25 All. 109 : L. R. 30 I. A. 35*, distinguished. WEBB *v.* MACPHERSON (1904) . . . . **I. L. R. 31 Calc. 57**
s.c. 8 C. W. N. 41

18. ——— *Contract Act (IX of 1872), s. 73—Contract to sell immoveable property—Damages for breach of such contract.* The rule in *Flureau* v. *Thornhill, 2 W. Bl. 1078*, is not law in this country. S. 73 of the Contract Act imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract. In cases of breach of contract for sale of immove-

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18. VENDOR, RIGHTS AND LIABILITIES OF—*concld.*

able property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. *Pitamber Sundarji v. Cassibai, I. L. R. 11 Bom. 272,* distinguished. RANCHHOD *v.* MANMOHANDAS (1907)

I. L. R. 32 Bom. 165

19. ——— *Sale—Purchase-money partly paid — Right of vendor's decree-holders to bring the property to sale in execution as his judgment-debtor's property.* Where on a sale part of the sale consideration remains unpaid, the vendor has a lien on the property sold for the unpaid purchase-money. But this does not entitle any decree-holder of the vendor to bring the property to sale in execution of his decree as property of his judgment-debtor. He may attach the unpaid portion of the purchase-money which is due to his judgment-debtor and enforce his lien on the property but he cannot cause the property purchased by a third party to be sold for the recovery of the unpaid purchase-money to which he, as decree-holder, is not entitled. MOTI LAL *v.* BHAGWAN DAS (1909)

I. L. R. 31 All. 443

19. MISCELLANEOUS CASES.

1. ——— **Deed of sale, proof of**—*Suit for possession under deed of sale—Delivery of deed of sale.* In a suit for possession of land on the ground of title under a kobala, it is not enough for the plaintiff to prove the writing and signature of the kobala; he must also prove that it was delivered as a complete instrument. OMED ALI *v.* NIDHEERAM . . . . **22 W. R. 367**

2. ——— **Fictitious sale**—*Mortgage—Suit by purchaser for confirmation of possession—Issues.* Where a sale by *A* to the plaintiff had taken place shortly before a mortgage of the same property by *A* to the defendant, the defendant is entitled to have raised, in a suit brought for confirmation of possession and to declare the sale valid, an issue whether the sale was *bonâ fide* and for consideration, and whether possession passed under it to the plaintiff. The proper issue is not whether the deed of sale was genuine or not. GARBHU BHAGAT *v.* RUNGLAL SING

7 B. L. R. Ap. 33

3. ——— **Owner standing by and seeing property sold**—*Right to have sale set aside.* The rule that one who, knowing his own title, stands by and encourages a purchase of property as another's will not be allowed to dispute the validity of the sale, implies a wilful misleading of the purchaser by some breach of duty on the owner's part. In this case there was nothing more than mere quiescence. BASWANTAPA SHIDAPA *v.* RANU . . . . **I. L. R. 9 Bom. 86**

VENDOR AND PURCHASER—*contd.*

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4. ——— **Purchaser from husband**—*—Acquisecence of wife—Suit to set aside purchase as being wife's property.* Where a husband was alleged to have given a share in some property to his wife, and the husband subsequently sold the whole property to another party, and put the said party in possession, without any objection from the wife, who for years behaved as though she had no interest in the property other than that arising from her husband's possession of it in his own right. *Held,* that a person afterwards claiming to have purchased the wife's share, and seeking to be put in possession, could not displace the *bonâ fide* purchaser from the husband, for a person in the position of the wife in this case, who chooses to stand by for years not asserting her rights, but allowing another to deal with her property as his own, has no equity to come into Court and eject any one who has purchased in ignorance of her title. SOOJAT MAHOMED *v.* MAHOMED TORAB **25 W. R. 281**

5. ——— **Grant of estate when having bad title**—*Vendor afterwards obtaining good title — Specific Relief Act (1 of 1877), s. 18. A,* holding a certain mehal as a ghatwal, mortgaged it to *B* by way of a zuri-peshgi lease for twenty-one years. Shortly after the granting of the lease, the zamindar got a decree against *A,* by which *A's* ghatwali right was extinguished. In execution of that decree, the zamindar ousted and took khas possession of the mehal. Some years afterwards, the zamindar granted to *A* a perpetual mokurari lease of the same mehal. *Held,* in a suit against *A* instituted by the assignee of *B's* rights in the zur-i-peshgi, that under *s.* 18, Act I of 1877, *A* must, out of his present estate in the mehal, make good the zuri-peshgi. LOOT NARAIN SINGH *v.* SHOWKEE LALL . . **2 C. L. R. 382**

6. ——— **Separate agreement by purchaser**—*Subsequent exercise of pre-emption—Co-sharers.* Where a vendor in selling his property got the vendee to execute another deed in his favour for certain bighas of land for his maintenance and subsequently, on the completion of the bargain, a co-sharer took that property by right of pre-emption: *Held,* that the agreement, being in fact a part of the consideration for sale and *bonâ fide,* was binding on the pre-emptor, who could not claim to have the bargain made with him on more favourable terms than those offered by the stranger and accepted by the vendor, the fact that he was no party personally to the agreement not withstanding. KHAIT SINGH *v.* HEERA DASS

1 Agra 75

7. ——— ——— **Decree in favour of vendor**—*Sale set side—Possession—Purchaser in possession after decree and pending appeal — Accident — Loss by fire — Liability for damage.* The plaintiff and the second defendant *A* were brothers, and worked a cotton press in partnership. In August 1884 *A* sold the press for R35,000 to *V* (the first defendant), who paid *A* R5,000 earnest-

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money and was put into possession. The plaintiff then brought a suit (No. 327 of 1884) against *A* praying for a dissolution of the partnership. *V* was also a party defendant to that suit. The plaintiff alleged that R35,000 was much too low a price for the press, and he objected to the sale. He prayed that *V* might be restrained from continuing in possession of the press and working it, and that a receiver might be appointed to take possession of it until further orders. On the 21st April 1885, on a motion, the Court refused to grant an injunction and receiver, but ordered *V* to pay R30,000 (*i.e.*, the balance of the purchase-money) to the solicitors of the parties of investment until the hearing of the suit, and directed that, if that sum was not paid by the 21st May 1885, a receiver should be appointed to take possession of the press. The suit (*i.e.*, No. 327 of 1884) was heard on the 15th February 1887, when it was held by the Court that the sale by *A* to *V* was without authority; that the defendant *V* took nothing under it, and that the plaintiff was entitled to have it set aside. Certain matters still remained to be decided, but on the 28th February 1887 the decree in the suit was made, giving effect to the findings already arrived at on the 15th February. The decree by consent directed various accounts to be taken, and, among others, an account of the profits realised by the working of the press by the defendant *V* since his possession thereof, credit being given to him for all sums expended by him in the repairs, maintenance, and working of the said press and for the management thereof by him. The decree further ordered that the defendant *V* should be repaid the R30,000 which he had paid under the order of the 21st April 1885, and directed "that on such payment the said defendant *V* do forthwith give over possession of the press to the plaintiff and the defendant *A*." The defendant *V* at once gave notice of his intention to appeal. There was some delay in drawing up the decree. The minutes were spoken to on the 31st March 1887; the decree was sealed on the 13th April 1887. Meantime, on the 6th April 1887, and while the defendant *V* was still in possession, a fire broke out in the press, and much damage was done. Subsequently to the sealing of the decree as above stated, the press in its damaged condition was handed over to the plaintiff's firm by *V*, who also desisted from prosecuting his appeal, the injury to the press having made it contrary to his interest to appeal. In May 1887 the plaintiff filed the present suit, claiming to recover R50,000 from the defendant *V* as the value of the press, or such further sum as might be necessary to rebuild and restore it. He alleged that the fire was caused by the working of the press, and contended that the working of the press by the defendant *V* after the decree of the 28th February was an act of trespass by him, and that therefore, independently of the question whether the fire was caused by the negligence of *V* and his servants, the said *V* was liable for

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the loss occasioned by the fire. *Held*, that, independently of negligence, the defendant *V* was not liable to the plaintiff for the loss occasioned by the fire. Down to the decree of the 28th February 1887 the defendant in keeping possession of the press and working it was, no doubt, a trespasser, but subsequently to that decree he remained in possession and worked the press with the consent of the plaintiff. The maxim *volenti non fit injuria* applied to the circumstances of the case. *Held*, also, that, no negligence having been proved against the defendant, the suit must be dismissed. JAMSETJI BURJORJI BAHADURJI *v.* EBRAHIM VYDINA . . . I. L. R. 13 Bom. 183

8. ——— Right of pre-emption—*Option of getting estate re-transferred — Mortgage.* In July 1870 *R*, the owner of a share of a village, executed in favour of *M* an instrument whereby he transferred by sale the share to *M* absolutely. In November 1870 *M* agreed to re-transfer the share to *R*, if *R* desired, at any time within thirteen years, to re-purchase it, on payment of the sum which *M* had paid for it. During the term mentioned in the agreement of November 1870, *R* not having taken advantage of the agreement, *M* sued, as owner of the share, to enforce the right of pre-emption in respect of the sale of another share of the village. *Held*, that *M* having become, under the transfer of July 1870, the out-and-out proprietor of the share, until *R* availed himself of option given him by the agreement of November 1870, the full estate of an owner carrying with it the right of pre-emption, vested in *M*, and it was competent for him to enforce such right by suit. *Ramsaran Lal* v. *Amrita Kuar*, *I. L. R. 3 All. 369*, distinguished. BHAJAN *v.* MUSHTAK AHMED . . I. L. R. 5 All. 324

9. ——— *Condition against alienation.* The co-sharers of a certain estate sold it to *R*. On the same day as the vendors executed the conveyance of such estate to *R* the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term, on repayment of the purchase-money or a proportionate share thereof, and in such case the sale would be considered cancelled: provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property, and not otherwise. The heir of one of the vendors sold his share of such estate to *A*, and *A* sued *R* to redeem such share. *Held*, by the Full Bench (STUART, *C.J.*; doubting), that the nature of the transaction between *R* and his vendors must be determined by looking at both the conveyance and the agreement, and both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption, and the proviso in the agreement was inequitable and incapable of enforcement against them or their representatives in title. *Held*, also, by PEARSON, *J.*, that the

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agreement was not of the nature of a personal contract enforceable only by the original vendors, and not by their representatives; that, assuming that a transfer of the property was prohibited by the agreement, *R* could not, as implied by the Full Bench ruling in *Dookhchore Rai* v. *Hidayut-oollah, Agra, F. B., Ed. 1874, 5*, treat as a mullity the sale which had been made to *A*, and *A's* right to redeem could not be reasonably denied and resisted; and that a transfer was not positively, but only implicitly, prohibited by the agreement *R* merely declaring that he would not recognize the transferees as having acquired the equity of redemption or cancel his own sale-deed, and such a declaration was beyond his competence and had no legal effect. RAM SARAN LAL *v.* AMRITA KUAR **I. L. R. 3 All. 369**

10. ——— *Specific Relief Act (I of 1877), s. 18 (a)—Transfer of property Act (IV of 1882), s. 43.* A member of an undivided Hindu family consisting of himself, his adoptive son, and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of, the land, it appeared that the sale was not justified by any circumstances of family necessity; and an objection that was taken to the adoption was overruled and the adoption held to be valid. During the pendency of the suit the undivided uncle died, having made a gift of his property to his daughter-in-law, which gift was held to be invalid. *Held*, that, under s. 16 (a) of the Specific Relief Act, together with s. 43 of the Transfer of Property Act, the plaintiff was entitled to a moiety of the land sold to him. VIRAYYA *v.* HANUMANTA **I. L. R. 14 Mad. 459**

11. ——— **Sale of zamindari share and appurtenances**—*Indigo factory not appurtenant.* On the sale of a share in zamindari property, buildings such as indigo factories, will not ordinarily pass to the vendee along with the zamindari share sold, unless there is distinct evidence of the user of such buildings as part and parcel of, or as appurtenant to, the zamindari. *Abu Hasan* v. *Ramzan Ali, I. L. R. 4 All. 381; Bankey Lal* v. *Damodar Das, All. Weekly Notes (1900) 31;* and *Salig Ram* v. *Debi Parshad, 7 N.-W. P. 38*, referred to. DURGA SINGH *v.* BISHESHAR DAYAL (1898) **I. L. R. 24 All. 218**

12. ——— **Stipulation as to payment of interest**—*Sale or mortgage—Agreement to re-convey the property sold, on payment of purchase-money with interest.* Where property is sold, and on the same date the purchaser executes an agreement promising to re-convey the land to the vendor if the latter repays the amount of the purchase-money with interest at a certain rate within the period of three year:—*Held*, that the stipulation as to the payment of interest is not conclusive to show that the transaction is not an absolute sale but a mortgage. *Bhagwan Sahai* v. *Bhagwan Din, I. L. R. 12 All. 387; Ali Ahmad* v. *Rahamtullah, I. L. R. 14 All. 195;* and *Bai Motivahu* v. *Mannu Bai, I. L. R. 21. Bom. 709*, distinguished. MODHU SUDAN DAS *v.* RHIDOY MONI BAISTABI (1901) . . **6 C. W. N. 192**

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19. MISCELLANEOUS CASES—*concld.*

13. ——— **Champerty and maintenance**—*Suit by person out of possession, but entitled to possession—Hindu Law—Deed of sale of share in taluk in consideration of funds for suit to recover it—Public policy—Evidence of adoption.* In order to provide funds to prosecute his claim to the Birwa Mehnon taluk a deed of sale, in favour of the respondent, of a moiety of the taluk was in 1888 executed, whilst out of possession by a person, who (if the adoption as successor to the Mankapur Raj of the head of a senior branch of the family in 1681 were proved) was entitled to succeed to the taluk as being the son of the collateral, who was the nearest heir when the succession opened out in 1879 on the death of the daughter of the original talukdar, whose husband, the appellant, then obtained possession. The taluk was one in lists 1 and 2 under Act I of 1869 and devolved on a single heir, though not descending by the rules of lineal primogeniture. The respondent as co-plaintiff with his vendor brought a suit against the appellant to recover possession of the taluk. The vendor entered into a compromise and withdrew from the suit, which was prosecuted by the respondent alone. The validity of the deed of sale was impeached by the appellant on the ground that it was champertous and contrary to public policy, it being contended that the suit was therefore not maintain-sale. *Held*, by the Judicial Committee (affirming the decision of the Court of the Judicial Commissioners of Oudh), that the transaction was a present transfer by the vendor of a moiety of his interest, in the taluk giving a good title to the respondent, on which it was competent to him to sue. The vendor could not have prosecuted his claim to the estate without assistance; there was nothing extortionate or unreasonable in the terms of the bargain, no gambling in litigation, and nothing contrary to public policy. *Held*, also, with regard to the adoption, that notwithstanding it took place so long ago that it was impossible to prove that all requisite ceremonies were duly and regularly performed, and although no change of *gotra* occurred, evidence in favour of the adoption preponderated: a body of strong and persistent tradition preserved in the *wajib-ul-arz* of the Mankapur Raj and recorded in the Oudh Gazetteer and Gonda Settlement Report was in favour of it; it had been supported by the appellant in former litigation, and no claim to the Birwa Mehnon taluk had ever been set up by any member of the Mankapur family, with which the adoption had been made. The decision of the Judicial Commissioner's Court upholding the adoption was therefore affirmed. ACHAL RAM *v.* KAZIM HUSAIN KHAN (1905) . **I. L. R. 27 All. 271**
s.c 9 C. W. N. 477

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VERBAL CONTRACT.

See LIMITATION ACT, 1877, SCH. II, ART. 75 **I. L. R. 3 Calc. 619**

VERDICT OF JURY.

Col.

1. GENERAL CASES . . . 12897

2. POWER TO INTERFERE WITH VERDICTS 12902

See ACQUITTAL. **I. L. R. 22 Calc. 377**

See APPEAL IN CRIMINAL CASES—PRACTICE AND PROCEDURE. **I. L. R. 21 Calc. 955**

See CRIMINAL PROCEEDINGS. **I. L. R. 20 Mad. 445**

See EVIDENCE—CRIMINAL CASES — CONSIDERATION OF, AND MODE OF DEALING WITH, EVIDENCE. **I. L. R. 13 Mad. 426**

See JOINDER OF CHARGES. **5 C. W. N. 866** **11 C. W. N. 715**

See MAGISTRATE, JURISDICTION OF — POWERS OF MAGISTRATES. **I. L. R. 9 All. 420**

See REFERENCE TO HIGH COURT—CRIMINAL CASES . **7 C. W. N. 345**

See REVISION—CRIMINAL CASES—VERDICT OF JURY, AND MISDIRECTION.

——— not unreasonable on the face of the charge—

See REFERENCE TO HIGH COURT. **I. L. R. 36 Calc. 629**

——— of acquittal—

See REFERENCE TO HIGH COURT — CRIMINAL CASES . **7 C. W. N. 135**

1. GENERAL CASES.

1. ——— Verdict of majority—*Want of independent opinion.* The law requires a juryman to exercise his own understanding on the case submitted to him, and to decide on evidence and not to follow blindly the opinion of his fellows. Where one out of three (in a jury of five) depends on the inspection and inquiries of the other two the verdict of the three is not that of a legal majority. PETAMBUR JUGI *v.* NASARUDDY **25 W. R. Cr. 4**

2. ——— Ground for refusing to accept verdict—*Verdict based on voluntary confessions.* Wherever trial by jury exists, the verdict of the jury must be accepted, unless it is manifestly and certainly wrong. A verdict based on voluntary confessions is just as good as a verdict based on the testimony of credible witnesses. It is the province of a jury to decide as to the credibility of witnesses. QUEEN *v.* WUZIR MUNDUL **25 W. R. Cr. 25**

VERDICT OF JURY—*contd.*

1. GENERAL CASES—*contd.*

3. ——— Unanimous verdict—*Further consideration of case by jury—Dissent by Judge from unanimous verdict—Procedure.* It is only in a case where the jury are not unanimous that a Court may require them to retire for further consideration. Where a verdict is unanimous, it must be received by the Judge, unless contrary to law. Where a Judge dissents from the unanimous finding of a jury given in accordance with the law, the only procedure open to him to follow is that laid down in the fifth clause of s. 263 of the Code of Criminal Procedure. GOVERNMENT OF BENGAL *v.* MAHADDI . **I. L. R. 5 Calc. 871**

S. C. EMPRESS *v.* MAHUDDI **6 C. L. R. 349**

4. ——— Dissent from verdict—*Criminal Procedure Code, 1872, s. 263, cl. 4.* The "dissent" referred to in the fourth clause of s. 263 of the Criminal Procedure Code (Act X of 1872) must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court. EMPRESS *v.* BHAWANI . **I. L. R. 2 Bom. 525**

5. ——— *Reference to High Court — Statement by Judge of offence committed—Criminal Procedure Code, 1872, ss. 263, 464.* It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, 1872, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed. EMPRESS *v.* SAHAE RAE **I. L. R. 3 Calc. 623 : 2 C. L. R. 304**

6. ——— Questioning jury as to their verdict—*Questions to member of jury as to reasons for verdict.* A Judge ought not to put questions to any of the jury as to his reason for the verdict he has given. QUEEN *v.* MEAJAN SHEIKH . . . **20 W. R. Cr. 50**

7. ——— *Questions as to grounds for verdict — Power of Sessions Judge. Per* GARTH, *C.J.*, and PRINSEP, *J.* (MARKBY, *J. contra*). The rule laid down in *Queen v. Wuzir Mandal, 25 W. R. Cr. 25*, goes too far. PRINSEP *J.* (MARKBY, *J., contra*).—The law does not prevent a Sessions Judge from asking a jury regarding the grounds for their verdict, and such a course is desirable in the ends of justice. See *Queen* v. *Sustiram Mandal, 21 W. R. Cr. 1.* EMPRESS *v.* MUKHUN KUMAR . . . **1 C. L. R. 275**

8. ——— *Ambiguity in verdict—Criminal Procedure Code, 1872, s. 263.* Under s. 263 of the Code of Criminal Procedure, 1872, a Court was authorized to ask the jury such questions as were necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question. *In the matter of* DHUNUM KAZEE. EMPRESS *v.* DHUNUM KAZEE **I. L. R. 9 Calc. 53 : 11 C. L. R. 169**

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VERDICT OF JURY—*contd.*

1. GENERAL CASES—*contd.*

9. ——— *Criminal Procedure Code, 1882, s. 303.* Although s. 303 of the Criminal Procedure Code empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as to ask the jury what is the exact majority, and what is the opinion of the majority, he ought to receive that verdict with hesitation, and if he differs from it he should proceed as directed by s. 307. HURRY CHURN CHUCKERBUTTY *v.* EMPRESS
I. L. R. 10 Calc. 140 : 13 C. L. R. 358

10. ——— *Criminal Procedure Code, 1872, s. 263.* In a case in which the accused was tried on charges of murder, culpable homicide, and causing grievous hurt, the jury acquitted him of murder, but convicted him on the other counts. This verdict was recorded by the Sessions Judge, who then, in accordance with s. 263, Criminal Procedure Code, 1872, questioned the jury as to the grounds for their verdict, and the jury eventually intimated their willingness to convict of murder. The Sessions Judge differed from the first verdict of the jury, but as he had recorded that verdict, he doubted whether he could accept the second verdict, and referred the case to the High Court under s. 263. *Held*, that s. 263 did not apply to such a case as this. There could be no verdict delivered, and no verdict finally recorded, until the last of the questions put by the Judge to the jury was answered ; and as it appeared from the answers of the jury that their findings of facts disclosed that the verdict ought to have been one of guilty on the charge of murder, the Judge should have entered the verdict of the jury as one of guilty of murder. The case was accordingly returned to the Judge to enable him to do that, and to pass such sentence as the law directed. It is only when it is necessary in order to ascertain what the verdict of a jury really is, that a Judge is justified under s. 263 in putting questions to the jury. QUEEN *v.* SUSTIRAM MANDAL . . **21 W. R. Cr. 1**

11. ——— *Special verdict—Question put by Judge to jury after special verdict—Penal Code, s. 330.* The prisoners were tried under s. 330 of the Penal Code (for voluntarily causing hurt to a girl, and under s. 348 (for wrongfully confining her). Circumstances of aggravation were alleged, as lifting up and using a sword, of lowering the girl into a well, and of pricking her with thorns. The jury in their verdict stated that they disbelieved these allegations and also the charge of illegal confinement, but that they believed that some slaps had been given. The Judge then asked the jury whether they convicted on either, and, if so, which head of charge. They answered that they believed the prisoners had beaten the girl, and they convicted them under s. 330. *Held*, that the question put by the Judge to the jury was a proper one, and not one of law. The conviction upheld. Such a case is not governed by the rules of English law as to special verdicts. QUEEN *v.* HARI PROSAD GANGOOLY
8 B. L. R. 557 : 14 W. R. Cr. 59

12. ——— **Special verdict**—*Criminal Procedure Code, 1882, ss. 298 and 302—Duty of Sessions Judge.* The accused was tried for rape. The jury, after considering their verdict, announced through their foreman that the accused "did the act with consent." The Sessions Judge thereupon, without requiring them to reconsider their verdict or giving them any fresh directions, asked them whether they found the accused guilty or not guilty. The jury again retired and brought in a verdict of guilty, upon which the Sessions Judge sentenced the prisoner to three years' rigorous imprisonment. *Held*, reversing the conviction and sentence, that the first verdict of the jury being a special verdict, and there being no real ambiguity about it, the Sessions Judge was bound, under s. 302 of the Code of Criminal Precedure (Act X of 1882) to recover the verdict and apply the law thereto. *Held*, also, that the second verdict could not be sustained, as there was nothing to show that the Sessions Judge gave the jury any fresh directions or explained to them that a finding that the woman had consented was tantamount to an acquittal. QUEEN EMPRESS *v.* MADHABRAO . . **I. L. R. 19 Bom. 735**

13. ——— *Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Criminal Procedure Code, 1882, s. 238.* The accused was tried for murder. The first verdict of the jury was "guilty of murder under grave and sudden provocation." The Sessions Judge told the jury that it was their duty, after considering the question of provocation to return a simple verdict of guilty or not guilty. The jury therefore brought in a second verdict of "not guilty." The Judge, considering this verdict to be perverse, referred the case to the High Court under s. 307 of the Code of Criminal Procedure (Act X of 1882). *Held*, that the direction given to the jury after the first verdict was wrong, as the case fell under s. 238 of the Criminal Precedure Code (Act X of 1882). Although the charge was only one of murder, the jury had a right to bring in a verdict of culpable homicide, if there was grave and sudden provocation so as to deprive the prisoner of the power of self-control. *Held*, also, that the jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, or findings on matters of fact to which the Judge applies the law. *Held*, also, that the first verdict was a verdict

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VERDICT OF JURY—*contd.*

1. GENERAL CASES—*contd.*

of murder, as the jury did not find that the provocation had destroyed the power of self-control. It is not a necessary consequence of anger, or other emotion that the power of self-control should be lost. Except where unsoundness of mind or real fear of instant death is proved, the pressure of temptation is no excuse for breaking the law. QUEEN-EMPRESS *v.* DEVJI GOVINDJI
I. L. R. 20 Bom. 215

14. ——— Form of verdict—*Culpable homicide—Murder—Illegal finding.* The finding of a jury that, although the accused killed the deceased, the crime was not murder because the accused had no object of killing him, is not a legal finding, and does not amount to a conviction of culpable homicide not amounting to murder. QUEEN *v.* UCKOOR GHOSE . 1 W. R. Cr. 50

15. ——— *Penal Code ss. 322 and 335—Verdict of guilty under section not in charge—Grievous hurt with provocation.* Where a prisoner was charged under the Penal Code, ss. 304, 325, and 323, and the jury brought in a verdict of guilty under s. 335 :—*Held*, that he was not acquitted of grievous hurt, but found guilty of the offence described in s. 322 with the extenuating circumstance which would confine the punishment within the limits specified in s. 335. QUEEN *v.* LUKHINARAIN AGOORI.
23 W. R. Cr. 61

16. ——— *Offence proved, though not independently charged—Code of Criminal Procedure (Act X of 1872), s. 457—Penal Code (Act XLV of 1860), ss. 149, 325.* The accused were charged under s. 149, coupled with s. 325, of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt under s. 325. *Held*, that such verdict was, under s. 457 of the Code of Criminal Procedure, legally sustainable, although that offence did not form the subject of a separate charge. S. 457 enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. GOVERNMENT OF BENGAL *v.* MAHADDI . I. L. R. 5 Calc. 871
s. c. EMPRESS *v.* MAHUDDI 6 C. L. R. 349

17. ——— Objections to verdict—*Ground for thinking verdict erroneous.* Where a party objects to the verdict of a jury, he ought to give the Magistrate reasonable *primâ facie* ground for the opinion either that the jury did not in fact apply a judicial discretion to the case, or that the verdict was such as the jury could not have arrived at by a proper exercise of their discretion upon the materials before them. BINDABUN CHUNDER DUTT *v.* DWARKA NATH SEN
23 W. R. Cr. 15

18. ——— Ambiguous verdict—*Criminal Procedure Code (Act V of 1898), ss. 303, 307—*

VERDICT OF JURY—*contd.*

1. GENERAL CASES—*concld.*

Jury—Verdict, ambiguous ; Judge's duty to ascertain meaning of—Questioning the jury. When an ambiguous verdict is delivered by the jury, it is the duty of the Judge to ask them such questions as are necessary, to ascertain what the jury really means by such verdict. The provisions of s. 303, Criminal Procedure Code, empower him to do so. KING-EMPEROR *v.* CHIDGHAN GOSSAIN (1902)
7 C. W. N. 135

19. ——— Evidence not taken—*Verdict of jury given without taking evidence, if legal.* A verdict given on mere local inspection, and without taking evidence, by a jury appointed under s. 138, Criminal Procedure Code, is illegal. *Kailash Chunder Sen* v. *Ram Lall Mittra, I. L. R. 26 Calc. 869*, followed. ADHORE CHANDRA DEY *v.* AMBIKA CHURN ROY (1902) 6 C. W. N. 886

2. POWER TO INTERFERE WITH VERDICTS.

1. ——— General principle regulating interference—*English law—Position of Judge in India—Criminal Procedure Code, 1872, s. 263.* The Code of Criminal Procedure, s. 263, casts upon the High Court the duty both of Judge and jury ; but, notwithstanding the difference, which clothes it with greater powers and responsibilities than the superior Courts in England, it will, as far as may be guided by the principle of English law, that the verdict of a jury will not be set aside unless it be perverse and patently wrong, or may have been induced by an error of the Judge. In a proper case, however, the High Court will rectify the verdict of a jury. REG. *v.* KHANDERAV BAJIRAV
I. L. R. 1 Bom. 10

2. ——— *English law—Acquittal by jury — Disagreement by Judge—Criminal Procedure Code (Act X of 1872), s. 263.* Notwithstanding the large discretionary power vested in the High Court under s. 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England, *viz.*, that the Court will not set aside the verdict of a jury unless it be perverse and patently wrong or may have been induced by the error of the Judge ; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. *In the matter of* DHUNUM KAZEE. EMPRESS *v.* DHUNUM KAZEE
I. L. R. 9 Calc. 53 : 11 C. L. R. 169

3. ——— *Exercise of powers of High Court—Criminal Procedure Code, 1872, s. 263.* The Court should exercise the powers vested in it by s. 263 of the Criminal Procedure Code (X of 1872) only when it finds the verdict of

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VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

the jury clearly and patently wrong, and only set such verdict aside, even if the Sessions Judge disagrees with it, when it is found unsustainable by the evidence. QUEEN *v.* SHAM BAGDI
13 B. L. R. Ap. 19 : 20 W. R. Cr. 73

QUEEN *v.* NOBIN CHUNDER BANERJEE
13 B. L. R. Ap. 20 : 20 W. R. Cr. 70

QUEEN *v.* ITWARYA . 14 B. L. R. Ap. 1

QUEEN *v.* HURRO MANJI . 14 B. L. R. Ap. 1
14 B. L. R. Ap. 2 note : 21 W. R. Cr. 4

4. ——— *Inconsistencies in evidence otherwise sufficient for conviction—Criminal Procedure Code, 1872, s. 263.* Where there are reasons sufficient to warrant a jury in disbelieving the witnesses and in giving the prisoner the benefit of the doubt raised by inconsistencies in that evidence, although another jury might have come to a different conclusion, the High Court will not interfere. It must be shown that the verdict of the jury is certainly unreasonable and perverse. *Queen* v. *Sham Bagdi, 13 B. L. R. Ap. 19 : 20 W. R. 73,* cited and followed. *In the matter of* HURREE NARAIN MOOKERJEA
2 C. L. R. 518

5. ——— **Exercise of power of interference**—*Ground for setting aside verdict—Verdict contrary to Judge's charge to jury.* Where a jury convicted a prisoner contrary to the charge of the Sessions Judge, which charge was *held* by the High Court to have been a proper charge, the High Court refused to interfere, although it concurred with the Sessions Judge in thinking that the verdict of the jury was not correct. The case was one in which an application could be made to the Government ; but as regards the Court, the petitions were rejected. QUEEN *v.* NIDHEERAM BAGDEE . . . 18 W. R. Cr. 45

(*Contra*) QUEEN *v.* SHIB CHUNDER MUNDLE
18 W. R. Cr. 46

6. ——— *Omission to sum up properly—Ground for setting aside verdict.* The omission of the Judge to sum up the case properly to the jury is an error in law sufficient to justify the setting aside of the verdict. No general rule can be laid down as to when a prisoner is prejudiced by a defective summing up, but in general, if the finding of the jury in such a case is one that an Appeal Court would set aside if the trial had taken place with assessors, the Court will interfere and set the verdict aside. REG. *v.* FATTECHAND VASTACHAND . 5 Bom. Cr. 85

7. ——— *Criminal Procedure Code, 1872, s. 263—Ground for setting aside verdict—Misdirection.* The High Court set aside the verdict of a jury in this case, because the Judge in his direction to the jury omitted to point out the absence of evidence very material to the case of the prosecution, and because he directed the jury to attribute an undue importance to the statements

VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

or excuses made by the prisoner in the explanation of certain documents. QUEEN *v.* GUNGA GOVIND PALIT . . . . 23 W. R. Cr. 21

8. ——— *Inconsistent verdict—Verdict of guilty.* Where a jury found an accused person guilty of murder, but refused to convict him because there had been no eye-witness of his crime, and on a second charge from the Judge refused to find him guilty at all :—*Held,* by the High Court, to whom the case was referred, that the Judge ought to have explained to the jury that the testimony of eye-witnesses was not necessary to the establishment of a charge of murder, and that the jury, if they had no doubt of the guilt of the accused, were bound to give effect to the conclusion at which they had arrived. QUEEN *v.* GOKOOL KAHAR . . 25 W. R. Cr. 36

9. ——— *Criminal Procedure Code, 1872, s. 263—Discretion of Court—Setting aside verdict of acquittal of murder.* A very large discretionary power is vested in the High Court by s. 263 of the Code of Criminal Procedure. No fixed rules can be laid down for the exercise of that discretion in every instance, and the decision in each case submitted must depend upon its own peculiar circumstances. In this case the Court set aside a verdict of acquittal of murder. EMPRESS *v.* MUKHUN KUMAR
1 C. L. R. 275

10. ——— *Judge disagreeing with verdict—Criminal Procedure Code, 1872, s. 263—Ground for setting aside verdict.* On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held,* that the High Court had power to set aside the verdict of the jury, and to direct an acquittal. S. 263 of the Criminal Procedure Code (Act X of 1872), explained. QUEEN *v.* KOONJO SETH .
11 B. L. R. 14 : 20 W. R. Cr. 1

11. ——— *Judge differing from verdict—Acquittal by majority of jury—Criminal Procedure Code, 1872, s. 263.* Where a jury are not unanimous in the finding, and the Judge dissents from the opinions expressed by them, on the case being referred, under s. 263 of Act X of 1872, the High Court is competent to find the prisoner guilty, notwithstanding an acquittal by the majority of the jury. EMPRESS *v.* SAHAE RAI
I. L. R. 3 Calc. 623 : 2 C. L. R. 304

12. ——— *Criminal Procedure Code, 1872, s. 263—Verdict of acquittal—Power to reverse verdict of acquittal.*—Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code :—*Held,* that the High Court could,

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VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence. EMPRESS *v.* HARAI MIRDHA **I. L. R. 3 Calc. 189**

13. ——— *Criminal Procedure Code, 1872, s. 263—Acquittal by jury.* The High Court, acting under s. 263 of the Criminal Procedure Code, 1872, convicted the accused in this case on the facts, notwithstanding the verdict of acquittal come to by the jury. QUEEN *v.* SIDHAM SIRCAR . . **20 W. R. Cr. 16**

14. ——— *Criminal Procedure Code, 1872, s. 263—Acquittal by jury—Confession—Evidence Act, s. 29.* The Court on a consideration of the evidence set aside the verdict of acquittal come to by a majority of the jury, holding that a confession made by the accused before the Assistant Magistrate was good, such confession, even if obtained by deception, being admissible under s. 29 of the Evidence Act, 1872. QUEEN *v.* RAM CHURN GHOSE **20 W. R. Cr. 33**

15. ——— *Criminal Procedure Code, 1872, s. 263—Acquittal by jury.* The prisoner, who was charged with having committed murder, was found by the jury who tried him to have been of unsound mind at the time he committed the offence. The Sessions Judge, differing on that point from the jury, referred the case to the High Court under s. 263 of the Code of Criminal Procedure. *Held*, that in a case of this kind the High Court will not interfere without the very clearest proof that the jury were mistaken, and that the interests of justice imperatively required the Court to take action under the extraordinary powers conferred upon it by s. 263, Code of Criminal Procedure. On a consideration of the medical evidence, the Court declined to interfere with the verdict of acquittal which the jury came to. QUEEN *v.* DOORJODHUN SHAMONTO *alias* DEEJOBOR . . . **19 W. R. Cr. 45**

16. ——— *Verdict of acquittal by jury—Criminal Procedure Code, 1872, s. 263—Judge disagreeing from verdict of Majority.* A majority of the jurors (four out of five) acquitted the prisoner on a charge of attempt to commit rape. The Sessions Judge disagreed with that verdict, and referred the case to the High Court under s. 263 of the Code of Criminal Procedure, because in his opinion the offence charged was proved. The High Court found that the evidence for the prosecution was fully worthy of belief and consistent with probabilities, and sentenced the prisoner. *In the matter of* TILUCKDHAREE . **2 C. L. R. 1**

17. ——— *Criminal Procedure Code, 1872, s. 263—Interference with verdict of Majority of jury where Sessions Judge differed.* The Sessions Judge differing from a majority of the jury, who acquitted the accused, referred the case to the High Court under s. 263 of the

VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

Criminal Procedure Code, 1872, to be dealt with as an appeal. Before proceeding with the case the High Court considered it fair to the accused to give him notice to bring forward any objections he might have to the Sessions Judge's recommendation. On a consideration of the evidence, the High Court convicted the accused of the offence with which he had been charged in the Court below. QUEEN *v.* OOTTUM DHOBA **19 W. R. Cr. 38**

18. ——— *Criminal Procedure Code, 1872, s. 263—Differing from verdict of acquittal by jury.* Where the Sessions Judge did not consider a confession to have been induced by illegal pressure, the High Court, upon a reference under s. 263 of the Code of Criminal Procedure, *held* it to have been properly admitted, and finding it to be full and clear, and supported by reliable evidence, acted upon it by convicting the person who made it, notwithstanding his retraction of it in the Court of Sessions, and his being found not guilty by the jury. REG. *v.* BALVANT V. PENDHARKAR . . . . **11 Bom. 137**

19. ——— *Criminal Procedure Code, 1872, s. 263—Trial on different charges—Discharge on some charges on which jury and Sessions Judge agree—Reference of whole case to High Court.* In a case in which the accused were charged with murder (s. 302, Penal Code), culpable homicide not amounting to murder (s. 304), and voluntarily causing grievous hurt (s. 325), the Sessions Judge at the trial added a further charge of housebreaking by night in order to the commission of an offence (s. 457). The jury unanimously acquitted the prisoners of the three original charges, and a majority of the jury (four out of five) acquitted them also of the last charge. The Sessions Judge agreed with the verdict of the jury as regarded the three original charges, and recorded a formal order acquitting and discharging the prisoners on these three charges. He differed from the majority as to the fourth charge, and referred the case to the High Court under s. 263 of the Criminal Procedure Code. *Held*, that where (as in this case) the Sessions Judge had approved of a verdict on certain charges and finally acquitted and discharged the accused as to these charges, the High Court could not under s. 263 convict on the facts on these very charges. That section seems to contemplate only a case in which, without recording any order of acquittal or conviction, the Sessions Judge refers the whole case. As there was nothing in this case to show on what grounds the majority of the jury acquitted the prisoners on the additional charge, and as the Sessions Judge agreed with the unanimous verdict as to the three original charges, the High Court presumed that the reason which weighed with the majority of the jury in finding the prisoners not guilty on the additional charge must have weighed with the whole jury in finding them not guilty on all the

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VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

three other charges, and accordingly the Court could not set aside the verdict of the majority on the last count, without practically finding directly in the teeth of the verdict of the unanimous jury on the first three counts. QUEEN *v.* UDYA CHANGA . . . **20 W. R. Cr. 73**

20. ——— *Verdict in accordance with charge—Verdict disagreed with by Judge—Penal Code, ss. 302, 304, 325—Reference under s. 307, Act X of 1882.* A prisoner was charged under ss. 302 and 304 of the Penal Code, and the Judge at the trial added a further charge under s. 325. The Judge in his charge to the jury directed them that, in the event of their finding the charges under ss. 302 and 304 unsustainable, they might find the prisoner guilty under s. 325. The jury unanimously acquitted the prisoner on the charge framed under s. 302, and a majority of them acquitted him on the charge framed under s. 304; but a majority of them found him guilty on the charge framed under s. 325. The Judge disagreed with their finding as regarded the charge framed under s. 304, and referred the case to the High Court under s. 307 of the Criminal Procedure Code. The High Court refused to interfere with the verdict, on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence and having expressed his opinion to the jury that they might find the prisoner guilty under s. 325. QUEEN-EMPRESS *v.* JACQUIET **I. L. R. 11 Calc. 85**

21. ——— *Criminal Procedure Code, 1882, s. 269—Jury wrongly treated as assessors by Judge—Unanimous opinion of jury treated as assessors accepted as formal verdict.* *L* and *N* were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of s. 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting *L* and *N* of dacoity, acquitted them of murder. *Held*, that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect. QUEEN-EMPRESS *v.* LAKSHMANA . . . . **I. L. R. 9 Mad. 42**

22. ——— *Criminal Procedure Code, s. 307—Powers of High Court on reference under s. 307—Criminal Procedure Code, ss. 418, 423 (d).* No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded or by setting aside the verdict of acquittal and causing conviction and sentence to be entered against the accused. The provisions

VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

of s. 307 of the Criminal Procedure Code are not in any way cut down by ss. 418 and 423; and the High Court has power under s. 307 to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, *i.e.*, misdirection by the Judge, or misapprehension by the jury of the judge's directions on points of law. QUEEN-EMPRESS *v.* MCCARTHY . **I. L. R. 9 All. 420**

23. ——— *Sessions Judge, opinion of—Criminal Procedure Code, s. 307—High Court, power of.* In the exercise of its powers under s. 307 of the Code of Criminal Procedure, the High Court will form and act upon its own view of what the evidence in its judgment proves; but in doing so the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight. *Reg.* v. *Khanderav Bajirav I. L. R. 1 Bom. 10; Queen* v. *Makhan Kumar, 1 C. L. R. 275; The Empress* v. *Dhunum Kazee, I. L. R. 9 Calc. 53; Queen-Empress* v. *Mania Dayal, I. L. R. 10 Bom. 497; The Queen* v. *Ram Churn Ghose, 20 W. R. Cr. 33; The Queen* v. *Sham Bagdi, 13 B. L. R. Ap. 19 : 20 W. R. Cr. 78; The Queen* v. *Hurro Manjhee, 14 B. L. R. Ap. 2; 21 W. R. Cr. 4; The Queen* v. *Wazir Mundul, 25 W. R. Cr. 25; The Queen* v. *Nabin Chunder Banerjee, 10 B. L. R. Ap. 20 : 20 W. R. Cr. 70,* referred to. QUEEN-EMPRESS *v.* ITWARI SAHO . . . . **I. L. R. 15 Calc. 269**

24. ——— *Criminal Procedure Code, ss. 307, 418—Perversity of verdict—Procedure when Sessions Judge disagrees with verdict—Misdirection.* A jury returned a verdict of guilty against the accused in a trial for dacoity. The Sessions Judge accepted the verdict, although he said he did not agree with it and had charged the jury for an acquittal; he observed that he could not refer the verdict as perverse since there was evidence against the accused which it was open to the jury to believe. The accused appealed to the High Court on the ground, *inter alia*, that the Sessions Judge "ought to have referred the case to the High Court under the Criminal Procedure Code, s. 307." *Held*, that since there had been no misdirection by the Sessions Judge, and there was some evidence to support the verdict, the High Court had no power to interfere however absurd the verdict might be considered. QUEEN EMPRESS *v.* CHINNA TEVAN **I. L. R. 14 Mad. 36**

25. ——— *Criminal misappropriation—Charge of misappropriation of specific sums of money—Form of charge—Evidence of general deficiency—Criminal breach of trust—Penal Code, s. 409—Practice—New trial.* The accused was charged with abetting the offence of criminal breach of trust committed by the nazir of

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VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

the Small Cause Court at Poona. The accused was a karkun in the Nazir's office, and it was his duty to keep the accounts of moneys received in the office from judgment-debtors, and of moneys paid out to decree-holders. He was charged with abetting the misappropriation of three sums, *viz.*, R20 on the 19th November 1885, R45 on the 23rd November 1885, and R10 on the 26th June 1886. As to the first sum, it was alleged that an instalment of R25 due under a decree had been paid into the Nazir's office by a judgment-debtor on the 19th November 1885, but the accused had entered in the office day-book only R5, thereby enabling the balance of R20 to be misappropriated. It appeared, however, that a sum of R25, being the instalment due to the decree-holder under the above decree, had been in due course paid out to him on the 4th December 1885. As to the second sum of R45, it was alleged that a sum of R50 had been paid in, but only R5 had been entered by the accused, the balance being misappropriated. It appeared, however, in this case also that the full amount of the instalment, *viz.*, R50, had been duly paid out to the decree-holder a few days after its receipt. As to the third sum, it was alleged that the total receipts entered in the book on the 26th June 1886 were R55, but the figure entered as the total was only R45, and that the balance of R10 had been misappropriated. The jury found the accused guilty on all three charges. On appeal by him, it was contended that there was no evidence of the misappropriation of the specific sums in respect of which he was charged. There was evidence of a general deficiency; but there was no evidence that these specific sums formed part of that deficiency. On the contrary, the evidence showed that the instalments paid into the office had been duly paid out to the persons to whom they were payable. *Held*, that, the jury having had the facts brought to their notice, their verdict was final, and the High Court would not interfere with the verdict. The provisions of s. 167 of the Evidence Act (I of 1872) apply to criminal trials by jury. When part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under s. 167 of the Indian Evidence Act (I of 1872) or to quash the verdict and order a re-trial. The law, as settled in England by the *Queen* v. *Gibson*, *L. R. 18 Q. B. D. 537*, and as stated by the Privy Council in *Makin* v. *Attorney General of New South Wales*, [*1894*] *A. C. 57, 69, 70*, with reference to the granting of new trials where evidence has been improperly admitted, does not apply to India. *Wafadar Khan* v. *Queen-Empress*, *I. L. R. 21 Calc. 955*, not followed. QUEEN-EMPRESS *v* RAMCHANDRA GOVIND HARSHE
I. L. R. 19 Bom. 749

VERDICT OF JURY—*contd.*

2. POWER TO INTERFERE WITH VERDICTS—*contd.*

26. ——— *Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Criminal Procedure Code, 1882, s. 307—High Court's power of interfering with the verdict of a jury.* The accused was tried for murder. The first verdict of the jury was "guilty of murder under grave and sudden provocation." The Sessions Judge told the jury that it was their duty, after considering the question of provocation, to return a simple verdict of guilty or not guilty. The jury, therefore, brought in a second verdict of "not guilty." The Judge, considering this verdict to be perverse, referred the case to the High Court under s. 307 of the Code of Criminal Procedure (Act X of 1882). *Held*, that the High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong. A verdict ought to be considered a proper and not a perverse verdict if it is one which reasonable men might find on the facts in evidence. *Queen-Empress* v. *Dada Ana*, *I. L. R. 15 Bom. 452*, and *Queen-Empress* v. *Magana*, *I. L. R., 14 Bom. 115*, followed. QUEEN-EMPRESS *v.* DEVJI GOVINDJI . **I. L. R. 20 Bom. 215**

27. ——— *Criminal Procedure Code, 1882, ss. 297 and 423, cl. (d)—Misdirection to jury—Allowing verdict before accused is called on for defence.* To allow the jury to pronounce their verdict before the accused is called upon to enter on his defence is a misdirection, though the Judge omits to charge the jury at all. In such a case, cl. (*d*) of s. 423 of the Criminal Procedure Code, does not stand in the way of the appellate Court's interfering with the verdict of the jury. QUEEN-EMPRESS *v.* IMAM ALI KHAN *alias* NATHU KHAN . **I. L. R. 23 Calc. 252**

28. ——— *Criminal Procedure Code, 1882, ss. 303, 307, 429—Power of Judge to put questions to jury under s. 303, after verdict delivered—Reference to High Court under s. 307—Power of High Court to interfere with verdict—Judges of High Court differing in opinion—Reference to third Judge—Letters Patent, 1865, cl. 36—Practice—Procedure.* A prisoner was tried for murder and acquitted by a majority of the jury. The Sessions Judge disagreed with the verdict and submitted the case to the High Court under s. 307 of the Criminal Procedure Code (Act X of 1882). The Judges of the High Court (JARDINE and CANDY, *JJ.*) differing in opinion, the case was laid before a third Judge (SARGENT, *C.J.*) under s. 429, who held that the verdict of the jury should be set aside, and that the prisoner was guilty of murder. *Per* SARGENT, *C.J.*—It is the uniform practice of the High Court, in cases referred under s. 307 of the Criminal Procedure Code (Act X of 1882), not to interfere with the verdict of a jury except when it is clearly and manifestly wrong. There is no true analogy between the discretionary power conferred on the High Court

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VERDICT OF JURY—*contd.*

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under this section and that which the Courts of law in England have exercised in interfering with the finding of a jury in civil actions by directing a new trial on the ground of the verdict being against the weight of evidence. The practice, therefore, of the latter Courts, although very properly regarded as a guide, cannot be resorted to as affording a fixed rule in the exercise of the powers conferred on the High Court by s. 307. Where a prisoner was charged with murder by administering dhatura poison to the deceased, the majority of the jury found him not guilty. After the delivery of the verdict, the Sessions Judge questioned the jury, who, in reply to specific questions on the points, stated through their foreman that the majority had doubts (i) whether the accused had fetched dhatura from a certain field; (ii) whether there was dhatura poison in the stomach of the deceased; (iii) whether the death of the deceased was caused by dhatura poison. The Sessions Judge differed so completely with the jury on the evidence that he submitted the case to the High Court under s. 307 of the Criminal Procedure Code. *Per* JARDINE, *J.*—The verdict of acquittal should be upheld. It was not manifestly wrong nor absolutely unreasonable. It was a verdict that reasonable but cautious men might find. The Sessions Judge ought not to have put to the jury, after verdict delivered, the questions which he did put as to their findings on particular points. In so doing the Sessions Judge exceeded the limits of questioning defined in s. 303 of the Criminal Procedure Code. There was no incompleteness nor ambiguity in the verdict and no misconception of any question of law. *Per* CANDY, *J.*—Admitting in the present case that the Sessions Judge was wrong in putting any questions to the jury after the verdict was delivered, disregarding the answers to the questions and dealing solely with the evidence and probabilities, there seemed to be no reasonable doubt of the guilt of the accused. The High Court, in the exercise of its powers under s. 307 of the Criminal Procedure Code, is bound to act upon its own view of the evidence. On a reference by a Sessions Judge, the whole case is opened up. When the verdict of the jury is erroneous, the High Court must put it aside and exercise the functions of both Judge and jury, giving due weight to the opinion of the Judge as well as to the verdict of the jury. When a case like the present depends upon the inferences to be drawn from two or three facts, neither principle nor statute forbids the Sessions Judge from asking the jury to state a plain concise finding on those facts. Where the Judges of the High Court differed in opinion in a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code, the Court (JARDINE and CANDY, *JJ.*) directed that the case should be laid before a third Judge of the High Court, being of opinion

VEDRICT OF JURY—*contd.*

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that the Criminal Procedure Code overrules the provisions of cl. 36 of the Letters Patent, 1865. QUEEN-EMPRESS *v.* DADA ANA

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29. ——— *Criminal Procedure Code (Act X of 1882), s. 423—Setting aside verdict of the jury—Power of Appellate Court to deal with the case.* If the verdict of the jury is set aside on any of the grounds mentioned in cl. (*d*) of s. 423 of the Criminal Procedure Code (Act X of 1882), then there is no restriction on the powers of the Appellate Court to deal with a case of which it has complete seizin in any of the manners provided in that section. The law nowhere lays down that when the verdict of the jury is set aside the Court must necessarily direct a new trial. *Wafadar Khan* v. *Queen-Empress, I. L. R. 21 Calc. 955,* dissented from. The course adopted in *Queen-Empress* v. *O'Hara, I. L. R. 17 Calc. 642; Regina* v. *Naoroji Dadabhai, 9 Bom. H. C. 358;* and *Queen-Empress* v. *Haribole Chunder Ghose, I. L. R. 1 Calc. 207,* followed. TAJU PRAMANICK *v.* QUEEN-EMPRESS

I. L. R. 25 Calc. 711

30. ——— Appeal on facts—*Criminal Procedure Code (Act V of 1898), ss. 418, 536—Trial by jury for offence triable by jury—Verdict of acquittal—Opinion of jury of guilt in respect of offence not triable by jury—Conviction.* Two persons were charged, as first and second accused, before a Court of Session, with robbery (under s. 392 of the Indian Penal Code, and first accused was also charged with having caused grievous hurt in the course of the robbery (under s. 397). Both offences are triable, and the accused were, in fact, tried, by a jury, who, by their verdict, acquitted both of the accused of the charges framed under the sections referred to, but found first accused guilty of voluntarily causing grievous hurt—an offence which is triable, not by a jury, but by assessors. The Sessions Judge acquitted both accused in respect of the charges under s. 392 and s. 397, but convicted first accused of having voluntarily caused grievous hurt, under s. 325. Against that conviction first accused preferred this appeal, when it was objected that, inasmuch as the trial had been held before a jury, the appeal lay on matter of law only, and not on questions of fact. *Held, per* BENSON, *J.*, that the conviction of the first accused for causing grievous hurt was not one by a jury, but by the Judge, who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. An appeal therefore lay on the facts, as in the case of *Muthusami Pillai* v. *Queen-Empress, I. L. R. 26 Mad. 243 n.*, and in *Empress* v. *Mohim Chunder Rai, I. L. R. 3 Calc. 765. Per* BHASHYAM AYYANGAR, *J.*—That the effect of s. 238 of the Criminal Procedure Code is to invest a jury trying an offence triable by a jury with authority to

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VERDICT OF JURY—*concld.*

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find, as an incident to such trial, that certain facts only are proved in the trial, which facts constitute a minor offence, and return a verdict of guilty of such offence, though such minor offence be not triable by a jury. And that a Sessions Judge may thereupon record judgment, convicting the accused of such minor offence, although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. The jury having found first accused guilty of causing grievous hurt, and the Judge having given judgment convicting him of the same, an appeal lay only on a point of law, as the accused had been convicted in a trial by jury. PATTIKADAN UMMARU *v.* EMPEROR (1902) . **I. L. R. 26 Mad. 243**

31. ——— Duty of High Court—*—Verdict of jury, disagreement with, by Judge—Reference to High Court—Procedure by High Court—Evidence, consideration of—Criminal Procedure Code (Act V of 1898), ss. 307, 451—Penal Code (Act XLV of 1860), ss. 147, 149, 325, 343—Assam Labour and Emigration Act (VI of 1901), s. 210.* S. 307 of the Code of Criminal Procedure requires that a High Court, in dealing with a case referred under it, shall consider the entire evidence on the case, and, next, after giving due weight to the opinions of the Sessions Judge and the jury, shall deliver judgment. The High Court in such a case is not bound to accept the opinion of the jury if it is not shown to be perverse or clearly or manifestly wrong. Without considering the entire evidence, the High Court could not be in a proper position to give due weight to the opinions of the Sessions Judge and of the jury. EMPEROR *v.* LYALL (1901) . . **I. L. R. 29 Calc. 128**
s.c. 6 C. W. N. 253

32. ——— *Criminal Procedure Code (Act V of 1898), s. 423 (2).* Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, *first*, that the verdict is erroneous; and, *secondly*, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence, or by a misunderstanding on their part of the law as to it as laid down by the Judge. EMPEROR *v.* WAMAN SHIVRAM DAMLE (1903) . . . **I. L. R. 27 Bom. 626**

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——— of plaint—

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See VILLAGE CHAUKIDARS' ACT.

VILLAGE CHAUKIDARI ACT (BENGAL ACT VI OF 1870).

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See CHAUKIDARI ACT (BENGAL ACT VI OF 1870).

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VILLAGE CHAUKIDARI ACT (BENGAL ACT VI OF 1870)—*contd.*

——— s. 8—*Order imposing fine by Sub-divisional Officer—Judicial order—Revision by the High Court—Magistrate, jurisdiction of.* Where the collecting member of a punchayat, constituted under the provisions of the Village Chowkidars' Act (Bengal Act VI of 1870), was fined by the Sub-divisional Officer of Serampore under s. 8 of the Act for having disobeyed his orders and realized assessment from the villagers under the Act from the month of Baisakh, though the Act was not introduced into the sub-division till the month of Kartick following:—*Held*, that, the fine having been imposed by a Magistrate under the provisions of an Act of the Bengal Council, it was imposed in respect of an "offence" as defined by s. 4 cl. (*p*), of the Criminal Procedure Code and by virtue of s. 4 of Bengal Act V of 1867 the provisions of ss. 63 to 70 of the Penal Code and s. 61 of the Criminal Procedure Code were applicable to the fine. The order of the Sub-divisional Officer was in its nature a judicial order, and was therefore subject to revision by the High Court. The order was bad because (i) there was no trial; (ii) no act punishable with fine under s. 8 of the Act (Bengal Act VI of 1870) had been committed; and (iii) because the District Magistrate only had the power to impose the fine. QUEEN-EMPRESS *v.* ASHWINI KUMAR GHOSE
I. L. R. 23 Calc. 421

——— ss. 26, 27 and 34.

See PENAL CODE, s. 183.
I. L. R. 25 Calc. 274

——— ss. 48, 50, 51—

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I. L. R. 33 Calc. 596

——— ss. 48, 51—

See CHAUKIDARI CHAKRAN LANDS.
I. L. R. 34 Calc. 564

——— ss. 48 and 64—*Chowkidari chakran land, settlement of — Power of Collector — Power of Commissioner to set aside Collector's order.* Under s. 48 of Bengal Act VI of 1870, a Collector can only settle lands with the zamindar within whose estate the lands lie. S. 64 of that Act does not empower the Commissioner to set aside an order passed by the Collector under s. 48. BEJOY CHAND MAHATAB BAHADUR *v.* KRISTO MOHINI DASI . . . **I. L. R. 21 Calc. 626**

——— s. 51—

See NUISANCE — UNDER CRIMINAL PROCEDURE CODE **7 C. W. N. 142**

———*Chowkidari chakran lands, Suit for recovery of, by patnidar against zamindar with whom the same had been settled under Bengal Act VI of 1870 — Landlord and tenant.* Where a patnidar sought to have transferred to him certain chowkidari chakran lands, which the Government had settled with the zamindar under Bengal Act VI of 1870, and where it was found that the lands were part of plaintiff's patni, and that the zamindar had sublet the same to a tenant:—*Held*, that the patnidar was entitled to possession but not to khas possession of the lands. That the tenant with whom the lands had been settled by the zamindar was entitled to retain actual possession of the lands. That the patnidar was bound to pay to the zamindar such rents for these lands as corresponded to the proportion between the gross collections and patni rent formerly payable by him. HARI NARAIN MAZUMDAR *v.* MUKUND LAL MUNDAL . **4 C. W. N. 814**

VILLAGE CHAUKIDARI ACT (BENGAL ACT VI OF 1870)—*concld.*

——— s. 51—*concld.*

——— ss. 58, 61—*Decision of Commission —Village chowkidars—Chowkidari chakran lands—Civil suit.* The words "final and conclusive" used in s. 61 of Bengal Act VI of 1870 must be taken to be used in their ordinary and literal sense. Where, therefore, a commission has been appointed under s. 58 for the purpose therein mentioned, and such commission has ascertained and determined that certain lands are chowkidari chakran lands, in the absence of fraud or non-compliance by the commissioners with the provisions of the Act, their decision is conclusive evidence in any civil suit of the fact that the lands are what they have found them to be. NOBOKRISTO MUKERJEE *v.* SECRETARY OF STATE FOR INDIA . **I. L. R. 11 Calc. 632**

VILLAGE CHAUKIDARS' AMENDMENT ACT (BENG. ACT I OF 1892).

See CONFESSION — CONFESSIONS TO POLICE OFFICERS. **2 C. W. N. 637**

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VIS MAJOR.

See CIVIL PROCEDURE CODE, 1882, s. 13 . . 10 C. W. N. 115

VIZAGAPATAM.

See GANJAM AND VIZAGAPATAM AGENCY COURTS ACT (XXIV OF 1839).

VIZAGAPATAM AGENCY RULES.

——— rule XXXI—

——— *Right to petition Government—Rule of a substantive character—Revision in execution proceedings.* Rule XXXI of the Agency Rules for the District of Vizagapatam is of a substantive character and provides for revision in execution and other petitions in regard to which no right of appeal has been given. Rule XXXI is not *ultra vires*. MAHARAJA OF JEYPORE *v.* SRI NILADEVI PATTAMAHADEVI (1902)
I. L. R. 27 Mad. 109

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VOLUNTARY ASSIGNMENT.

See INSOLVENCY — VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR.

VOLUNTARY CONVEYANCE.

See CONTRACT ACT, s. 25.
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See DEBTOR AND CREDITOR.

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VOLUNTARY CONVEYANCE—*concld.*

——— Subsequent sale for value—*Avoidance of gift or settlement voluntarily made—Stat. 27 Eliz., c. 4.* Where a person who has made a voluntary gift or settlement of an estate sells the same to another for value, the conveyance operates as a conveyance of the estate which the settlor had before the voluntary settlement, the Stat. 27 Eliz., c. 4, putting the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser: words showing an intention on the part of the person who made the voluntary gift to convey to the purchaser all the interest or estate that he had are sufficient to avoid such gift. JUDAH *v.* ABDOOL KURREEM . . . 22 W. R. 60

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See SALE FOR ARREARS OF RENT—DEPOSIT TO STAY SALE.

See SALE FOR ARREARS OF REVENUE—DEPOSIT TO STAY SALE.

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE — RIGHTS OF PURCHASERS — RECOVERY OF PURCHASE-MONEY . 11 B. L. R. 121
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——— what amounts to—

See WATER, RIGHT TO.
I. L. R. 32 Mad. 456

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VOLUNTARY PAYMENT—*contd.*

1. ——— **Money paid, but not due, and paid under compulsion**—*Contract Act (IX 1872), ss. 15, 72.* In execution of a decree, the plaintiff puchased certain property. Subsequently the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property. The plaintiff thereupon preferred a claim which was disallowed, as he had not then obtained, and consequently could not produce, the sale-certificate. In order to prevent the sale, he then paid the amount of the defendant's decree into Court, and subsequently instituted a suit against the defendant to recover the amount so paid into Court, to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back. *Held*, following *Dooli Chand* v. *Ram Kishen Singh, L. R. 8 I. A. 93 : I. L. R. 7 Calc. 648*, that it was not a voluntary payment ; and that the plaintiff was entitled to a decree. *Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdhry, 12 Moo. I. A. 65 : 10 W. R. P. C., 29*, referred to. *Asiban* v. *Ram Proshad Dass, 1 Shome, 25*, doubted. JUGDEO NARAIN SINGH *v.* RAJA SINGH . . **I. L. R. 15 Calc. 656**

2. ——— **Money paid under protest—**—*Right of suit—Contract of indemnity—Contract Act ss. 124, 141, 142.* The Thakor of Limdi possesses several talukhdari villages in the Ahmedabad District, for which he pays a lump jumma to Government. One of these villages was Akru. Disputes arose between the Thakor and the grassias of Akru as to the ownership of the village. The Thakor filed a suit against the grassias, which was ultimately compromised, and a consent decree was passed in 1883, providing, *inter alia*, that the Thakor should assign to the grassias a moiety of the village ; that the grassias should hold the same free from all liability to pay the jumma, and that the Thakor should alone be responsible for all Government demands. In accordance with this decree, a moiety of the village was made over to the grassias. The Collector demanded jummabandi for this moiety. The Thakor intervened, and objected to the demand, on the ground that he paid a lump jumma for the whole of his talukh including the moiety of the village assigned to the grassias. Government, however, passed a resolution declaring that half of the village belonged to the grassias ; that from them the Government had a right to levy the jumma ; that the Thakor might, if he chose, pay the same on behalf of the grassias, and that, if it was not paid, it would be recovered by attachment and sale of the grassias, half share. The Thakor thereupon paid the jumma on behalf of the grassias for two years, and then filed a suit against Government to recover back the payments he had made, and for a declaration that Government had no right to levy any assessment on any portion of the village beyond the lump jumma fixed for his talukh. This suit was dismissed on the preliminary ground that the Thakor had no cause of action against Government in respect

VOLUNTARY PAYMENT—*contd.*

of any of the reliefs sought, the Court being of opinion that the payments he had made to Government on account of the grassias were voluntary, and that he had no interest whatever in the grassias' half share of the village. *Held*, reversing the decision of the lower Court, that the suit would lie. Under the consent-decree, the Thakor stood in the relation of an insurer to the grassias from all exactions of Government dues. The payments of jumma he made on account of the grassias were therefore not voluntary, but made under protest, and as such were recoverable by suit. JASVATSINGJI FATESINGJI *v.* SECRETARY OF STATE FOR INDIA . . . **I. L. R. 14 Bom. 299**

3. ——— **Money paid for benefit of another**—*Contract Act (IX of 1872), ss. 69 and 70—Money paid to protect property from sale in execution of decree for arrears of rent.* Certain immoveable property was inherited by *S*, the mother, of the plaintiff, from her husband, and during her tenure of it she alienated it by deed of sale to the defendants. *S* died in April 1890, and the estate then devolved upon the plaintiff, an only daughter (there being no male issue). In 1890 the property in possession of the defendants was, at the suit of a person who was the landlord, ordered to be sold together with other properties of the defendants for arrears of rent, due in the lifetime of *S*, and to prevent the sale the plaintiff paid the amount of the decree. In a suit for possession of the property and for a refund of the sum paid by the plaintiff to stop the sale, the defendants claimed an absolute interest in the property, but the Courts below found that the alienations by *S* to the defendants were not made for legal necessity and were therefore invalid. *Held*, that the payment made by the plaintiff was not a voluntary payment, but was one which she was entitled to recover from the defendants. It being a question at the time whether the property belonged to the plaintiff or to the defendants, the payment to stop the sale was one in which the plaintiff was interested sufficiently to bring the case within s. 69 of the Contract Act. S. 70 was also applicable, as the payment relieved the defendants from liability to their landlord, and was made for the defendants, and not gratuitously, and the defendants enjoyed the benefit of such payment. The principles laid down in the cases of *Duli Chand* v. *Ramkishen Singh, I. L. R. 7 Calc. 648 : L. R. 8 I. A. 93 ; Smith* v. *Dinonath Mookerjee, I. L. R. 12 Calc. 213 ;* and *Jugdeo Narain Singh* v. *Raja Singh, I. L. R. 5 Calc. 656*, were held to govern this case. BAMA SUNDARI DASI *v.* ADHAR CHUNDER SIRKAR **I. L. R. 22 Calc. 28**

4. ——— **Payment made to save the patni talukh from sale**—*Contract Act (IX of 1872), s. 69—Arrears of rent—Payment made by a mortgagee.* The plaintiff, who was the mortgagee of a certain patni talukh, obtained a consent decree for R 35,000 on his mortgage-bond on the 13th August 1888. In the solenamah it was

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VOLUNTARY PAYMENT—*contd.*

stipulated that, if the decretal amount were not paid within a certain date, it was to be increased to R52,000. On the 14th March 1891 the plaintiff applied for execution of that decree, and claimed the larger amount, as admittedly the smaller amount was not paid within the stipulated period. The Subordinate Judge allowed the plaintiff's claim. The defendant appealed to the High Court, and on the 31st September 1891 the order of the Subordinate Judge was reversed, and an inquiry was directed as to the conduct of the plaintiff in the matter. On the 31st August 1892 the Subordinate Judge held that the plaintiff had been guilty of misconduct, and that the decree had been fully satisfied. The plaintiff appealed from this order to the High Court, and on the 4th January 1894 the appeal was dismissed, and he preferred an appeal to Her Majesty in Council. In the meantime on the 13th May 1892 the plaintiff had paid a certain sum of money to protect the patni talukh from sale for arrears of rent due to the landlord. In a suit brought to recover from the defendant the amount so paid :—*Held*, that the payment was not a voluntary payment, and that the plaintiff was interested in the payment of the money, and therefore he was entitled to recover it. BINDUBASHINI DASSI *v.* HARENDRA LAL ROY
I. L. R. 25 Calc. 305
2 C. W. N. 150

5. ———— **Payment by a purchaser of a patni talukh during the pendency of an appeal for setting aside the patni sale**—*—Person interested in the payment of the patni rent—Patni Regulation (VIII of 1819), s. 14.*—A payment of rent made by the purchaser of a patni talukh after the decision of the first Court in a suit brought by the defaulting patnidars for the setting aside of the patni sale, by which it was held that the sale was invalid, and during the pendency of an appeal preferred, not by the plaintiff, the auction-purchaser, but by the zamindar at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of s. 69 of the contract Act. *Bindubashini Dassi* v. *Harendra Lal Roy, I. L. R. 25 Calc. 305*, followed. The remedy which the plaintiff in this case had, after the reversal of the sale, to be re-imbursed by the defendant under s. 69 of the Contract Act was *held* not to be curtailed by the provisions of s. 14 of Regulation VIII of 1819. RADHA MADHUB SAMONTA *v.* SASTI RAM SEN .
I. L. R. 26 Calc. 826

6. ———— **Payment of decree for rent by purchaser at sale for arrears of rent**—*—Contract Act (IX of 1872), ss. 69, 70—Suit to recover money so due.* Rent is by operation of law the first charge on a tenure, and a person who purchases the same at any execution-sale must, in the absence of anything to denote the contrary, be taken to purchase it, charged with the rent which is due in respect of it at the time of its purchase

VOLUNTARY PAYMENT—*concld.*

and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase. So where a plaintiff, in execution of a mortgage-decree, purchased the tenure mortgaged, and then paid the money due under a decree obtained by the landlord against the tenure-holder for arrears of rent for the period anterior to the confirmation of sale :—*Held*, that the plaintiff was not entitled to recover the money paid by him for satisfying the rent decree. MOHARANEE DASYA *v.* HARENDRA LAL ROY . . . . **1 C. W. N. 458**

VOLUNTARY SETTLEMENT.

See ONUS OF PROOF—DECREES AND DEEDS, SUITS TO ENFORCE OR SET ASIDE . . **I. L. R. 15 Bom. 549**

———— **breach of covenants in**—

See DAMAGES—SUITS FOR DAMAGES—BREACH OF CONTRACT.
I. L. R. 2 Bom. 273

VOLUNTEERS.

See ARMY ACT, s. 19.
I. L. R. 22 All. 323

VOTERS, LIST OF.

See CALCUTTA MUNICIPAL CONSOLIDATION ACT, s. 31.
I. L. R. 22 Calc. 717

VOTING:

See COMPANY—MEETINGS AND VOTING.
I. L. R. 27 Bom. 113

VRITTI.

See STRIDHAN **I. L. R. 33 Calc. 229**

VYAVAHARA MAYUKHA.

See HINDU LAW—MITAKSHARA.

W

WAGERING.

———— **and gaming transaction**—

See EVIDENCE ACT, s. 92.
9 C. W. N. 355

WAGERIN G CONTRACT.

See CIVIL PROCEDURE CODE, 1882, s. 111.
9 C. W. N. 178

See CONTRACT—WAGERING CONTRACTS.

See CONTRACT ACT, 1872, ss. 20, 30 and 65 . . **I. L. R. 25 Mad. 561**

See CONTRACT ACT, 1872, s. 30.
I. L. R. 30 Bom. 83

See EVIDENCE—PAROL EVIDENCE—VARYING FOR CONTRADICTING WRITTEN INSTRUMENTS **I. L. R. 9 Calc. 791**
I. L. R. 12 Bom. 585
I. L. R. 17 Mad. 480

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WAGERING CONTRACT—*contd.*

See EVIDENCE ACT, s. 92, pro. (1).
I. L. R. 32 Calc. 437

1. ——————————*Wagering contract—Contract Act (IX of 1872), s. 30.* In order that a transaction may fall within s. 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager and both side must be parties to the wager. It is of the essence of a wager that each side should stand to win or lose, according to the uncertain or unascertained event, in reference to which the chance or risk is taken: in other words, to make an agreement a wager there must be a common intention to bet. SASSOON *v.* TOKERSEY (1904) . . . I. L. R. 28 Bom. 616

2. ——————————*Principal and agent—Sale and purchase by the agent on his own account—Usage of trade—Commission agents—Pakki adat system—Tender of evidence as to delivery at other vaidas—Relevancy of such evidence.* The defendant, a resident of the North-West Provinces, from time to time sent orders to the plaintiffs in Bombay to sell and purchase cotton on his account. The plaintiffs carried out the defendant's orders as they were received. Up to the due date they had purchased on behalf of the defendant 400 bales more than they had sold. It appeared that by reason of other contracts entered into with the merchants, from whom they had purchased on behalf of the defendant, the plaintiffs had 'cancelled' all these purchases, before the due date. The defendant neither sent money to pay for the cotton nor did he direct the plaintiffs to sell on his behalf. The plaintiffs sued the defendant describing themselves as commission agents for their commission and for the loss on 400 bales sold on defendant's account. The plaintiffs were unable to show that they had paid any damages on account of the defendant, for failure to take delivery, to any of the merchants from whom they had purchased on defendant's account. The suit was dismissed in the lower Court on the ground that the contracts were wagering contracts. In appeal the plaintiffs contended that they were entitled as between themselves and the defendant to treat themselves as the principals, on the ground that the business was conducted on the *pakki adat* system, under which no privity was established between the defendant and the merchants to whom or from whom cotton was sold or bought on his account. *Held*, that if the plaintiffs were, as their plaint stated, commission agents, and they were employed by the defendant as his commission agents, and as such, under instructions and on account of the defendant, entered into these purchases, they had no cause of action. *Held*, further, that the usage termed the *pakki adat* system involved a material departure from the ordinary relations between a principal and his agent of which there was no suggestion, in the pleadings or issues, nor was there any evidence to prove it. The plaintiffs must therefore be held to the case they had made.

WAGERING CONTRACT—*concld.*

During the course of the hearing in the lower Court it appeared that at the *vaida* for which the contracts in question had been made the plaintiffs had neither given nor taken delivery of any cotton. They tendered evidence to show that at other *vaidas* they had given or taken delivery of cotton and other goods. The learned judge rejected the evidence as irrelevant to the issue, whether the contracts were wagering contracts. *Held*, on appeal, that the evidence tendered was relevant and should have been admitted. CHANDULAL SUKLAL *v.* SIDHRUTHRAI (1905) I. L. R. 29 Calc. 291

3. ——————————*Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Contract Act (IX of 1872), s. 30—Bombay Act III of 1865.* The law which is contained in s. 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms, in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must prove among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions, which might in certain events become operative, to compel the passing of property, though neither party anticipated such a contingency. The Court should be astute to discover what in fact was the common intention of both parties and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain. MOTILAL *v.* GOBINDRAM (1905) I. L. R. 30 Bom. 83

WAGES.

See ATTACHMENT—SUBJECTS OF ATTACHMENT—WAGES . 1 B. L. R. S. N. 15
I. L. R. 5 Bom. 132

See MASTER AND SERVANT.

——————— **of labourers—**

See BENGAL ACT VI OF 1865.
3 B. L. R. A. Cr. 39

——————— **suit for—**

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—WAGES.
6 B. L. R. Ap. 91

See SMALL CAUSE COURT, RANGOON.
I. L. R. 10 Calc. 878

WAGING WAR.

See JURISDICTION OF CRIMINAL COURT—OFFENCES COMMITTED ONLY PARTLY IN ONE DISTRICT—ABATEMENT OF WAGING WAR 9 B. L. R. Ap. 36

See SENTENCE—TRANSPORTATION.
3 W. R. Cr. 16

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WAGING WAR AGAINST THE QUEEN.

——— **Conspiracy to wage war**—*Treason—Misprison of treason—Limitation of period for prosecution—Penal Code, s. 121—7 Will. III, c. 3, s. 5.*—The offence of engaging in a conspiracy to wage war, and that of abetting the waging of war, against the Queen, under s. 121 of the Penal Code, are offences under the Penal Code only, and are not treason or misprison of treason; and therefore the provisions of the Stat. 7 Will. III, c. 3, s. 5, as to placing a limitation on the period for prosecution are not applicable. QUEEN *v.* AMIRUDDIN
7 B. L. R. 63; 15 W. R. Cr. 25

WAHABIS.

See MAHOMEDAN LAW—WORSHIP.
I. L. R. 35 Calc. 294

WAIVER.

See ACQUIESCENCE.

See ARBITRATION—AWARDS— VALIDITY OF AWARDS AND GROUNDS FOR SETTING THEM ASIDE **I. L. R. 21 Calc. 590**

See BENGAL MUNICIPAL ACT (III OF 1884), SS. 238 AND 273.
5 C. W. N. 42

See BOND . . **11 C. W. N. 903**

See ESTOPPEL—ESTOPPEL BY CONDUCT.
7 Mad. 263
8 Mad. 14
I. L. R. 18 Calc. 341
I. L. R. 15 Mad. 82
I. L. R. 14 Bom. 558

See EVIDENCE—PAROL EVIDENCE—EXPLAINING WRITTEN INSTRUMENTS AND INTENTION OF PARTIES.
6 C. W. N. 242

See FOREIGN COURT—JUDGMENT OF.
I. L. R. 2 Mad. 400; 407
I. L. R. 15 Mad. 82

See GUARDIAN —DUTIES AND POWERS OF GUARDIANS **I. L. R. 18 Calc. 99**
L. R. 17 I. A. 90

See INSURANCE—LIFE INSURANCE.
I. L. R. 23 Calc. 320

See LANDLORD AND TENANT.
12 C. W. N. 1059
13 C. W. N. 635

See LIMITATION . **I. L. R. 31 Calc. 297**

See LIMITATION, MORTGAGE, VENDOR AND PURCHASER.
I. L. R. 31 Calc. 57; 83; 297

See LIMITATION ACT, 1877, SCH. II, ART. 75.

See LIMITATION ACT, 1877, SCH. II, ART. 179—ORDER FOR PAYMENT AT SPECIFIED DATES.

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 35 Calc. 402

WAIVER—*contd.*

See MALABAR LAW—MORTGAGE.
I. L. R. 13 Mad. 490
I. L. R. 15 Mad. 480

See MARINE INSURANCE.
I. L. R. 36 Calc. 516
13 C. W. N. 425

See MUNICIPALITY.
I. L. R. 29 Bom. 35

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 34 Calc. 709

——— **by accused—**

See CRIMINAL PROCEEDINGS.
I. L R. 2 Calc. 23
I. L. R. 6 Calc. 83

See JURISDICTION OF CRIMINAL COURT—EUROPEAN BRITISH SUBJECTS.
I. L. R. 12 Bom. 561
I. L. R. 25 All. 511

——— **of condition in lease—**

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITIONS.
I. L. R. 20 Bom. 439

——— **of covenant for title—**

See VENDOR AND PURCHASER—BREACH OF COVENANT **I. L. R. 15 Mad. 50**

See VENDOR AND PURCHASER—VENDOR, RIGHTS AND LIABILTIES OF.
I. L. R. 13 Mad. 158

——— **of fresh proclamation of sale—**

See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—IRREGULARITY.
I. L. R. 24 Mad. 311
6 C. W. N. 42; 48

——— **of irregularity—**

See LIMITATION ACT, 1877, ART. 179 (1871, ART. 167)—JOINT DECREES—JOINT DECREE-HOLDERS **I. L. R. 4 Calc. 605**

——— **of objection—**

See APPELLATE COURT—OBJECTIONS TAKEN FOR FIRST TIME ON APPEAL.

See JURISDICTION—QUESTION OF JURISDICTION—CONSENT OF PARTIES AND WAIVER OF OBJECTION TO JURISDICTION.

See JURISDICTION—QUESTION OF JURISDICTION—WHEN IT MAY BE RAISED.
I. L. R. 13 Mad. 273

See JURISDICTION OF CIVIL COURT—FOREIGN AND NATIVE RULERS.
I. L. R. 21 Bom. 351

See LAND ACQUISITION ACT, S. 19.
I. L. R. 17 Bom. 299

See LIMITATION—QUESTION OF LIMITATION **I. L. R. 19 Mad. 416**

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WAIVER—*contd.*

——— of objection—*contd.*

See REVIEW—GROUND FOR REVIEW.
I. L. R. 12 Bom. 228

See WRITTEN STATEMENT.
I. L. R. 22 Calc. 268

——— to sue—

See LIMITATION ACT, 1877, SCH. II, ART. 75 . . . 13 C. W. N. 1004

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 75, 116 . 13 C. W. N. 1010

1. ——— **Waiver by conduct**—*Appeal—Irregularity — Substitution of parties—Consent.* Where the purchaser of a plaintiff's rights was substituted for the plaintiff, the irregularity was *held* to be cured by the consent of the defendant, implied in his offering no opposition, but appealing from the judgment of the merits, making the substituted plaintiff one of the respondents. BEER CHUNDER ROY *v.* TUMEEZOODDEEN **12 W. R. 87**

2. ——— *Appeal—Right of objection to proceedings taken in accordance with appeal to High Court.* Where a party, dissatisfied with the decision of the lower Court appeals to the High Court and re-opens the whole cases he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his appeal. GUNGARAM DUTT *v.* CHOWDHRY JUNMAJOY MULLICK. **1 C. L. R. 144**

3. ——— *Withdrawal of objection—Raising same objection subsequently.* Where parties have, before the Deputy Collector, withdrawn their objections to an Ameen's report, the lower Appellate Court should not allow the same objections to be revived before it. BHUGOBUTTY BURMONEE *v.* GOUR CHUNDER MUNDUL. **9 W. R. 267**

KANTEE CHUNDER DUTT *v.* GOPEE MADHUB NEOGEE . . . . . **11 W. R. 3**

4. ——— *Objection to non-service of notice of execution—Appearance.* Where a judgment-debtor appears and contests the decree-holder's right to execute his decree, he cannot object that no notice was served as required by law, having impliedly waived the objection. GRISH CHUNDER BANERJEE *v.* BHANOO MOTEE CHOWDHRAIN. **11 W. R. 329**

5. ——— *Waiver by judgment-debtor of objection—Right to deduct mesne profits.* A judgment-debtor claiming a deduction on account of mesne profits decreed against him should make good his claim when called upon by the Court executing the decree. Failing to do so, he loses his remedy. NUBO COOMAR CHATTERJEE *v.* RAMDHUN CHATTERJEE. **15 W. R. 266**

6. ——— *Omission to take objection—Remand. Held,* that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand. BENI RAM BHUTT *v.* RAM LALL DHUKRI . **I. L. R. 13 Calc. 189**

WAIVER—*contd.*

7. ——— *Suit by infant without a next friend—Objection not taken until case came on appeal when plaintiff had attained majority—Civil Procedure Code, 1882, s. 440.* Suit by the adoptive daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother. The plaintiff was 17 years old at the time the suit was instituted, and she did not sue by a next friend. No objection was taken by the defendants, on the ground that the plaintiff could not sue without a next friend, until the case came before the Court of first appeal, at which time the plaintiff had attained majority. *Held,* that, seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend until after she had attained her majority, the irregularity was waived. KAMALAKSHI *v.* RAMASAMI CHETTI **I. L. R. 19 Mad. 127**

8. ——— **Effect of waiver**—*Landlord and tenant—Waiver of right of forfeiture for non-payment of rent.* A landlord who has waived his right to sue for the cancelment of a lease on the raiyat's failure to pay six successive instalments is not barred by limitation from suing for cancelment on further breaches of the covenant. DULLI CHAND *v.* MEHER CHAND SAHOO . **8 W. R. 138**

9. ——— *Waiver of vendor binding on purchaser—Sale for arrears of rent.* The Government, as auction-purchaser of the zamindari right of a pergunnah, having waived all right to cancel the tenures of the talukdars, and having admitted them to settlement and otherwise recognised their rights, it was *held* that the defendant, a purchaser, could not put in force against the talukdars any rights which his vendor had waived. OBHOY CHURN ROY *v.* ASANOOLLAH **2 W. R., Act X, 81**

10. ——— **Waiver of rights under mortgage**—*Resumption by Government of mortgaged land under Land Acquisition Act, and re-sale to mortgagor—Omission of mortgagee to claim compensation.* Government having under the Land Acquisition Act taken possession of portion of certain land which had been mortgaged by the owner subsequently, while the mortgage was still in force, re-sold the portion taken, to the mortgagor, who sold it to a third person *bonâ fide* for value. In a suit by the mortgagee (who had taken no steps to obtain any portion of the money paid by the Government for the land) praying for the sale under the mortgage of the land resumed by Government :—*Held,* that the plaintiff as mortgagee had waived his rights under the mortgage, and that the purchaser from the mortgagor had acquired a title free from the plaintiff's incumbrance. *Quære :* Whether the mortgage claim might not, but for the waiver, have re-attached, on the lands resumed by the Government again

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WAIVER—*contd.*

coming into the possession of the mortgagor. RAM AWTAR SINGH *v.* TULSI RAM **5 C. L. R. 227**

11. ——— **Waiver of grounds of enhancement.**—*Reliance on one ground only—Presumption.* In a suit for enhancement of rent upon different grounds, the fact that at the hearing the plaintiff relies on one of the grounds only, and that in the judgment of the first Court the whole case was rested on that ground only, is not a safe warrant for the inference that the other grounds were waived. BONOMALEE CHURN MYTEE *v.* SHOROOP HOOTAIT **14 W. R. 60**

12. ——— *Objection as to absence of demand for enhanced rent—Objection as to want of parties—Objection taken for first time on appeal.* Where in a suit for rent at an enhanced rate no objection as to the absence of legal demand for enhanced rent was taken :—*Held*, that the suit was properly tried by the Court of first instance on the merits. The lower Appellate Court having dismissed the suit on the ground that the inamdar was not a party to the suit, a point on which no issue was raised, although it had been taken in the written statement and which was not made a ground of appeal. *Held*, also, that the point must be considered to have been abandoned at the trial ; it was therefore not open to the lower Appellate Court to dismiss the suit on that ground. GOVINDRAV KRISHNAV RAIBAGKAR *v.* BALU BIN MONAPA **I. L. R. 16 Bom. 586**

13. ——— **Waiver of right to execute decree**—*Agreement to give time to debtor—New contract.* The granting of a judgment-debtor the indulgence of a temporary stay of the warrant of execution issued to inforce the decree does not prejudice the judgment-creditor's right to execution at a subsequent time. BUTCHENNER *v.* RAYUDU **5 Mad. 285**

14. ——— *Waiver where decree-holder was allowed to perform act under decree in case judgment-debtor failed to do so.* *H C* obtained a decree agaist *G R* for the reconstruction in the family house, within one month, of a verandah which had been improperly pulled down by the latter ; on failure of *G R* to rebuild it in the specified time, the decree-holder was to be allowed to rebuild it himself at the cost of *G R*. About a month after the reconstruction was begun, but after the lapse of the month allowed to the judgment-debtor, *H C* applied for an injunction to stop the work as not being according to the decree, and for permission to rebuild it himself. *Held*, notwithstanding *G R* had made alterations and contravened the decretal order, that the judgment-creditors' conduct in looking on without remonstrance for nearly a month while the judgment-debtor incurred considerable expense amounted to a waiver of his right to take matters into his own hands. GOPEE KISHEN GOSSAIN *v.* HEM CHUNDER GOSSAIN . . . **16 W. R. 38**

15. ——— **Waver of right to interest on arrears of rent**—*Receipt of arrears of rent for long time without interest.* By the terms of a kabuliat, rent not paid when due was to bear interest. The zamindar received rent for a period of ten years without making any demand of interest in respect of arrears, and without claiming to apply any portion of the payments towards the discharge of interest. Having subsequently brought a suit for interest, the Courts below were of opinion that the zamindar had waived his claim to interest and dismissed his suit. *Held*, that there were facts justifying such an inference, and that their finding could not be reviewed in special appeal. DINDOYAL PORAMANICK *v.* PRAN KISHEN PAUL CHOWDHRY **Marsh. 394 : W. R. F. B. 117 : 2 Hay 423**

16. ——— *Omission to enforce interest under kabuliat—Variation in contract.* In order to establish variation in a written contract, it must be distinctly pleaded and proved when and how the variation took place, the mere fact of a kabuliat not having been enforced in the most stringent manner does not take away from the lessor the right to enforce it. PEAREE MOHUN MOOKERJEE *v.* BROJO MOHUN BOSE **. 21 W. R. 36**

PEAREE MOHUN MOOKERJEE *v.* BROJO MOHUN BOSE . . . . . **22 W. R. 423**

17. ——— *Omission to claim interest—Pleading.* Both parties stipulated for payment of rent on certain dates, and, if not so paid, of a certain rate of interest until paid. The rent not having been paid at the time agreed on :—*Held*, that the landlord's omission to claim interest, instalment by instalment, for the fractional time that the rent was not paid after it become due, did not justify the plea that the interest stipulated for was not due, or warrant the belief that the plaintiff had waived his claim to interest. RUTTY KANT BOSE *v.* GUNGADHUR BISWAS **W. R. F. B. 13 : 1 Ind. Jur. O. S. 6 Marsh. 40**

18. ——— **Waiver of objection to service of notice of enhancement**—*Omission to appeal from decision finding notice properly served—Question of law and fact.* Plaintiff sued to recover rents at enhanced rates after notice, and got a decree. Defendants appealed on the merits, tacitly accepting the finding of the lower Court that notice had been duly served. On appeal, the Subordinate Judge of his own motion took up the question of notice, decided that it had not been duly served, and reserved the decree of the lower Court. *Held*, that the Subordinate Judge was wrong, for, seeing that the defendants had not appealed from the finding of the first Court which declared that there had been good service, it might fairly be presumed that they had due notice of the claim to enhance, until evidence sufficient to rebut that presumption should be shown. An objection that notice of enhancement has not been properly served is not an objection purely law, but a mixed objection of law and fact, which may

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WAIVER—*contd.*

be impliedly waived by the conduct of the parties. *Chunder Monee Dossee* v. *Dhuroneedhur Lahory*, *7 W. R.*, *2*, cited and distinguished. SHUSHEE BHOOSUN *v.* MUDDUN MOHUN CHUTTOPADHIYA **2 C. L. R. 297**

19. ——— **Agreement come to under mistaken belief**—*Agreement to accept provision in satisfaction of claim to maintenance—Mutual mistake, effect of—Suit by son for partition—Relinquishment of claim.* The plaintiff's father, a member of an undivided Hindu family, signed an agreement by which he agreed to accept a provision in satisfaction of his claim for maintenance. The agreement was signed by reason of a mistaken belief entertained by the plaintiff's father and the other members of the family that there existed an established custom in the family which rendered the property indivisible. *Held*, in a suit by the plaintiff for a partition of the family property liable to partition, that the agreement having been come to under a mutual mistake, it was no bar to the plaintiff maintaining the suit, for it would not have prejudiced the right of the plaintiff's father if he had chosen to insist upon a partition. SOOBRAMANIA TELAVER *v.* SOKKA TELAVER **5 Mad. 437**

20. ——— *Agreement to accept portion of property for maintenance—Suit for full share of property on partition.* In a suit to recover a share of family property, the Civil Judge found that the plaintiff in 1856 waived his right to a share of the family property by accepting a small portion, and dismissed the suit. The plaintiff shared with other members of the family the belief that by established family usage the property was impartible and passed at each succession to the eldest of the co-heirs according to the ordinary law, the other co-heirs being entitled only to a portion for maintenance. Under that belief the plaintiff accepted the allotment made to him in 1856 by the then eldest co-heir of a smaller portion of the property than he would be entitled to on a partition as a sufficient provision for his maintenance. The plaintiff's younger brother instituted a suit in 1861, and succeeded in resisting the alleged custom, and obtained a decree for his full share. *Held* (reversing the decision of the Civil Judge), that the plaintiff was entitled to the relief asked for, it not appearing from the arrangement of 1856 that the parties intended the allotment to be in satisfaction and discharge of every right of the plaintiff as a co-parcener. SUBBIEM PILLAY *v.* ARNACHALA IRUNGOL PILLAY **5 Mad. 444**

21. ——— **Waiver by renunciation of rights**—*Renunciation of rights—Law of waiver—Privileges of office.* It is not law that every right may be renounced. The general rule is power of renunciation, but there are two marked classes of exceptions. There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law; nor of things inherent in man as man. A man may renounce a concrete right, but not one resulting from a natural condition. *Semble:* A karnavan cannot part, by contract, so as to be unable to resume them, with the privileges and duties which attach to his position as a karnavan. CHERUKOMEN *alias* GOVINDEN NAIR *v.* ISMALA **6 Mad. 145**

APPUNI *v.* AYANEPALLI EKANATHA THAVAI VARIKARNAVAN SHANGUNI. APPUNI *v.* VETTUTHADATHA SHAMA **6 Mad. 401**

22. ——— **Effect of signing document in which there is an omission**—*Omission in wajib-ul-urz of interest in property—Imperfection in settlement-proceedings.* The mere signature by an agent of a wajib-ul-urz from which the record of an inportant interest in property was omitted, cannot be construed as a waiver of such right or claim. Still less can the imperfection or inaccuracy of settlement-proceedings operate to extinguish or disallow existing rights. IMAMBUNDEE *v.* BHUGWAN DASS **1 N. W. 41 Ed. 1873, 38**

23. ——— **Effect of acceptance of mortgage-money on right of purchase**—*Condition in favour of purchase by mortgagee.* *A* mortgaged land to *B*, the mortgage instrument providing that *B* should be entitled to purchase the land if it were not redeemed by 12th July 1843. In 1845 *B* accepted from *A* one pagoda in part payment of the mortgage-money. *Held*, that this was a waiver by *B* of his right to purchase. VENKATACHARI *v.* ANANTACHARI . . . . **1 Mad. 69**

24. ——— **Refusal to receive rent in kind**—*Effect of refusal on right to sue for rent.* A refusal by a landlord to accept rent in kind when it is tendered, on the ground that he is suing for a money rent, is a waiver of his right to sue his tenant (on the dismissal of his suit for a money rent) for the value of the rent in kind. NARAIN GEER *v.* GOUR SURUN DOSS . . **23 W. R. 368**

25. ——— **Withdrawal of objection to sale in execution of decree**—*Effect of, on subsequent right to sue to set it aside.* The plaintiff purchased certain property from the first and second defendants. The property was subsequently put up for sale by order of the Civil Court in execution of a decree against the first and second defendants, and was purchased by the third defendant. When the property was about to be sold under the decree, the plaintiff presented to the Court a petition objecting to the sale, but his vakil withdrew the petition with his consent before the sale. In a suit by the plaintiff for the recovery of the land:—*Held*, that the plantiff was not precluded from recovering the land by reason of his having withdrawn the petition, as he could not thereby be considered to have waived his right to sue. KUMARASAMY REDDI *v.* PANNA SOONA MOOROOGAPPA CHETTY . . . . . **7 Mad. 359**

26. ——— **Relinquishment by Hindu widow**—*Relinquishment of title to property by widow—Petition.* A mere petition by a widow to the effect that she has relinquished her title in certain property in favour of parties suing the

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WAIVER—*contd.*

lessees of the property for possession is not a legal relinquishment of her share therein. OOMA CHURN KOONDOO *v.* BHOOBUN MOHUN PAL **10 W. R. 98**

27. ——— Agent's right to execute decree obtained by him as agent—*Civil Procedure Code, 1882, s. 37—Recognized agent—Execution of decree.* *P* filed a suit in the second class Subordinate Judge's Court at Mahad. As *P* resided at Thana, outside the jurisdiction of the Court of Mahad, she authorized her agent, under a general power-of-attorney, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in *P's* favour. The agent then sought to execute the decree. The Court of Mahad passed an order upon his darkhast granting only partial execution. Against this order the agent filed an appeal in the District Court at Thana. Then, for the first time, the judgment-debtors challenged the agent's right to represent *P* who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed. *Held*, that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been taken to the agent's right to represent *P* at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation. PARVATIBAI *v.* VINAYEK PANDURANG **I. L. R. 12 Bom. 68**

28. ——— Remission of part performance of contract—*Sum accepted on account of interest.* A hypothecation-bond provided for payment of interest on the principal sum at the rate of 9 per cent. and contained a further provision that, on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum, a little more than the arrears calculated at 9 per cent. In a suit by the creditor:—*Held*, that the plaintiff had not waived any right under the bond by accepting the payment on account of interest. NANJAPPA *v.* NANJAPPA **I. L. R. 12 Mad 161**

29. ——— Decree payable by instalments—*Execution of decree—Default—Limitation.* A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years: and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887 he made another application for execution which he relied on the same default. *Held*, that the default, if it was one, had been

WAIVER—*contd.*

waived by the decree-holder, and that such waiver was a good defence to the present application, *Mumford* v. *Peal, I. L. R. 2 All. 857*, and *Asmutullah Dalal* v. *Kally Churn Mitter, I. L. R., 7 Calc. 56*, distinguished. BUDDHU LAL *v.* REKKHAB DAS . . . . **I. L. R. 11 All. 482**

30. ——— *Decree payable by instalments, and in default, execution for whole amount to issue—Default in payment of instalments—Waiver by plaintiff of right to execute decree—Receipt by plaintiff of overdue instalments.* By a consent decree passed in a mortgage suit the defendant was ordered to pay to the plaintiff the sum of R1,800 by yearly instalments of R50 payable on 30th April in each year, and in case of default in payment of any instalment the plaintiff was to be at liberty to execute the decree by sale of the mortgaged property. The defendants failed to pay the first instalment, which fell due on the 30th April 1888, and the plaintiff applied for execution and obtained an order for the sale of the property. In order to prevent the sale, the defendants, on the 13th November 1888, paid R60 out of Court, and the application for execution thereupon was allowed to drop. The defendants subsequently made the following payments, *viz.*, R15 on the 5th June 1889, R25 on the 12th June 1889, R15 on the 1st January 1890, and R50 in the Nazir's office on the 2nd June 1890, which was the day on which the Court opened after the summer vacation, which had begun on the 30th April 1890. On the 6th June 1890 the plaintiff again applied for execution of the decree, which was granted by the Subordinate Judge. On appeal the District Judge reversed the order, holding that the plaintiff by accepting the above payments had waived his right to execute the decree. On appeal to the High Court:—*Held*, that the plaintiff was entitled to execution. The acceptance of the payments did not prove a waiver. They were not accepted on account of the specific instalments in arrears, but on account of the whole decree; and even if they were taken as payments of overdue instalments, they could not by themselves prove a waiver. BALAJI GANESH *v.* SAKHARAM PARASHRAM . . **I. L. R. 17 Bom. 555**

31. ——— Omission to take objection that pottahs and muchalkas had not been exchanged before suit—*Suit to recover customary dues payable on account of a chattram.* In a suit by the District Board in charge of a chattram to recover a certain sum as the arrears of various merais, being customary dues payable by the defendants for the benefit of the chattram on account of lands held by them, the defendants raised no objection on the ground that there had been no exchange of pottahs and muchalkas, but among other defences they relied upon a plea of limitation. *Held*, that the defendants should be considered to have admitted tacitly that the exchange of pottahs and muchalkas had been dispensed with. VENKATAVARAGA *v.* DISTRICT BOARD OF TANJORE . . **I. L. R. 16 Mad. 305**

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WAIVER—*contd.*

32. ——— **Instalment-bond**—*Waiver—Payment of part of an instalment and interest.* Where the terms of a bond were that, if any instalment remained unpaid, then the whole amount was to become due :—*Held*, that part payment and acceptance of part of an overdue instalment would not amount to a waiver, for on payment of a part of an instalment, there would remain something due and there would still be a default. Similarly payment and receipt of interest would not amount to a waiver. *Cheni Bash Shaha* v. *Kumud Mundul, I. L. R. 5 Calc. 97*, and *Mon Mohun Roy* v. *Durga Churn Gooee, I. L. R. 15 Calc. 502*, referred to. MOHESH CHANDRA BANERJEE *v.* CHINTAMONI SINGH (1904)
I, L. R. 31 Calc. 83

33. ——— *Instalment-bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877) s. 9, Sch. II, Art. 75—Cause of action—Disability or inability.* In an unregistered instalment-bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. The second instalment was due on the 12th June 1899. The plaintiff brought a suit on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments. *Held*, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation, under s. 9 of the Limitation Act *Hurronauth Roy* v. *Maheroollah Mollah, 7 W. R. 21*, and *Mon Mohun Roy* v. *Doorga Churn Gooee. I. L. R. 15 Calc. 502*, followed. GIRINDRA MOHAN ROY *v.* KHIR NARAYAN DAS (1909)
I. L. R. 36 Calc. 394

34. ——— **Waiver of right to object to sale**—*Civil Procedure Code (Act XIV of 1882), ss. 244, 291, 311—Execution-sale, brought about by fraud—Plea of waiver when to be given effect to and to what extent—Public policy—Circumstances from which waiver to be inferred—Knowledge of rights waived, necessity of proving—Burden of proof—Presumption.* A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right, and there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of the facts which would enable him to take effectual action for the enforcement of such rights. The burden of proof of such knowledge is on the person who relies on the waiver and such knowledge must be made to appear. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. When it appeared from the proceedings that a judgment-debtor only

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waived objections to an execution-sale on the ground of (i) non-issue of fresh sale proclamations when the sale was adjourned from time to time, and (ii) inadequacy of price as resulting therefrom :—*Held*, that this did not prevent him from attacking the sale on the ground (i) that the sale proclamation had never been issued and had been fraudulently suppressed at the decree-holder's instance, and (ii) that the price realised was inadequate by reason of the decree-holders fraud. Whether there has been a waiver or not of the rights of a judgment-debtor to object to a sale and to what extent they may have been waived must depend upon the circumstances of each individual case : and the question has to be decided not merely upon the language of the petitions preferred by the judgment-debtor, but with regard to the whole of the proceedings in the case and particularly with reference to the order made by the Court upon the petitions. The right of waiver is subject to the control of public policy which cannot be contravened by any conduct or agreement of the parties and an agreement which seeks to waive an illegality may be void on grounds of public policy or morality. *Quære :* Whether, if it were made out that the judgment-debtors had in fact waived all possible rights to object to the validity of the sale, a Court of justice would give effect to the plea of waiver when the sale was brought about by fraud upon the processes of the Court. DHANUKDHAR SINGH *v.* NATHIMA SAHU (1907) . **11 C. W. N. 848**

35. ——— **Jurisdiction—Leave to sue—Letters Patent, 1865, cl. 12.** Where there is no want of jurisdiction in this Court over the subject-matter of the action, but leave under cl. 12 of the Letters Patent is required before the Court can entertain the suit, the objection that such leave has not been properly obtained may be waived and will be considered to have been waived if the defendant files his written statement and applies for a commission to examine witnesses. *Moore* v. *Gamgee, L.R. 25 Q. B. D. 244*, followed KING *v.* SECRETARY OF STATE FOR INDIA (1908)
I. L. R. 35 Calc. 394
s.c. 12 C. W. N. 705

WAJIB-UL-ARZ.

See COLLECTOR **I. L. R. 15 All. 410**

See EVIDENCE—CIVIL CASES—MISCELLANEOUS DOCUMENTS—WAJIB-UL-URZ.
I. L. R. 2 All. 876
I. L. R. 15 All. 147

See LANDLORD AND TENANT.
I. L. R. 27 All. 338; 356
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See MAHOMEDAN LAW—PRE-EMPTION—CEREMONIES.
I. L. R. 9 All. 513

See MAHOMEDAN LAW—PRE-EMPTION—MISCELLANEOUS CASES.
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WAJIB-UL-ARZ—*contd.*

See MOHOMEDAN LAW—PRE-EMPTION—PRE-EMPTION AS TO PORTION OF PROPERTY
I. L. R. 10 All. 182
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See MORTGAGE. 10 C. W. N. 778

See OUDH ESTATES ACT (I OF 1869), SS. 22, 23. I. L. R. 31 All. 457

See PRE-EMPTION.
I. L. R. 27 All. 12 ; 457 ; 553 ; 602
I. L. R. 28 All. 60 ; 124 ; 168, 235 ; 237 ; 246 ; 286 ; 454 ; 456 ; 614 ; 679
I. L. R. 29 All. 295
I. L. R. 31 All. 111 ; 533 ; 539 ; 623

See PRE-EMPTION—
RIGHT OF PRE-EMPTION
I. L. R. 25. All. 90 ; 421
I. L. R. 26 All. 212

See PRE-EMPTION—RIGHT OF PRE-EMPTION—CO-SHARERS.
I. L. R. 9 All. 480
I. L. R. 10 All. 472
I. L. R. 26 All. 389

See PRE-EMPTION—RIGHT OF PRE-EMPTION—WAIVER OF RIGHT OR REFUSAL TO PURCHASE.
I. L. R. 11 All. 108

CONSTRUCTION OF WAJIB-UL-URZ.
I. L. R. 26 All. 10, 544 ; 549 ; 547

See WASTE LANDS
I. L. R. 19 All. 172

——— testamentary bequest contained in—

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ADOPTION.
I. L. R. 24 All. 195

See HINDU LAW—WILL—CONSTRUCTION OF WILLS—ESTATES ABSOLUTE OR LIMITED
I. L. R. 19 All. 16

1. ——— *Conditions enabling co-sharer on payment of revenue due to take over the share of a defaulter—Mortgage by conditional sale—Transfer of Property Act (IV of 1882), s. 58—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 148.* The wajib-ul-arz of a certain village provided that if any co-sharer was in default in payment of Government revenue, certain persons—co-sharers in the patti and in the village amongst them—might, on discharging the unpaid revenue due by the defaulter, take possession of his share, though without power to partition and without power to transfer or sell. Also that, if within twelve years the defaulter or his heir wished to take back the property he could get it in the month of Jeth on payment of the amount of default without interest and without being entitled to a rendition of accounts. The wajib-ul-arz went on to provide that after the term of twelve years the heirs

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of the defaulter should not get the property, but the person, who had paid up the arrears of revenue should be the owner. *Held*, that, notwithstanding the provision last mentioned, the position of the person who had obtained possession under the wajib-ul-arz by paying arrears of revenue due by a defaulter, was that of a mortgagee under a mortgage by conditional sale as defined in s. 53 of the Transfer of Property Act, 1882, and that the defaulter or his representative, in the absence of a suit for foreclosure, had a period of sixty years within which the arrears of revenue might be paid up and the property redeemed. JAI RAM *v.* MAKUNDA (1904) . . . I. L. R. 26 All. 337

2. ——— *Declaration recorded in wajib-ul-arz—Construction of will—Document of testamentary nature as to wishes respecting the succession to property on death—Whether bequest was to person irrespective of his adoption, or whether valid adoption was a condition of inheriting the property—Regulation VII of 1892—Act XIX of 1873.* The value as evidence, the importance as records, and the misuse by proprietors, of *wajib-ul-arzes* under Regulation VII of 1822 and Act XIX of 1873, which repealed that Regulation in the North-Western Provinces, commented upon. *Lekhraj Kuar* v. *Mahpal Singh*, *L. R. 7 I. A. 63 ; I. L. R. 5 Calc. 744*, and *Uman Parshad* v. *Gandharp Singh*, *L. R. 14 I. A., 127 ; I. L. R. 5 Calc. 20*, referred to. A recital in a *wajib-ul-arz* may operate as a will (see *Mathura Das* v. *Bhikhan Mal*, *I. L. R. 19 All. 16*). The weight to be given to a statement of that nature must depend in each case on the circumstances, in which it was originally made, and the corroboration it receives from extrinsic evidence. A village proprietor in 1877 caused the following declaration to be made in the *wajib-ul-arz* of the village recorded under Act XIX of 1873—"I am the only zamindar in this village. I am a Marwari Brahman. Seven years ago I adopted my sister's son, Murli. He is my heir and successor (*Malik*). If after this agreement, a son is born to me half the property would be received by him and half by the adopted son. If more than one son are born to me the property would be equally divided among them, including the adopted son, as brothers. I have two wives now : they will receive their maintenance from him (Murli)." The declarant died in 1885 leaving a natural-born son, who died childless in 1887. In 1896 the respondent (the "adopted son," mentioned in the declaration) brought a suit claiming to be entitled to the property therein mentioned on the strength of his adoption and also on the terms of the declaration, which he contended was a will. Under a ruling of the Privy Council in 1899, the adoption of a sister's son was held to be invalid ; and both Courts in India found that a family custom, which would have validated such an adoption, was not established in this suit. The High Court held that the respondent was entitled to succeed irrespective of the adoption. *Held*, by the Judicial Committee assuming that the *wajib-*

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WAJIB-UL-ARZ—*concld.*

ul-arz might be treated as a will, that the words "adopted son" in the declaration were descriptive only, and not the "reason and motive of the gift." The intention was to give him the property as an adopted son capable of inheriting by virtue of the adoption, and as his adoption was invalid by Hindu law, and not warranted by family custom, it gave him no right to inherit and the gift did not take effect. *Fanindra Deb Raikat* v. *Rajeswar Das, L. R. 12 I. A. 72, I. L.R. 11, Calc., 463,* followed. *Bireswar Mookerjee* v. *Ardha Chander Roy, L. R. 19 I. A. 101: I. L. R. 19 Calc. 452,* and *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee, L. R. 3 I. A. 253,* distinguished. LALI *v.* MURLIDHAR (1906) **I. L. R. 28 All. 488**
s.c. L. R. 33 I. A. 97
10 C. W. N. 730

3. ———— *Wajib-ul-arz—Entry verified—Verifier's estate, if bound—Will.* An entry in a *wajib-ul-arz,* which a person has verified cannot, by reason of verification, be regarded as his will or as a document of a testamentary character by him. A rule of succession laid down therein cannot bind his estate after his death. SAHOODRA *v.* GANESH PRASAD (1905) **10 C. W. N. 249**

4. ———— *Construction of document—House-tax—Cess—Rent.* Under the wajib-ul-arz of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held,* that this payment (which was called "gharghanna") was not a house-tax or cess, but merely ground-rent and did not require special sanction. BALWANT SINGH *v.* SHANKAR (1908) **I. L. R. 30 All. 235**

WAKF.

See ACT XX OF 1863, S. 18.
15 B. L. R. 167
I. L. R. 3 Calc. 324

See LIMITATION.
I. L. R. 32 Calc. 537

See MAHOMEDAN LAW **9 C. W. N. 625**
I. L. R. 27 All. 320
I. L. R. 33 Calc. 85
I. L. R. 28 All. 633
I. L. R. 36 Calc. 21
I. L. R. 31 All. 136

See MAHOMEDAN LAW—ENDOWMENT.

See MAHOMEDAN LAW—WAKF.

See RIGHT OF SUIT.
I. L. R. 32 Calc. 273

1. ———— **Suit by heir against mutwalli**—*Wakfnamah—Compromise—Recognition of validity of wakf by heir—Right of judgment-creditor of heir to proceed against wakf properties—Privity.* One *D* executed a *wakfnamah* appointing *B mutwalli.* After *D's* death his widow *M* sued to recover a share of the properties as one

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of *D's* heirs. *B* set up the *wakfnamah* in defence. But the suit was compromised and a *solenamah* was executed, in which *M* admitted the genuineness and validity of the *wakfnamah* and in consideration of an annuity stipulated that neither she nor her heirs should ever in future be competent to claim any of the properties covered by the *wakfnamah,* but that if, at the instance of a third party, the *wakfnamah* should be declared invalid, the terms of the *solenamah* would not affect or interfere with her right of inheritance. Previous to the institution of the suit, *M* had borrowed moneys from the plaintiff. The plaintiff obtained a decree against *M* for the debt and having failed to execute the same against *M's* share in the alleged *wakf* properties instituted the present suit for a declaration that he was not bound by the *wakfnamah* or the *solenamah,* and that he was entitled to proceed against *M's* share in the properties in execution of the decree. *Held,* that the suit was maintainable as the plaintiff was not bound by the *solenamah :* and that he was entitled to show that the *wakf* was invalid and inoperative. The principle of *Srimati Anandmayi Debi* v. *Dhirendra Chandra Mukherjee, 8B. L. R. 122,* followed. MUHAMMAD BUKHT *v.* AZMAN REZA (1906) **10 C. W. N. 560**

2. ———— **Statement in a will that the testator had at a former time given away or set apart property to charity**—*Not a testamentary devise—Absence of actual delivery—Reasonably clear intention.* A mental act although afterwards sufficiently expressed in conduct will not, unless clothed in appropriate words, create a *wakf. Per* CURIAM.—We do not think that a mere statement in a will of some gift in the past can be referred back to the date, still undetermined, when that gift is afterwards alleged to have been made, or that such a narrative statement can in any view be an adequate substitute for the oral declaration of dedication to God, which the Mahomedan law appears to us imperatively to require, synchronously with the act of dedication itself. There is a plain distinction between giving in charity and declaring that one has given in charity. And for the purpose of fixing the origin of the *wakf,* if there was a *wakf* at all, the mere statement in a will that at some past date the testator has set apart such and such funds for charitable objects is of comparatively slight value. Where there has been no actual delivery, a reasonably clear declaration is necessary to create a *wakf.* BANUBI *v.* NARSINGRAO (1906) **I. L. R. 31 Bom. 250**

WAQF.

See WAKF.

WARG LAND.

See SOUTH CANARA.
I. L. R. 28 Mad. 257

WARRANT.

See INSOLVENCY ACT, S. 50.
I. L. R. 17 Calc. 207

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WARRANT—*contd.*

See WARRANT CASE.

See WARRANT OF ARREST.

See WARRANT OF ATTACHMENT.

See WARRANT OF ATTORNEY.

See WARRANT OF COMMITMENT.

See WARRANT OF EXECUTION.

——— **arrest or search without—**

See ESCAPE FROM CUSTODY.
24 W. R. Cr. 45
I. L. R. 19 Mad. 310

See OPIUM ACT, s. 9.
I. L. R. 24 Calc. 691

See PRIVATE DEFENCE, RIGHT OF.
7 Bom. Cr. 50
I. L. R. 19 Mad. 349

——— **seal warrant—**

See LIMITATION ACT, 1877, SCH. II, ART. 179—STEP IN AID OF EXECUTION . . **I. L. R. 29 Calc. 580**

——— **search-warrant—**

See SEARCH-WARRANT.

——— **service of—**

See PENAL CODE, s. 186.
I. L. R. 22 Calc. 596; 759
I. L. R. 23 Calc. 896
I. L. R. 24 Calc. 320

1. ——— **Warrants made by Lieutenant-Governor of Bengal**—*Seal of Court.* The Court will order its seal to be impressed on any warrant made by the authority of the Lieutenant-Governor of Bengal, even if not actually signed by him. ANONYMOUS **1 Ind. Jur. N. S. 106**

2. ——— **Search-warrant**—*Criminal Procedure Code, 1861, ss.114, 115—Requisites of warrant.* It is essential to the legality of a search-warrant, under s. 114 of the Code of Criminal Procedure, that the production of some specified and particular thing is desired; that the Magistrate alone shall determine that such production is necessary; and that a specified house or place only is to be searched. The warrant must, under s. 115 of that Code, be directed to some other person only when a police officer is not forthcoming. QUEEN *v.* HOSSAIN ALI CHOWDHRY **8 W. R. Cr. 74**

3. ——— *Criminal Procedure Code, s. 96—Magistrate, jurisdiction of.* The accused was charged with the offence of criminal misappropriation of treasure belonging to a temple of which he was alleged to be the trustee. From the complaint, it appeared that some of the treasure belonging to the temple had been buried under a flagstaff in the temple, and the Magistrate was of opinion that the nature of the property so buried had an important and material bearing on the case for the prosecution. *Held*, that the Magistrate had jurisdiction to issue a warrant to search for and produce such property upon information which he considered credible, since there was a complaint before him duly affirmed as prescribed by the Criminal Procedure Code; and that it was not incumbent on him to wait until the evidence for the prosecution should have been recorded in the presence of the accused. QUEEN-EMPRESS *v.* MAHANT OF TIRUPATI **I. L. R. 13 Mad. 18**

WARRANT—*concld.*

4. ——— *Criminal Procedure Code (Act X of 1882), s. 96—Issue of search-warrant in the absence of any inquiry, trial, or other proceeding pending before Magistrate.* Some treasure belonging to the Native State of Radhanpur was missing. The Administrator of Radhanpur sent a telegram to the District Superintendent of Police at Ahmedabad, stating that part of the missing treasure was in the possession of the accused who was a resident of Ahmedabad, and asking that this house should be searched. In consequence of his telegram, the City Police Inspector applied for a search-warrant to the City Magistrate of Ahmedabad. Thereupon the Magistrate issued a search-warrant under s. 96 of the Code of Criminal Procedure. In execution of this warrant, the house of the accused was searched and the police seized and took away certain property belonging to the accused, to his wife, and to his servant. The accused was subsequently arrested under a warrant issued by the Political Superintendent of Palanpur under s. 11 of the Extradition Act (XXI of 1879), but he was admitted to bail by the District Magistrate of Ahmedabad. On the 12th June 1897 the District Magistrate passed an order refusing to deliver up the property seized by the Police to the Political Superintendent of Palanpur, but allowing the police to retain the property for some time, as it was possible that a prosecution would be instituted in British India in respect of the stolen treasure. The Magistrate directed that, if no prosecution were instituted within two months, the property should be restored to the persons from whose possession it was taken. The District Magistrate subsequently reversed this order as being erroneous, and passed a fresh order on the 3rd August 1897, directing the property to be delivered up to the Political Superintendent of Palanpur. *Held*, that the City Magistrate had no authority to issue a search-warrant under s. 96 of the Code of Criminal Procedure, as at the time of issuing the search-warrant there was no investigation, inquiry, trial, or other proceeding under the Code pending before the Magistrate, for the purposes of which the production of the articles seized was necessary or desirable. *Held*, also, that the search-warrant being illegal and *ultra vires*, the subsequent orders relating to the detention and delivery of the property seized were also illegal and unjustifiable. *In re* HARILAL BUCH
I. L. R. 22 Bom. 949

WARRANT CASE.

See CRIMINAL PROCEDURE CODE, S. 252
8 C. W. N. 83

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WARRANT CASE—*concld.*

See DISCHARGE OF ACCUSED.
I. L. R. 28 Calc. 652

See PARDANASHIN WOMEN.
I. L. R. 21 Calc. 588

WARRANT OF ARREST.

1. CIVIL CASES 12944
2. CRIMINAL CASES 12948

See ASSAULT ON PUBLIC SERVANT.
I. L. R. 26 Calc. 630

See JURISDICTION OF CRIMINAL COURT—GENERAL JURISDICTION.
I. L. R. 25 Calc. 20
L. R. 24 I. A. 137

See MALICIOUS PROSECUTION.
I. L. R. 19 Bom. 485

See PENAL CODE, S. 332.
I. L. R. 18 All. 246

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION.
5 C. W. N. 71

See PRIVATE DEFENCE, RIGHT OF.
11 C. W. N. 836

See WITNESS—CIVIL CASES—DEFAULTING WITNESSES.
9 W. R. 359
13 W. R. 324
5 Mad. 104
I. L. R. 17 All. 277

See WRONGFUL CONFINEMENT.
I. L. R. 19 Bom. 72

——— **after order for bail—**

See CRIMINAL PROCEDURE CODE, SS. 75, 76.
13 C. W. N. 1091

——— **execution of—**

See WITNESS—CRIMINAL CASES—SUMMONING WITNESSES.
I. L. R. 24 Calc. 320

——— **illegal issue of—**

See PENAL CODE, S. 186.
I. L. R. 24 Calc. 320

——— **not in legal form—**

See PENAL CODE, S. 186.
I. L. R. 23 Cal. 896

See PENAL CODE, S. 332.
I. L. R. 18 All. 246

——— **of Governor-General in Council**

See BENGAL REGULATION III OF 1818.
6 B. L. R. 392 ; 459
9 B. L. R. 36

See HABEAS CORPUS.
6 B. L. R. 392 ; 459

WARRANT OF ARREST—*contd.*

——— **resistance to—**

See CRIMINAL PROCEDURE CODE, SS. 75, 76.
13 C. W. N. 109

1. CIVIL CASES.

1. ——— **Absence of warrant**—*Discharge from custody of Sheriff.* The court will discharge a prisoner from custody when the jailor holds no warrant for his detention, although he has been properly in the custody of the Sheriff. *In the matter of* SHAH SAHIB 1 Ind. Jur. N.S. 191

2. ——— **Informality of warrant**—*Application for discharge—Civil Procedure Code, 1859, s. 273—Delay in bringing up prisoner.* *B M* and several other prisoners in the custody of the Sheriff of Calcutta for debt, without having been brought up to have an order for their allowance made, on being produced for that purpose by the Sheriff, applied for their discharge under s. 273 of Act VIII of 1859. Preliminary objections were taken to the validity of the warrants on which the Sheriff arrested them, on the grounds that the time for execution was not specified in them ; and that, even had they been orginally valid, their authority had expired, owing to the delay in bringing up the prisoners. Both objections were overruled. *Held*, that a mere informality in a warrant, such as the omission of the time for execution, only renders it irregular, and does not invalidate it ; that advantage having been taken of such irregularity to prejudice the prisoner, affords grounds for an application to the Court to set the warrant aside ; and that a mere delay in bringing the prisoner before the Court after his arrest, if not for a considerable period, does not render his detention illegal. *In re* BHOLANAUTH MULLICK . Bourke O. C. 96

3. ——— **Form of warrant**—*Sufficiency of warrant.* Where a person had been taken in execution under a *ca. sa.* directed to the Sheriff under the old procedure, it was *held* to be sufficient to empower the jailor to detain him. The words "ordinary civil jurisdiction" are only used to distinguish the civil from the criminal jurisdiction. *In re* ANWAR BISWAS . 1 Ind. Jur. N. S. 106

4. ——— **Writ of Calcutta Small Cause Court, form of**—*Act XII of 1865—Fixing subsistence-money.* A writ of the Calcutta Small Cause Court commanding its "Bailiff to take the body of *A*, and have him before the Court on the——day of——to satisfy *B* in the sum of——debt and costs, ordered and decreed by the said Court on the——day of——to be paid to the said *B* with costs of execution, and by virtue thereof to take and convey the said *A* to the common jail of the said Court, there to be detained in safe custody for ——weeks, or until he shall sooner perform the said order of the Court" is in point of form a sufficient warrant to the jailor to receive and detain *A*, notwithstanding Act XII of 1865. It was not necessary, in the case of commitment of a debtor to prison by the Calcutta Court of Small Causes,

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WARRANT OF ARREST—*contd.*

1. CIVIL CASES—*contd.*

to bring him in the first instance before the Court, as under the provision of Act VIII of 1859, in order to have his subsistence-money fixed. *In the matter of* MEER NAWAUB.

1 Ind. Jur. N. S. 315

5. ——— **Warrant directed to Nazir** —*Arrest of judgment-debtor—Indorsement to peon —Civil Procedure Code, 1882, s. 343—Indorsement of particulars of arrest by Naib Nazir.* Where a warrant issued by a Subordinate Court, directing the Nazir to arrest a judgment-debtor in execution of a decree, was entrusted by the Nazir to a subordinate for execution by indorsing his name upon it:—*Held*, that there is nothing in the Civil Procedure Code to prohibit a Nazir from authorizing a deputy to execute a warrant of arrest for him, and that his indorsement must be regarded as *primâ facie* evidence of the authority of the person to whom the warrant is delivered to execute it. *Held*, also, that it is most desirable, when the Nazirs of the Subordinate Courts delegate the duty of executing warrants of arrest, that they should confer the authority in more clear and explicit terms than are expressed by a mere indorsement, and that they should be careful in selecting proper persons to discharge that duty, bearing in mind, as far as circumstances permit, the position and caste of the party to be arrested, so as to avoid, through the medium of Court process, subjecting any such party to personal indignity or offence. *Held*, further, that it is important that the person chosen should be made acquainted with the contents of the warrant in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody. Where a warrant for the arrest of the judgment-debtor had been executed, and an indorsement thereon, professedly under s. 343 of the Civil Procedure Code, was irregularly made by the Naib Nazir, he not having been "the officer entrusted with the execution of the warrant:"—*Held*, that such irregularity did not invalidate the arrest. ABDUL KARIM *v.* BULLEN

I. L. R. 6 All. 385

6. ——— **Irregularity in warrant**— *Warrant of arrest in execution of a decree only initialled by proper officer—Civil Procedure Code, 1882, ss. 2 and 251.* A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under s. 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad, and the officer could not legally execute it, and consequently no offence under s. 353 of the Penal Code had been committed. *Held*, that this contention could not

WARRANT OF ARREST—*contd.*

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be allowed, and although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant. QUEEN-EMPRESS *v.* JANKI PRASAD

I. L. R. 8 All. 293

7. ——— **Validity of warrant**—*Liability of Nazir—Escape of judgment-debtor.* The plaintiff sued out a warrant for the arrest of his judgment-debtor on the 4th December 1876. The warrant was lodged with the Nazir on the 16th December and was to be in force till the 4th January 1877. On the 22nd December 1876 the Nazir was informed that the judgment-debtor was already in the civil jail under a writ of execution issued by another creditor. The Nazir then returned the warrant to the Subordinate Judge who had issued it. On the 29th December the Subordinate Judge again sent it to the Nazir's office, where it was duly received by the Nazir's karkun (defendant No. 2). This fact was not reported by the karkun to the Nazir (defendant No. 1) until the 4th January 1877. On the 1st January 1877 the judgment-debtor's debt was paid by Government, and he was released in honour of Her Majesty's assumption of the title of Empress of India. The judgment-debtor thereupon left the district and could not be found, and the plaintiff's warrant remained unexecuted. The plaintiff sued the Nazir and his karkun for allowing his judgment-debtor to escape. *Held*, that the Nazir ought not to have sent the warrant back to the Subordinate Judge, and that there was no necessity for a fresh order on it until the time for which it had to run had expired. *Held*, also, that, according to Act VIII of 1859, as it stood at the end of 1876 and until October 1877, the batta for the maintenance of a debtor could not become payable until he was arrested and brought before the Court and the latter made the order for his committal to the civil jail. KASTURCHAND *v.* RAVJI SADASHIV . . **I. L. R. 4 Bom. 65**

8. ——— **Warrant not exhausted if on one occasion the serving officer is unable to find the judgment-debtor**—*Execution of decree—Limitation—Civil Procedure Code, 1882, s. 230.* The holders of a decree for money, dated the 2nd of December 1885, after various infructuous applications for execution, applied on the 4th of August 1897 for a warrant for the arrest of the judgment-debtor. That application was granted, but the peons sent to arrest the judgment-debtor reported that he had concealed himself, and the Court in consequence struck off the application for execution. On the 29th of November 1897 the decree-holders again applied for the arrest of the judgment-debtor, but that application also was struck off without the arrest having been made. Against the order striking off this latter application the decree-holders appealed to the High Court, where, on objection made that the decree could no-

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WARRANT OF ARREST—*contd.*

1. CIVIL CASES—*contd.*

longer be executed, having regard to s. 230 of the Code of Civil Procedure, it was *held* that the warrant of arrest issued on the decree-holders' application of the 4th of August 1897 still subsisted and ought to be executed. *Anwar Ali Khan* v. *Phul Chand, All. Weekly Notes, (1898) 137,* followed. JIT MAL *v.* JWALA PRASAD. .

I. L. R. 21 All. 155

9. ——— **Jurisdiction of High Court**—*Indian High Courts Act, 1861 (24 & 25 Vict., cap. 104), s. 11—Letters Patent, 1865, cl. 11—Letters Patent, 1800, cls. 15 and 21—Jurisdiction of High Court to issue warrant against judgment-debtor and appoint special bailiff for its execution.* A Judge, in the exercise of the ordinary original civil jurisdiction of the High Court at Madras, directed a warrant to issue against the person of a judgment-debtor, and appointed a special bailiff to execute the warrant of arrest against the judgment-debtor, wherever he might be found in the Presidency of Madras. *Held*, that the order was made without jurisdiction. *Sagore Dutt* v. *Ramchunder Mitter, 1 Hyde 136,* referred to. *Monomotha Nath Dey* v. *Greender Chundu Ghose, 24 W. R. 366,* referred to. *Jamuna Bhai* v. *Sadagopa, I. L. R. 7 Mad. 56,* referred to. RAJAH OF RAMNAD *v.* SEETHARAM CHETTY (1902)

I. L. R. 26 Mad. 120

10. ——— **Showing warrant**—*Penal Code (Act XLV of 1860), ss. 353, 225B—Assaulting a public officer in execution of his duties—Resisting or obstructing public officer in discharge of his duties as such—Warrant, execution of, by person not authorized—Warrant of arrest, issue of, in execution of a Civil Court decree—Notification of contents of warrant, if necessary—Lawful arrest.* To make an arrest under a warrant issued in execution of a Civil Court decree valid, it may not be necessary to show the warrant to the person to be arrested ; but it is the duty of the bailiff to acquaint the person with the contents of the warrant at the time he arrests him, and with the fact that he was authorized to arrest him, and if the accused then wants to see the warrant it would be the duty of the bailiff to show it to him. When a warrant is not shown to the person arrested, and the contents of the warrant are not notified to him, before or at the time of the arrest, there is no lawful arrest. *In the matter of* RAJANI KANTO PAL *v.* EMPEROR (1901) . . . . **5 C. W. N. 843**

11. ——— **Signature of warrant**—*Indian Penal Code (Act XLV of 1860), s. 225B—Resistance to lawful apprehension—Warrant, legality of—Civil Procedure Code (Act XIV of 1882), ss. 251, 337, 644, and Sch. IV, Form No. 154—Warrant for arrest of judgment-debtor, by whom to be signed—Indian Evidence Act (I of 1872), s. 114, cl. (e)—Presumption—Judicial and official acts.* Under s. 251, Civil Procedure Code, a warrant for arrest, like any other warrant issued in execution of a decree, may be signed by the Judge himself, or by any other officer appointed in that behalf by Court.

WARRANT OF ARREST—*contd.*

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Queen-Empress v. *Janki Prasad, I. L. R. 8 All. 293,* referred to. Form No. 154, Sch. IV, Civil Procedure Code, as the provision for variation in s. 644, Civil Procedure Code, shows, cannot be taken as implying a direction that a warrant for arrest, in particular, must be signed by the Judge himself. Where a warrant for arrest was signed by a *sheristadar* duly authorized to sign warrants, and the judgment-debtor resisted its execution: *Held*, that he had committed an offence under s. 225B, Indian Penal Code. From the mere fact that the warrant for arrest of a judgment-debtor bore the signature of the *sheristadar*, it cannot be presumed, under s. 114, cl. (*e*), Indian Evidence Act, that the *sheristadar* had been duly appointed to sign warrants. Evidence of the fact of appointment is necessary. *Per* HARINGTON, *J.*—*S.* 114, cl. (*e*), Indian Evidence Act, authorises the presumption that a particular judicial or official act which has been performed has been performed regularly, but it does not authorize the presumption, without any evidence, that the act has been performed. DEPUTY LEGAL REMEMBRANCER *v.* MIR SARWAR. JAN (1902) . . . . **6 C. W. N. 845**

2. CRIMINAL CASES.

1. ——— **Arrest in pending case**—*Power of Magistrate—Criminal Procedure Code, 1861, s. 68.* S. 68 of the Code of Criminal Procedure gave a Magistrate jurisdiction on proper evidence to issue a warrant for the arrest of persons in a pending case. *In the matter of* SIDESHURY CHOWDHRAIN

16 W. R. Cr. 50

2. ——— **Warrant on non-appearance to summons**—*Lessee of tolls—Disobedience of summons to appear—Undertaking not to sue.* *A*, the lessee of a toll, was in arrear to Government in respect of the rent. The Magistrate issued a summons to him, whereby it was recited that a plaint had been preferred against him (*A*) for not paying the sum of R262 for arrears of rent, and *A* was summoned to appear before the Magistrate to answer the charge. *A* did not appear on the day appointed, but had an application presented for postponement of the demand for arrears of rent, on the grounds therein stated. On the following day the Magistrate passed the following order : " Whereas the debtor, defendant, has not appeared in person, the summons has not been obeyed ; therefore it is ordered that a warrant be issued for the arrest of the defendant." Proceedings were afterwards taken upon the warrant. *Held*, that all the proceedings taken by the Magistrate were irregular and must be set aside, the defendant undertaking not to take legal proceedings for anything done under the order or warrant. *In the matter of* BANKA BIHARI GHOSE

2 B. L. R. A. Cr. 17 : 11 W. R. Cr. 28

3. ——— **Issue of warrant**—*Complaint on oath—Report of police officer—Criminal Procedure Code, 1869, ss. 68 and 155.* In cases in which

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WARRANT OF ARREST—*contd.*

2. CRIMINAL CASES—*contd.*

the police cannot arrest without a warrant, a warrant cannot legally be issued by a Magistrate except on a complaint made on oath (or under s. 68 of the Criminal Procedure Code), whether such Magistrate is authorized to entertain cases either on complaint directly to himself or on the report of a police officer. REG. *v.* JAFAR ALI . . **8 Bom. Cr. 113**

4. ——— *Arrest on report of policeman for offence for which arrest without warrant might be made.* Where a policeman in whose sight a theft was committed arrested the thief, and being himself unable to take or send the accused to a Magistrate, sent a report, on which the Magistrate issued a warrant:—*Held*, that, under these circumstances, the accused was legally brought before the Magistrate. REG. *v.* MAHIPYA VALAD BOMYA MAHAR . . . **5 Bom. Cr. 99**

5. ——— *Validity of warrant—Criminal Procedure Code (X of 1872), s. 157—Magistrate out of jurisdiction—Extradition.* It was not essential to the validity of a warrant issued under s. 157 of Act X of 1872 that the Magistrate issuing it should be, at the time he issues it, within the local limits of his jurisdiction. He might issue such a warrant from a place in foreign territory. REG. *v.* LOCHA KALA . **I. L. R. 1 Bom. 340**

6. ——— **Procedure on warrant**—*Act XII of 1867.* When a prisoner was arrested by the Sheriff under a writ of *ca. sa.*, it was necessary to bring him before the Court without delay, under s. 14 of Act XII of 1867. *In re* RAMCOOMAR DUTT . . . **2 Ind. Jur. N. S. 340**

7. ——— **Operation of warrant**—*Detention of prisoner.* The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate. MUTHOORA NATH CHUCKERBUTTY *v.* HEERA LALL DOSS **17 W. R. Cr. 55**

A Magistrate therefore is not at liberty to retain an accused person in custody, except upon a proper remand made after taking sufficient evidence given on oath or solemn affirmation. *In the matter of* ZUHURUDDEEN HOSSEIN . **25 W. R. Cr. 8**

8. ——— *Warrant issued to unofficial person—Criminal Procedure Code (Act X of 1872), s. 161—Act XXV of 1861, s. 77.* Under s. 77 of the Criminal Procedure Code, a Magistrate ought not to issue a warrant to an unofficial person, except when he is without the assistance of competent police officers, and unless the urgency is imminent. The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate, and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence there can be no grounds. *In the matter of the petition of* SURENDRONATH ROY. QUEEN *v.* SURENDRONATH ROY **5 B. L. R. 274 : 13 W. R. Cr. 27**

WARRANT OF ARREST—*contd.*

2. CRIMINAL CASES—*contd.*

9. ——— *Criminal Procedure Code (Act XXV of 1861), s. 68—Act X of 1872, ss. 142 and 150—Detention of accused.* A warrant issued under s. 68, which was a warrant of arrest as described under s. 76 (Form B), is only for the purpose of bringing an accused person before the Magistrate. It was not a warrant for commitment, and did not authorize the detention of a person longer than is necessary for his production before the Magistrate. To detain him further, there must be a fresh warrant under s. 222, charging the prisoner with some offence, on evidence taken on oath or affirmation, and in the presence of the accused. *In the matter of* MAHESH CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SIRKAR. **4 B. L. R. Ap. 1 : 13 W. R. Cr. 1**

10. ——— *Detention of accused—Order sanctioning detention for indefinite period—Remand of accused. Held*, that the order of a Magistrate sanctioning the detention by the police of an accused person for an indefinite period is illegal. At the expiration of twenty-four hours from the time of arrest, the accused must be brought before a Magistrate, who could then remand for a period not exceeding fifteen days under s. 224 of the Criminal Procedure Code, 1861. No remand without a hearing can last for a longer period. REG. *v.* SURKYA VALAD DHAKU . **5 Bom. Cr. 31**

11. ——— **Form of warrant**—*Omission to seal warrant—Criminal Procedure Code, 1869, s. 76—Requisites of good warrant.* A warrant issued under s. 76 of the Code of Criminal Procedure should be stated, should describe the person to be apprehended under it with reasonable particularity, so that there may be no difficulty in establishing his identity, and should be subscribed with the name and full official title of the Magistrate issuing it. Where a warrant was defective in all the above particulars, the prisoner apprehended under it was released by the High Court. *In re* HASTINGS **9 Bom. 154**

12. ——— *Form of endorsement on warrant.* An endorsement on a warrant under s. 79 of the Code of Criminal Procedure should be regularly made by name to a certain person in order to authorize him to make the arrest. DURGA TEWARI *v.* RAHMAN BUKSH **4 C. W. N. 85**

13. ——— *Act XIII of 1856, s. 58—Error in warrant not affecting conviction.* A warrant issued under s. 58 of Act XIII of 1856 should be addressed to some one or more inspectors, and not generally to "all constables and peace officers." Where a warrant in the latter form was executed under the direction of an inspector, it was *held* that the error in the form of the warrant was merely an error of procedure, and did not affect the validity of the conviction, under s. 57, of persons apprehended in pursuance of the warrant

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WARRANT OF ARREST—*contd.*

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so executed. REG. *v.* NANA MOROJI. *In re* MADHAV MORAR . . . **8 Bom. Cr. 1**

14. ——————— *Warrant not containing specification of offence.* A warrant which did not specify a punishable offence, and which had been issued upon a statement not sufficient to make out any offence, quashed. *In re* BIDHUMUKHI DEBI . . . . **6 B. L. R. Ap. 129**
s. c. BIDHOOMOOKEE DABEE *v.* SREENATH HALDAR
15 W. R. Cr. 4

15. ——————— **Informality in warrant**—*Criminal Procedure Code, 1869, s. 404—Power of High Court—Irregularity in process of arrest and attachment.* The High Court was not empowered to interfere under the provisions of s. 404 of the Criminal Procedure Code, 1869, until there has been a judicial proceeding by a Magistrate. A person complaining of irregularity of process issued for his arrest and for the attachment of his property, before applying to the High Court under s. 404 of the Criminal Procedure Code, should make application to the Magistrate issuing such process for his discharge and the release of his property, on the ground of the informality of the warrants. QUEEN *v.* BISHESHUR PERSHAD
2 N. W. 441 : Agra F. B. Ed. 1874, 236

16. ——————— **Mode of arrest in foreign territory or out of jurisdiction**—*Warrant of arrest for contempt of Court.* The High Court of Bombay will not send a special bailiff into the territories of the Gaikwar of Baroda to arrest a defendant who has been guilty of a contempt of Court, but the Court will send a special bailiff for such purpose beyond the local limits of the High Court to a place within the Presidency of Bombay. HARIVALLABHDAS KALLIANDAS *v.* UTAMCHAND MANIKCHAND . . . **7 Bom. O. C. 172**

17. ——————— *Warrant to arrest and imprison—Form of warrant—Service of warrant—Irregularity—Defect in warrant—Foreigners, arrest of—Act III of 1864, s. 3—Criminal Procedure Code, s. 491.* On the 3rd July 1894, certain foreigners, resident in Bombay, having been arrested by the police and sent to jail under warrant issued under ss. 3 and 4 of Act III of 1864, they applied to the High Court and obtained a rule *nisi* under s. 491 of the Criminal Procedure Code (Act X of 1882) and under Stat. 31 Car. II, c. 2 (HABEAS CORPUS ACT), calling on the Superintendent of the Jail to show cause why they should not be set at liberty. A separate warrant was issued in the case of each of the foreigners in question and all were in the same form. The warrant directed the person whose name appeared in it forthwith to "remove himself from British India by sea, and it further contained the following words : "All officers to whom this order may be communicated are required to see that it is duly obeyed, and, in the event of its being infringed, to apprehend and detain the said Solomon Moses in safe custody in the jail of Bombay under s. 4 of the said Act,

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until he shall be lawfully discharged therefrom." Each warrant was signed by the Secretary to Government and was directed to the Commissioner of Police and to the Superintendent of the Jail. *Held*, that the warrants were not valid warrants for the following reasons : (i) they were irregular in that they contained an order to the person named in them to do a certain thing with a further conditional order for his imprisonment in the event of his not doing it. There ought to have been a separate order to each prisoner to remove himself from British India, which order should have been duly served upon him. Then, in case of his refusal or neglect to comply with its terms, there ought to have been a further order by the Governor in Council authorizing his arrest and detention in jail. (ii) The persons named in them were not indicated with sufficient certainty and particularity. The warrants contained no description of the persons against whom they purported to be directed, and did not give their place of residence. (iii) By reason of the direction contained in them that the persons named in them were to remove themselves from British India by sea to the places mentioned in the warrant. The particular route to be specified under s. 3 of Act III of 1864, is intended to be a route in British India, and not a route beyond the high seas. The Government has no jurisdiction to direct a person's movements at sea beyond the limits of three miles from the shore. (iv) *Per* STARLING, *J.*—The warrants were also defective, inasmuch as they bore no seal. ALTER CAUFMAN *v.* GOVERNMENT OF BOMBAY
I. L. R. 18 Bom. 636

18. ——————— *Warrants issued under Act XIII of 1859—Execution outside jurisdiction—Criminal Procedure Code, 1882, s. 83—Magistrate, jurisdiction of—Breach of contract of service.* S. 83 of the Criminal Procedure Code applies to warrants issued under s. 1 of Act XIII of 1859, and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them. QUEEN-EMPRESS *v.* KATTAYAN . . . **I. L. R. 20 Mad. 235**
QUEEN-EMPRESS *v.* MUTHAYYA
I. L. R. 20 Mad. 457

GAURI SHANKAR *v.* MATA PRASAD
I. L. R. 20 All. 124

19. ——————— **Endorsement**—*Criminal Procedure Code (Act V of 1898), s. 79—Warrant, validity of—Endorsement by initials, if sufficient—Arrest made in execution of such warrant—Resistance or obstruction to arrest—Penal Code (Act XLV of 1860), ss. 224, 353.* An endorsement on a warrant of arrest should be made properly in accordance with law. When an endorsement is made only by initials which are proved or identified to be of the proper person, the warrant does not become invalid by reason merely of the endorsement being by initials. ABDUL SIKDAR *v.* MATHU SINGH (1901)
5 C. W. N. 447

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WARRANT OF ARREST—*concld.*

2. CRIMINAL CASES—*concld.*

20. ——— Wrong description of accused—*Onus of proof—Resistance to lawful apprehension—Criminal force to deter public servant from discharge of duty—Code of Criminal Procedure (Act V of 1898), s. 75—Penal Code (Act XLV of 1860), ss. 225B and 353.* A warrant of arrest which contains a wrong description of the accused is not a valid warrant; and a conviction under ss. 225B and 353 of the Penal Code of such accused person, who resisted or used criminal force upon his being arrested under such warrant, is illegal. In order to have a conviction for an illegal disobedience of a warrant, the *onus* is on the prosecution to show that the accused is the person against whom the warrant has issued. It is not for the accused to show that he is not the person against whom the warrant was issued. DEBI SINGH *v.* QUEEN-EMPRESS (1901) . . **I. L. R. 28 Calc. 399**
s.c. 5 C. W. N. 413

WARRANT OF ATTACHMENT.

——— Warrant issued by Civil Court—*Resistance to execution of—Legality of warrant—Rioting—Legal common object—Penal Code (Act XLV of 1860), ss. 141, 147 and 325—Civil Procedure Code (Act XIV of 1882), Sch. IV, Form No. 136.* Where resistance was made to the execution of a warrant issued by a Civil Court for the attachment of the moveable property of the judgment-debtor, the warrant being general in its terms and not purporting on the face of it to authorize the seizure of the property of the judgment-debtor, nor giving the *peon* executing it authority to enter his house, nor containing the name of the judgment-debtor: *Held*, that the warrant was not one which could lawfully be executed against the judgment-debtor, and that resistance to the execution of such warrant did not constitute an offence under s. 147 of the Penal Code. *Held*, further, that, where one of the parties resisting the execution had exceeded his rights and inflicted a severe injury on one of the opposite parties, his conviction of an offence under s. 325 of the Penal Code was lawful. *Held*, also, that s. 141, cl. (2), of the Penal Code does not have the effect of making an assemblage of persons an unlawful assemblage, if the object with which they assembled was a perfectly legal one. UMA CHARAN SINGH *v.* EMPEROR (1901).
I. L. R. 29 Calc. 244
s.c. 6 C. W. N. 164

WARRANT OF ATTORNEY.

1. ——— Extent and operation of warrant—*Civil Procedure Code, 1859, ss. 17 and 49—Acceptance of service and appearance—Act XX of 1862, s. 7.* A warrant of attorney to the attorney of a defendant to receive a declaration or plaint, etc., in any action or suit to be brought for the recovery of certain moneys, and to confess the same action or suit, or else to suffer or consent to a judgment or decree in the said action or suit by

WARRANT OF ATTORNEY—*concld.*

default, or in any other way to pass or be pronounced against the defendant, empowered the attorney to accept service and appear for the defendant within the meaning of ss. 17 and 49 of Act VIII of 1859. *Held*, that s. 7 of Act XX of 1862 referred only to warrants of attorney for the entering up of judgments in the High Court which were in existence before the 1st July 1862. KHALUT CHUNDER GHOSE *v.* SARODASOONDERY DOSSEE
Bourke O. C. 244

2. ——— Limitation Act, 1859—*Entering up judgment.* The statute of limitation is no answer to a rule *nisi* to enter up judgment on a warrant of attorney. SOOJAN MULL *v.* HYDER JUNG BAHADOOR . **1 Ind. Jur. O. S. 58**

WARRANT OF COMMITMENT.

——— Signature of Magistrate—*Criminal Procedure Code, 1872, s. 303.* The signature of a Magistrate to a warrant of commitment under s. 303 of the Code of Criminal Procedure, 1872, should not be affixed by a stamp. SUBRAMANAY *v.* QUEEN . . . **I. L. R. 6 Mad. 396**

WARRANT OF EXECUTION.

1. ——— Executing a warrant for attachment of property—*Penal Code (Act XLV of 1860), ss. 353, 147, 114—Assaulting a public servant in the discharge of his duty—Contents of the warrant—Form of the warrant—Non-production of evidence as to terms of warrant—Validity of warrant, and of conviction had upon it.* A warrant for the attachment of whatever property of a judgment-debtor which the officer executing it might find on search, which did not describe the area of the search and was different from the form prescribed by the Code of Civil Procedure, Ex. IV., No. 136, was not a valid warrant. In the absence of any evidence as to the terms of the warrant either by the production of the original or in the form of secondary evidence a conviction for resisting or obstructing a public officer in the discharge of his duty, *viz.*, the execution of a distress-warrant for attachment of property, cannot stand. CHUNDER COOMAR SEN *v.* QUEEN EMPRESS . . . . **3 C. W. N. 605**
TAFAZZUL AHMED CHOWDHRY *v.* QUEEN-EMPRESS
I. L. R. 26 Calc. 630

2. ——— Extension of time for operation of warrant—*Act X of 1859, s. 88—Jurisdiction.* Where a warrant of execution under Act X of 1859, s. 88, was extended for four days after a particular day, when the original warrant was not sixty days old, in order that more moveable property might be pointed out:—*Held*, that, until the time so extended has elapsed, an order for sale of immoveable property was without jurisdiction. NABI BAX *v.* DIDER BAX SHAH
3 B. L. R. A. C. 10 : 11 W. R. 326

3. ——— Return of warrant—*Public servant—Resistance to public servant—Penal Code, s. 183—Civil Procedure Code, 1882, s. 251.* A person

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WARRANT OF EXECUTION—*concld.*

was convicted under s. 183 of the Penal Code of offering resistance to the attachment of property by a public servant. The offence was committed on the 4th February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held*, that the conviction was bad. *In the matter of the petition of* ANAND LALL BERA. ANAND LALL BERA *v.* EMPRESS **I. L. R. 10 Calc. 18 : 13 C.L.R. 209**

4. ——— **Irregularity in warrant—** *Civil Procedure Code, 1859, s. 222—Civil Procedure Code, 1877, 1882, s. 251.* An execution-sale of the right, title and interest in land was set aside by the Court, on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court ; and at a second sale the property was sold to other purchasers who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed. The High Court having *held* that, with reference to s. 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs. RAM DAYAL *v.* MAHTAB SINGH . . . . **I. L. R. 7 All. 506**

5. ——— *Warrant, validity of—Attachment of property in execution of an invalid warrant—Resistance or obstruction to such execution—Re-issue of warrant after expired date, legality of—Penal Code (Act XLV of 1860), ss. 183, 186.* A warrant for realization of money due under a certificate from a Revenue officer, having the force of a decree, dated the 15th February, was issued on the 24th February, 1900, and made returnable on the 5th March following. A return was made on the 3rd March that no property of the debtor could be found. On the 30th March the same warrant was re-issued by the Nazir and made returnable on the following day. In execution of this warrant certain cattle belonging to the judgment-debtor were attached, and these were taken away by the debtor's men, who pushed one of the *peons*. The debtor's men were thereupon prosecuted for and convicted of offences under ss. 183 and 186 of the Penal Code. *Held*, that, after the return of the 3rd March was made, the warrant ceased to be a valid warrant, and it could not be re-issued in that form. *Held*, also, that, the warrant being illegal, no offence relating to the execution of such warrant was committed by the persons resisting such execution. ADHAR MIDDAY *v.* EMPRESS (1900) **5 C. W. N. 391**

WARRANTY.

See MARINE INSURANCE.
I. L. R. 36 Calc. 516
13 C. W. N. 425

WARRANTY, BREACH OF.

See CHARTER PARTY
8 B. L. R. 544

WARRANTY, BREACH OF—*concld.*

See CONTRACT—BREACH OF CONTRACT.
14 B. L. R. 180 : 23 W. R. 136
I. L. R. 13 Calc. 237
L. R. 13 I. A. 60

See CONTRACT ACT, s. 78.
I. L. R. 4 Calc. 801

See INSURANCE—LIFE INSURANCE
I. L. R. 25 Mad. 183

See RIGHT OF SUIT—MISREPRESENTATION.
I. L. R. 24 Bom. 166

See VENDOR AND PURCHASER—BREACH OF WARRANTY.

——— *Sample—Jute—Examination—Proof of inferiority of quality——Opportunity of examining the bulk—Mode of examining sample.* There may be cases in which the Court would be justified in drawing an inference as to the quality of the bulk from the quality of the sample, *e.g.*, in a case in which the plaintiff had no opportunity of examining and testing the bulk ; but the Court would not condemn the bulk as of inferior quality on proof of the inferiority of a sample, if the plaintiff had the opportunity of examining the bulk but adduces no evidence to prove its quality. In examining a certain number of bales of goods taken as a sample, the entire quantity in each bale, and not merely a portion, should be examined. It is not proper to examine a portion merely of each such bale and to assume that the residue would be of quality similar to the portion examined, and this is particularly so when the examination of the sample is, by a trade custom, to be the test of the quality of the bulk. BOISOGOMOFF *v.* NAHAPIET JUTE COMPANY (1901) **I. L. R. 29 Calc. 587**

WARRANTY OF TITLE.

See SALE IN EXECUTION OF DECREE—PURCHASERS, TITLE OF—GENERALLY.
See SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE—RIGHTS OF PURCHASERS . **I. L. R. 2 Bom. 258**
I. L. R. 17 Mad. 228

See VENDOR AND PURCHASER—BREACH OF WARRANTY.

See VENDOR AND PURCHASER—CAVEAT EMPTOR.

WASHERMAN.

See MADRAS TOWNS IMPROVEMENT ACT. 1871, s. 1 . **I. L. R. 1 Mad. 174**

See WILL—CONSTRUCTION.
9 B. L. R. Ap. 4

WASTE.

See HINDU LAW.
I. L. R. 31 Calc 11 ; 214 ; 408

See HINDU LAW—ALIENATION—ALIENATION BY WIDOW—SETTING ASIDE ALIENATIONS, AND WASTE.

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WASTE—*concld.*

See HINDU LAW—REVERSIONERS—POWERS OF REVERSIONERS TO RESTRAIN WASTE, ETC.—WHO MAY SUE.
6 Moo. I. A. 433
I. L. R. 6 Calc. 198
I. L. R. 9 Calc. 817
Marsh. 622

See LANDLORD AND TENANT—FORFEITURE—BREACH OF CONDITION
I. L. R. 10 Mad. 351
I. L. R. 22 Mad. 39

See LIMITATION ACT, 1877, SCH. II, ART. 125 (1859, s. 1, CL. 16).
7 B. L. R. 131

——— by mortgagee in possession.

See MORTGAGE—ACCOUNTS.
I. L. R. 15 Mad. 290

1. ——— Limitation—*Allegation of waste—Prayer for protection from contemplated waste. Held, per* PHEAR, J., that where a suit was one to prevent contemplated waste, it was not barred by lapse of time. GROSE *v.* AMIRTAMAYI DASI
4 B. L. R. O. C. 1 : 12 W. R. O. C. 13

BISWANATH CHUNDER *v.* KHANTAMANI DASI
7 B. L. R. 131

2 ——— Liability for waste—*Hindu widow : liability for waste committed by her husband as administrator.* In a suit against a widow individually, and not in her representative capacity, to recover plaintiff's share of property alleged to have been in her possession, the suit being one wherein defendant was charged with devastation in respect of such property only :—*Held*, that defendant was not liable in that suit to be made answerable out of her husband's assets for any devastation which he might have committed. STAVES *v.* DIAS
10 W. R. 444

WASTE LANDS.

See LANDLORD AND TENANT—MIRASIDARS
I. L. R. 1 Mad. 205

See LANDLORD AND TENANT—NATURE OF TENANCY. I. L. R. 28 Calc. 693

See ONUS OF PROOF—LIMITATION AND ADVERSE POSSESSION.
I. L. R. 9 Mad. 175

See PARTITION. I. L. R. 35 Calc. 961

See SETTLEMENT—EVIDENCE OF SETTLEMENT . . I. L. R. 26 Calc. 792

See SETTLEMENT—RIGHT TO SETTLEMENT.
4 Mad. 429

See SETTLEMENT—SUBJECTS OF SETTLEMENT . . 1 Mad. 12 ; 407

See VALUATION OF SUIT—SUITS—WASTE LANDS, SUIT FOR . 7 W. R. 349

——— grant of—

See MORTGAGE—FORM OF MORTGAGES.
I. L. R. 21 Calc. 882
L. R. 21 I. A. 96

WASTE LANDS—*contd.*

——— made cultivable.

See ONUS OF PROOF—LIMITATION AND ADVERSE POSSESSION.
I. L. R. 24 Calc. 256

——— right of village to pasturage on—

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, BOMBAY.
I. L. R. 21 Bom. 684

1. ——— Presumption from land lying waste—*Evidence as to possession.* The fact of land lying waste does not of itself show that no one is in possession. MAHOMED ALI *v.* SHURUM ALI
8 W. R. 422

2. ——— Ownership of waste land—*Presumption as to possession.* Where land is waste and there is no visible sign of occupation the possession must be taken to go with the right, and the right is *primâ facie* in the zamindar of the estate to which the waste land belongs. WOODWANT MAHTOON *v.* HUNOOMAN PERSHAD SINGH
22 W. R. 419

3. ——— *Ownership of waste land not belonging to any private person.* Unsettled and unoccupied waste land, not being the property of any private owner, must belong to the State. PROSUNO COOMAR ROY *v.* SECRETARY OF STATE FOR INDIA . I. L. R. 26 Calc. 792
3 C. W. N. 695

4. ——— Possession of waste land—*Limitation—Presumption—Proof of title.* There may be such possession of waste lands as to protect a suit from being barred by limitation ; and where the question of possession is doubtful, a presumption will arise in favour of the party who proves title. MAHOMED BASSIR *v.* KUREEM BUKSH
11 W. R. 268

5. ——— *Possession, presumption of, from evidence of title.* In disputes as to the right to possession of waste and jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have title has also possession. RAM BANDHU *v.* KUSU BHATTU
5 C. L. R. 481

6. ——— *Title to uncultivated or jungle lands—Adverse possession—Limitation—Acts of ownership.* If adverse possession for a sufficiently long time is proved, the title of a person to uncultivated or jungle land may be barred by limitation in the same manner and to the same extent as in the case of cultivated land ; the evidence of possession being the exercise of such acts of ownership as would ordinarily be exercised over property of that nature. MITTERJEET SINGH *v.* RADHA PERSHAD SINGH . 23 W. R. 368

See WATSON *v.* GOVERNMENT
B. L. R. Sup. Vol. 182 : 3 W. R. 73

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WASTE LANDS—*contd.*

7. ——— **Right to use of waste land—** *Permissive use of, by tenants—Right of landlord to erect building on—Works of permanent character executed by licensee—Easements Act (V of 1882), ss. 60, 61.* In a suit by a zamindar to have his right declared to build a house on some waste land in the mouzah, the defendants, who were tenants in the mouzah, resisted the claim, on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung: *Held*, that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed. LAND MORTGAGE BANK OF INDIA *v.* MOTI . . . . **I. L. R. 8 All. 64**

8. ——— *Rights of zamindar in respect of waste lands—Provisions of wajib-ul-urz as to right of pasturage. Held*, that a general provision contained in a wajib-ul-urz that village cattle might graze on the waste land of the village could not be construed, in the absence of any definite covenant to that effect, as depriving the zamindar of his right to reclaim such waste lands. RAM SARAN SINGH *v.* BIRJU SINGH **I. L. R. 19 All. 172**

9. ——— **Act XXIII of 1863, s. 5—***Suit to contest sale.* Where the Collector failed to give notice of his intention to dispose of the estates, it was not incumbent on the plaintiff to contest the sale within the period prescribed by s. 5, Act XXIII of 1863. HIMMUT SINGH *v.* COLLECTOR OF BIJNOUR **2 Agra 258**

10. ——— *Act to reclaim waste lands—Suit to contest award by Board of Revenue—Extension of time—Institution of suit.* The Court cannot extend the period of thirty days allowed by s. 5, Act XXIII of 1863, for preferring a suit to contest an award by the Board of Revenue. The filing of a vakalatnama is not an institution of such a suit. TARANATH DUTT *v.* COLLECTOR OF SYLHET **5 W. R. Waste Land Court Ref. 1**

11. ——— **ss. 8, 18—***Suit for possession—Statute, interpretation of.* Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. There is nothing in Act XXIII of 1863 to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory

WASTE LANDS—*concld.*

suit, or who for any other reason is in the advantageous position of a defendant, from defending his rights, notwithstanding any sale which the Government may have professed to make under the Waste Lands Act. *Quære:* Whether the terms of the Act are not sufficiently satisfied by making it apply to waste lands of Government, and by understanding the claims and objections mentioned in the Act as claims in respect of Government land, and objection with the same limitation. KRISTO CHUNDER DASS *v.* STEEL . . **I. L. R. 12 Calc. 279**

12. ——— **s. 18—***Suit for compensation for land wrongly sold as waste.* A purchaser of land sold as waste land under Act XXIII of 1863 cannot be compelled to grant a pottah to a person alleging himself to have been in occupation of the land before the sale. If the claimant has omitted to come in in due time to stay the sale, and the land has actually been sold, his only remedy is by a suit under s. 18 for compensation, making the Collector a defendant. MAGUN POLLAN *v.* MONEY **7 W. R. 474**

WATER.

See WATER-CESS.

See WATER-COURSE.

See WATER-RIGHT.

See WATER-SUPPLY.

——— **dispute, relating to—**

See CRIMINAL PROCEDURE CODE, s. 147 **I. L. R. 36 Calc. 923**

——— **liability for damage done by—**

See EMBANKMENTS **I. L. R. 3 Calc. 776**

——— **rights concerning—**

See INJUNCTION—SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY—WATER.

See PRESCRIPTION—EASEMENTS—RIGHTS CONCERNING WATER.

See RIGHT TO USE OF WATER.

——— **right to use of—**

See EASEMENT **I. L. R. 18 Mad. 320**

See MADRAS FOREST ACT, s. 10. **I. L. R. 20 Mad. 279**

WATER-CESS.

See CESS . **I. L. R. 10 Mad. 282**

See CONTRACT ACT (IX OF 1872), s. 70. **I. L. R. 30 Mad. 277**

See MADRAS IRRIGATION CESS ACT, s. 1. **I. L. R. 12 Mad. 407** **I. L. R. 19 Mad. 24**

WATER-COURSE.

See BOMBAY IRRIGATION ACT. **I. L. R. 28 Bom. 105**

See RIPARIAN RIGHTS. **11 C. W. N. 85**

See WATER RIGHTS.

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WATER-COURSE—*concld.*

——— **obstruction of**—

See EASEMENT **I. L. R. 23 Bom. 506**
See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—DAMAGES.
I. L. R. 18 Mad. 28
I. L. R. 20 Bom. 283

——— **right to use of**—

See PRESCRIPTION—EASEMENTS—RIGHTS, CONCERNING WATER.
See RIGHT TO USE OF WATER.

WATER-RIGHT.

See RIPARIAN OWNERS
I. L. R. 28 Mad. 236
I. L. R. 29 Bom. 357

1. ——— *Infringement of water right whether contractual or proprietary, when likely to cause damages may be restrained by injunction though no evidence of actual damage is given.* Ryotwari lands belonging to the plaintiff had been irrigated for a period of more than 60 years by a channel without any interference on the part of Government. The defendant without any justifying cause blocked up the mouth of the channel cutting off the entire supply of water. The plaintiff without claiming any damages, but stating in a general way that he had been damnified by the act of the defendants, sued to restrain the defendants by injunction from interfering with the channel. *Held*, that the plaintiff was entitled to the injunction sued for, whether his right to the water was based on a contract with Government or whether his right was a proprietary right appurtenant to his ownership of land. In either view of the case, the plaintiff is entitled to succeed without an express finding as to damage. It is enough if the act is such as to be likely to cause damage to the plaintiff and the stoppage of the entire supply of water is such an act. The interference with contractual relations without sufficient justification is a violation of legal right, which gives a right of action to the party, whose rights are infringed. The observation of Lord Macnaghten in *Quinn* v. *Leathem*, [*1901*] *A. C. 495, 510*, referred to. RAMA ODAYAN *v.* SUBRAMANIA AIYAR (1907) **I. L. R. 31 Mad. 171**

2. ——— *Damage caused by retention of water—Liability of owner of land for damage caused by storage of water.* An owner of land is not liable for damage caused to other lands by the retention of water on his land in the natural and usual course of enjoying his property. The retention of water by a person on a portion of his land to prevent its passing on to other portions of his land is not an act done in the natural and usual course of enjoyment and the person so doing is liable for damage caused thereby. *Mohonlal* v. *Baijivkore, I. L. R. 28 Bom. 472*, doubted and distinguished. RAMANUJA CHARIAR *v.* KRISHNASAWMI MUNDALI (1907) . . **I. L. R. 31 Mad. 169**

3. ——— **Madras Act VII of 1865**—*Extent right tax free water to be implied in Grants by*

WATER-RIGHT—*contd.*

Government—Voluntary payment, what amounts to. A grant by the Government of the right to collect the revenue of certain lands will, in the absence of a contract regarding water rights, carry with it, by implication, only an undertaking on the part of Government not to refuse to the ryots holding nunja lands, the quantity of water necessary to enable them to irrigate those lands and so to pay the revenue which they had paid to the Government before the grant. In 1826 the Government granted to A by a cowle the revenues of a village T., which was irrigated by a tank. The cowle specified the lands granted and no portion of the bed of the tank was included in the grant. The ryots of T. and those of other villages were drawing water from the tank by turns in shares proportioned to the extent of their acreage. The Government had on certain occasions levied the cost of repairing the tank in accordance with such shares. In a suit by the grantee of T. against Government to recover moneys collected from him as water-cess under Madras Act VII of 1865 :—*Held*, that the above arrangement regarding the distribution of water by turns and the action of Government in collecting the cost of repairs according to the shares in which the water was so drawn was merely evidence of a customary distribution of the water in the tank according to the areas served by it and was no evidence of the grant of any definite share of the water by Government. The ryots might demand that not less than the share should be sent down to their lands if required for the irrigation of those lands, but the Government was not bound to supply them with more than was required for the irrigation of the land irrigated at the time of the grant. Where the quit-rent on an inam is fixed on the income derived from the cultivation of a certain extent of land in a certain manner, the inamdar is entitled to use, free of water-rate, such quantity of water as may be required for the cultivation of such extent in the mode in which such income was calculated whether the water-rate is leviable as a tax or otherwise. The engagement between the Inam Commissioner and inamdar amounts to an engagement by which the Government undertake not to take more than a certain share of the income derived from the various sources taken into account in arriving at the amount of such income, as the consideration for relinquishing its reversionary right. The Inam Commissioner having power to sell the reversionary right of Government has the power to fix the price according to the rules framed by Government and any engagement by him in that respect, not in contravention of such rules, will be binding on Government. Where the income on which the quit-rent is calculated includes the income derivable from a second crop on a certain extent of wet land and from a single irrigated crop on a certain extent of dry land, no charge except the quit-rent, can be levied as water-cess or otherwise in respect of such extent for such cultivation. Payment made under threat of distress and sale, before the actual issue of the warrant of distress, will not be a voluntary payment if,

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on non-payment before the specified date, such warrant would be issued as a matter of course. *Narayanasawmy Reddi* v. *Osuru Reddi, I. L. R. 25 Mad. 548*, referred to. LUTCHMEE DOSS *v.* SECRETARY OF STATE FOR INDIA (1909)

I. L. R. 32 Mad. 456

4. ——— **Right of Government to divert and distribute by irrigation works**—*No action against Government without proof of damage—Paramount right of Government higher than that of riparian owners—Easement Act (V of 1882), s. 7 (2) (a) and s. 7, ill. (h)—Right of diversion for riparian and non-riparian purposes—Right of riparian owner to take out water put in by himself.* The Government has power, by the customary law in India, to regulate in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense and in the public interests, for purposes of irrigation, provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised. In regard to works of irrigation constructed by Government in connection with a natural stream, a riparian owner has no higher right than that of not being damaged by any diminution in the supply of water he has been accustomed to receive. The *onus of* proving damage lies on the riparian owner. The maintenance of irrigation works is a duty cast upon Government and the rights and liabilities of Government in connection with irrigation works are not commensurate with those of private riparian proprietors. They are analogous to those of persons and corporations on whom statutory powers have been conferred and statutory duties imposed. *Ponnusawmi Tevar v. Collector of Madura, 5. Mad. H. C. R., 6*, referred to. *Kristna Ayyan* v. *Venkatachella Mudali, 7 Mad. H. C. R. 60*, referred to. *Madras Railway Company* v. *Zemindar of Carvatenagarum, 1 I.A. 364*, referred to. *Sankaravadivelu Pillai* v. *Secretary of State for India, I. L. R. 28 Mad. 72*, referred to. *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil, I. L. R. Bom., 209*, referred to. This paramount right of Government is recognised by the Legislature in section 7(2) (*a*) of the Easement Act. It is independent of the ownership of the bed of the stream and exists alike whether the interest affected that of ryotwari tenants or of the holders of proprietary estates. The right of riparian owners, recognised by section 7, ill. (*h*) of the Easement Act to the flow water without interruption, is only a right to enjoy without *such interruption as will cause material damage.* As between riparian owners the law established in England is that diversion of water for riparian purposes is not actionable without proof of injury, but diversion for non-riparian purposes is actionable without proof of such injury. *Kensit* v. *Great Eastern Railway Company, 23 Ch. D., 566*, referred to. *Bailey & Co.* v. *Clark, Son and Morland*, [*1902*] 1 *Ch. 649*, referred to.

Debi Pershod Singh v. *Joynath Singh, I. L. R. 24 Calc. 865*, referred to. *Swindon Water-works Company* v. *Wilts and Berks Canal Navigation Company, L. R. 7 H. L. (E. & I.), 697*, referred to. *McCartiney* v. *Londonderry and Lough Swilly Railway*, [*1904*] *A. C. 301, 313*, referred to. In India, however, the Government by virtue of the paramount power vested in it as aforesaid will not be liable, in either case, without proof of damage. *Quære:* Whether the American law of "appropriation," by which the upper riparian owner may divert water for non-riparian tenements provided the quantity so taken does not inflict perceptible injury on the lower riparian proprietor cannot, having regard to the climate and other circumstances in India, be applied to this county. *Belbahadur Pershad Singh* v. *Sheik Barkai Ali, 11 C. W. N. 85*, referred to. An upper riparian proprietor is entitled to divert water, provided the amount diverted does not exceed the amount which he has himself, by artificial means, cut into the stream. ROBERT FISCHER *v.* THE SECRETARY OF STATE FOR INDIA (1908)

I. L. R. 32 Mad. 141

WATER-SUPPLY.

See MUNICIPALITY

I. L. R. 32 Bom. 460

——— **causing diminution of—**

See MISCHIEF **I. L. R. 1 Mad. 262**
I. L. R. 10 Bom. 183

WAY.

See PENAL CODE, S. 241

I. L. R. 31 Calc. 691

See RIGHT OF WAY

——— **suit to recover right of—**

See CIVIL PROCEDURE CODE (XIV OF 1882), S. 44 . **13 C. W. N. 451**

WEDDING PRESENTS.

See MINOR . **I. L. R. 36 Calc. 768**

WEIGHTS AND MEASURES.

——— **Fraudulent use of**—*Penal Code s. 266—Fraudulent intention.* The mere possession of weights in excess of the authorized standard will not support a conviction under s. 266 of the Penal Code; a fraudulent intent must be charged and proved. REG. *v.* DAMO DHAR DALJI

1 Bom. 181

GOVERNMENT *v.* KANGALEE MUDUK

18 W. R. Cr. 7

WELL.

——— **right to use—**

See PRESCRIPTION—EASEMENTS—RIGHTS CONCERNING WATER.

I. L. R. 20 Mad. 389

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WHARFAGE.

See BILL OF LADING.

I. L. R. 4 Calc. 736
I. L. R. 5 Calc. 477
I. L. R. 7 Bom. 386

See INTERPLEADER SUIT.

I. L. R. 18 Bom. 231

WHARFINGER.

See BILL OF LADING.

I. L. R. 4 Calc. 736

WHIPPING.

See SENTENCE—WHIPPING.

1. ——— **Juvenile offenders**—*Act VI of 1864, s. 3.* S. 3 of Act VI of 1864 (the Whipping Act) applies to juvenile as well as to adult offenders. REG. *v.* KUSA VALAD LAKSHMAN.

7 Bom. Cr. 70

2. ——— *First conviction of adults—Substituted punishment.* In the case of adults on a first conviction, or in the case of juvenile offenders whether for a first offence or otherwise, whipping can only be in lieu of, and not added to, any other punishment. QUEEN *v.* ABDOOL

W. R. 1864, Cr. 38

QUEEN *v.* KANTIRAM. . 1 W. R. Cr. 24

QUEEN *v.* TONAOKOCH . 2 W. R. Cr. 36

QUEEN *v* AMARUT . 4 W.R. Cr. 20

3. ——— *Whipping Act (VI of 1864), s. 2—Whipping in lieu of fine or other punishment under the Penal Code (Act XLV of 1860).* When an accused person is sentenced to whipping under s. 2 of the Whipping Act (VI of 1864), the punishment of fine or imprisonment or both cannot be legally inflicted under the Penal Code in addition to the whipping. The word "punishment" in s. 2 of the Act means the total of punishments awardable under the Penal Code. QUEEN-EMPRESS *v.* DAGADU

I. L. R. 16 Bom. 357

4. ——— *Act VI of 1864.* Under Act VI of 1864 (the Whipping Act), a juvenile offender means a person under the age of sixteen years. REG. *v.* MUHAMMAD ALI VALAD ABDUL ALI . . . 8 Bom. Cr. 9

5. ——— *Act XI of 1864, ss. 5, 10—Criminal Procedure Code, s. 392.* By the term "juvenile offender" in s. 5, Act VI of 1864 (Whipping Act), is meant an offender under the age of sixteen years. *Reg.* v. *Muhammad Ali, 8 Bom. Cr. 9,* referred to. EMPRESS *v.* DIN ALI

I. L. R. 6 All. 482

6. ——— **Sentence of whipping when allowable**—*Act VI of 1864, s. 4—Offence after previous conviction.* The punishment of whipping under s. 4, Act VI of 1864, can only be inflicted on a second conviction of a person who, having served a sentence of imprisonment, again commits a crime. QUEEN *v.* UDAI PATNAIK

4 B. L. R. A. Cr. 5 : 12 W. R. Cr. 68

7. ——— *Offence after previous conviction—Previous conviction not shown.*

WHIPPING—*contd.*

On a reference by a Sessions Judge under s. 434 of the Criminal Procedure Code, a sentence of whipping in addition to one of rigorous imprisonment in the case of an offence specified in s. 2 of Act VI of 1864 was annulled, as the offence was not committed after previous conviction. REG. *v.* SURYA BIN KRISHNA MANDAVKAR . 3 Bom. Cr. 38

REG. *v.* BABJI VALAD BAPU 4 Bom. Cr. 5

8. ——— *Act VI of 1864, s. 3—Second conviction for offence committed before first conviction.* S. 3 of Act VI of 1864 (the Whipping Act) does not apply to cases in which the second conviction is for an offence committed previously to the first conviction. REG. *v.* KUSA VALAD LAKSHMAN . . . . . 7 Bom. Cr. 70

9. ——— *Previous conviction.* A sentence of whipping founded on a previous conviction of the prisoner is only warranted where the subsequent conviction is for the same specific offence as that in respect of which the previous conviction applied. ANONYMOUS

5 Mad. Ap. 1

ANONYMOUS . . . 5 Mad. Ap. 39

10. ——— *Theft in dwelling-house—Act VI of 1864, s. 3—Previous conviction of theft.* A prisoner convicted of "theft in a dwelling-house" who has previously been convicted of "simple theft" is not thereby rendered liable to whipping under Act VI of 1864, s. 3. REG. *v.* CHANGIA VALAD SHUMIA. .7 Bom. Cr. 68

11. ——— *Act VI of 1864, s. 7—Conviction of dishonestly receiving stolen property—Previous conviction for theft.* P was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and, on the expiration of the term of imprisonment, to furnish security for good behaviour. *Held,* that the offence of theft not being the same offence as that of dishonestly receiving stolen property, the punishment of whipping was illegal. EMPRESS *v.* PARTAB

I. L. R. 1 All. 666

12. ——— *Conviction of separate offences—"House-breaking to commit theft," and "theft"—Whipping Act, VI of 1864, s. 2.* Where a prisoner convicted of "house-breaking in order to commit theft," and of "theft" both offences being portions of one continuous criminal act, was sentenced on the first head of charge to one year's rigorous imprisonment, under s. 457 of the Penal Code, and on the second head of charge to receive twenty stripes, under s. 2 of the Whipping Act (VI of 1864), the separate sentences (though not illegal) were disapproved of, as contrary to the spirit and intention of the Whipping Act. REG. *v.* GENU BIN AKU. . . 5 Bom. Cr. 83

13. ——— *Act VI of 1864, s. 7—Conviction of theft.* A sentence of whipping cannot with reference to Act VI of 1864, s. 7, be

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WHIPPING—*contd.*

passed on a conviction for theft under s. 379, Penal Code as the former section only provides for sentences of imprisonment for a term not exceeding three years. QUEEN *v.* ESAN CHUNDER DEY
21 W. R. Cr. 40

14. ——— *Attempt at housebreaking with view to theft.* In the case of a conviction of attempting the commit house-breaking by night with intent to commit theft, a sentence of whipping was annulled as being illegal. REG. *v.* YELLA VALAD PARSHIA . . **3 Bom. Cr. 37**

15. ——— *Substitution of whipping for other punishment—Sentence—Theft.* Whipping may be substituted for any other punishment for the offence of theft in a dwelling-house. QUEEN *v.* JUNGHOO KHAN . **3 W. R. Cr. 36**

16. ——— *Act VI of 1864 s.7—Whipping in addition to other sentences.* A sentence of whipping passed on a person who is already under sentence of death, or transportation or penal servitude, or imprisonment for more than five years, is illegal. If the sentence of whipping precede, instead of follow, the other sentence, the passing of the latter sentence renders the infliction of the whipping illegal. ANONYMOUS
I. L. R. 1 Mad. 56

17. ——— *Act VI of 1864—Power of Magistrate.* When a Magistrate in exercise of the powers conferred by *s.* 46 of the Criminal Procedure Code, 1861, passed a cumulative sentence against a person convicted at one and the same time of two or more offences punishable under the Penal Code :—*Held, per* PEACOCK, *C. J.*, and PHEAR and SETON-KARR, *JJ.*, that he could not, in addition to the penalties prescribed by the Penal Code, sentence the prisoner to whipping under Act VI of 1864 ; nor could he exceed twice the extent of his ordinary jurisdiction as defined by s. 22 of the Criminal Procedure Code, 1861. *Held,* further, *per* SETON-KARR, *J.*, that in the case of hardened offenders, a Magistrate can award whipping in addition to the maximum of imprisonment which he is competent to award. *Held, per* MACPHERSON and JACKSON, *JJ.*, that the Magistrate may in such case, in addition to awarding double the punishment which may be awarded for a single offence, award the punishment of whipping ; but only one whipping can be awarded. NASSIR *v.* CHUNDER
B. L. R. Sup. Vol. 951 : 9 W. R. Cr. 41
RUTTUN BEWA *v.* BUHUR. JHOWLA *v.* BUHUL
14 W. R. Cr. 7

18. ——— *Act VI of 1864 Penal Code, ss. 325, 342, 378—Criminal Procedure Code (Act XXV of 1861), s. 46—Cumulative sentences.* Where the prisoner was convicted by the Magistrate of three distinct and separate offences, and was sentenced to a month's imprisonment for the offence of wrongful confinement under s. 342 six months' imprisonment for the offence of voluntarily causing grievous hurt under s. 325, and to whipping with twenty stripes for the offence of that

WHIPPING—*contd.*

under s. 378 of the Penal Code, it was held (KEMP and PHEAR, *JJ.*, dissenting) that the sentence was legal. Where a person is convicted at the same time of two or more offences punishable under the Penal Code :—*Held* (KEMP and PHEAR, *JJ.*, dissenting), that it is lawful for the Court in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping. *Nassir* v. *Chunder, B. L. R. Sup. Vol. 951,* not followed. MANIRUDDIN *v.* GAUR CHANDRA SHAMADAR.
7 B. L. R. F. B. 165 ; 15 W. R. Cr. 89

19. ——— *Magistrate of second class under Criminal Procedure Code, 1872—Criminal Procedure Code (Act X of 1882), ss. 2 and 32.* A person appointed a Magistrate of the second class under Act X of 1872 is incompetent, since the coming into force of Act X of 1882, to pass a sentence of whipping, unless he is specially empowered so to do according to the provisions of s. 32 of the latter Act. EMPRESS *v.* BHAGVANTA RAVJI . . . **I. L. R. 7 Bom. 303**

20. ——— *Whipping in addition to imprisonment—Criminal Procedure Code, 1872, ss. 305, 310.* In passing a sentence of whipping in addition to six months' imprisonment, a Deputy Magistrate ordered that the prisoner should be brought before him at the termination of the imprisonment, and that the sentence of whipping should then be carried out. On the recommendation of the Sessions Judge (who referred to ss. 305 and 310, Act X of 1872), the High Court cancelled the sentence of whipping as having become inoperative and incapable of being carried out. HUR CHUNDER KULAL *v.* JAFER ALI
20 W. R. Cr. 72

21. ——— **Grounds for sentence of whipping**—*Statement of grounds in judgment.* When a sentence of whipping is imposed, the grounds for that punishment should be stated on the judgment. BADIYA *v.* QUEEN
I. L. R. 5 Mad. 158

22. ——— *Previous convictions, proof of—Kyfeut.* As a rule, before flogging is given as an additional punishment, there ought to be formal evidence upon the record of the previous convictions relied on. The conviction and identity of the prisoner ought to be proved in the regular way : a mere kyfeut is no evidence whatever. QUEEN *v.* NUZEE NUSHYO
15 W. R. Cr. 52

23. ——— **Mode of infliction of sentence of whipping**—*Stay of sentence, grounds for—Act VI of 1864, ss. 11 and 12.* Meaning of the words "execution shall be stayed" in Act VI of 1864, s. 11. Ss. 11 and 12 together mean that a man sentenced to whipping is not to be whipped unless in a fit state to bear it, the whipping should not be commenced, but if it be commenced, it is not to be continued longer than the man is fit to bear it ; and then the sentence has been satisfied, for it cannot be executed by instalments. ANONYMOUS. **3 Mad. Ap. 1**

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WHIPPING—*concld.*

24. ——— **Time after sentence within which whipping may be given**—*Act VI of 1864, s. 9.* A sentence of flogging cannot be carried out after the expiry of the limit of fifteen days from the date of sentence provided in s. 9 of Act VI of 1864. ANONYMOUS **6 Mad. Ap. 38**

This ruling was *held* to be applicable to s. 310 of the Code of Criminal Procedure, 1872. ANONYMOUS . . . . . **7 Mad. Ap. 30**

25. ——— **Added to imprisonment**—*Whipping Act (VI of 1864, as amended by Act III of 1895), s. 4—Dacoity—Penal Code—(Act XLV of 1860), s. 395—Previous conviction—Sentencee.* Under s. 4 of the Whipping Act, a sentence of whipping in addition to imprisonment is not legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence. *Reg.* v. *Surya, 3 Bom. H. C. R. Cr. C. 38* ; and *Reg.* v. *Kusa, 7 Bom. H. C. R., Cr. C., 70,* followed. KING-EMPEROR *v.* BABYA BHIVA (F.B., 1901) **I. L. R. 25 Bom. 712**

26. ——— **Postponement**—*Criminal Procedure Code (Act V of 1898), ss. 391, 407—Sentence of whipping by Second-class Magistrate—Appeal—Application for postponement of sentence till hearing of appeal—Refusal—Validity.* Where a Second-class Magistrate passes a sentence of whipping only, without imprisonment, he has no power to postpone the execution of the sentence pending an appeal by the accused. It is only when whipping is added to imprisonment in an appealable case that the whipping may, and ought to, be postponed under s. 391 of the Criminal Procedure Code. MEYYAN *v.* EMPEROR (1902) **I. L. R. 26 Mad. 465**

WHIPPING ACT (VI OF 1864)

See WHIPPING.

WIDOW.

See CO-WIDOWS.

See DOMICILE. **I. L. R. 19 Bom. 697**

See EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES. **7 C. W. N. 678**

See HINDU LAW. **I. L. R. 29 Bom. 346**
9 C. W. N. 651
10 C. W. N. 802
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PARTITION—RIGHT TO PARTITION —WIDOW

See HINDU WIDOW.

See HINDU WIDOW RE-MARRIAGE ACT (XV OF 1856), SS. 2-5. **I. L. R. 33 Bom. 107**

See KHOJA MAHOMEDANS. **I. L. R. 29 Bom. 85**

See LIMITATION ACT, 1877, SCH. II, ART. 120 . . **I. L. R. 19 All. 169**
I. L. R. 21 Calc. 157
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See MAHOMEDAN LAW—
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5 W. R. 221
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See MAHOMEDAN LAW—WILL.
I. L. R. 25 Calc. 5
L. R. 24 I. A. 192

See MORTGAGE. **I. L. R. 32 Bom. 36**

See PENSION. **I. L. R. 30 Mad. 266**

See WILL. **I. L. R. 31 Mad. 283**

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See SPECIFIC RELIEF ACT, S. 42.
8 C. W. N. 465
L. R. 31 I. A. 67

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See MAHOMEDAN LAW—DOWER.

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WIDOW—*concld.*

1. ——— **Re-marriage**—*Hindu Law—Death of the son by the first husband—Succession to the son.* A re-married Hindu widow is entitled to succeed to the property left by her son by her first husband, the son having died after the re-marriage. *Akora Suth* v. *Boreani, 2 B. L. R. 199,* followed. BASSAPA *v.* RAGAVA (1905)
I. L. R. 29 Bom. 91

2. ——— **Maintenance, suit for**—*Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit.* The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court. *Held,* that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later. DATTATRAYA WAMAN *v.* RUKHMABAI (1908)
I. L. R. 33 Bom. 50

WIFE.

See DEFAMATION—IMPUTATION ON A WIFE.

See HINDU LAW—CONTRACT—HUSBAND AND WIFE.

See HINDU LAW—HUSBAND AND WIFE.
I. L. R. 13 All. 136

See HINDU LAW—PARTITION—RIGHT TO PARTITION—WIFE.

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See MARRIED WOMAN.

See RESTITUTION OF CONJUGAL RIGHTS.

See WILL—CONSTRUCTION.
4 B. L. R. O. C. 53
I. L. R. 13 Mad. 379
I. L. R. 22 Bom. 774

See WITNESS—CIVIL CASES—PERSONS COMPETENT OR NOT TO BE WITNESSES.
I. L. R. 18 Bom. 468

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See RESTITUTION OF CONJUGAL RIGHTS.
I. L. R. 1 Bom. 164

——— **costs of**—

See DIVORCE ACT (IV OF 1869), S. 7.
I. L. R. 29 Calc. 619
I L. R. 30 Calc. 631

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——— **custody of**—

See HABEAS CORPUS. 13 B. L. R. 160

See HINDU LAW—GUARDIAN—RIGHT OF GUARDIANSHIP 23 W. R. 178
I. L. R. 12 Bom. 110

See MAHOMEDAN LAW—CUSTODY OF WIFE. 5 B. L. R. 557
13 B. L. R. 160

——— **evidence of**—

See EVIDENCE—CRIMINAL CASES—HUSBAND AND WIFE.
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7 Bom. Cr. 50

——— **maintenance of**—

See HINDU LAW—MAINTENANCE—RIGHT TO MAINTENANCE—WIFE.

See MAINTENANCE, ORDER OF CRIMINAL COURT AS TO.

——— **relinquishment of**—

See BIGAMY. I. L. R. 19 Calc. 627

——— **removal of husband's property by**—

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8 Bom. Cr. 11
1 Mad. Ap. 23
I. L. R. 17 Mad. 401

——— **safety of**—

See RESTITUTION OF CONJUGAL RIGHTS.
I. L. R. 34 Calc. 971

WILD ANIMALS.

See FERÆ NATURÆ.

1. ——— **Animals feræ naturæ**—*Escape of wild animals kept in confinemnet—Return or pursuit of such animals.* Wild animals are no longer the property of a man than while they continue in his keeping or actual possession; but if they regain their natural liberty, his property ceases until they have a mind to return, which is only to be known by their usual custom of returning or are instantly pursued by their owner, for during such pursuit his property remains. CHOYTUN CHURN DOSS *v.* COLLECTOR OF SYLHET
21 W. R. 75

2. ——— *Capture of wild elephant—Right of owner of land where captured—Right of finder.* A wild elephant, having fallen into a pit made by *K N* in his own land, was secured, removed, and tamed by *U M*, without the leave of *K N*. *Held,* that *K N* was the captor, and that *U M* acquired no property in the elephant. MAKATH UNNI MOYI *v.* MALABAR KANDAPUNNI NAIR
I. L. R. 4 Mad. 268

3. ——— *Escaped elephant—Ownership—Recapture.* A tame female elephant escaped from her master's field in company with a herd of wild elephants and resumed her natural wild habits. The owner-plaintiff abandoned his search after two months, and then offered a reward

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WILD ANIMALS—*concld.*

of R200 to any person who should recapture her. At the end of four months she was recaptured by the defendant, who was compelled to tame her in the same way as if she had been an ordinary wild elephant. Plaintiff offered the reward of R200 to the defendant and demanded the elephant, but the demand was refused. *Held*, that under the circumstances the plaintiff had lost all claim to the animal. PEAL *v.* CAMPBELL
3 C. L. R. 515

4. ——— *Elephant—Animals feræ naturæ—Right of property— Animus revertendi—Recapture.* When a wild animal has escaped from captivity, and pursuit of it has been given up, the property which a man may formerly have had in it, ceases, and it becomes open to any one else to reduce the animal to his possession, when it will, for the time, become his property. An animal, which has gone away, and may be supposed to be likely to return to a state of captivity, is not a wild animal. Where an elephant, which had apparently been in a state of domestication for a long time, disappeared from the jungle, where it regularly grazed, but resumed its domestic habits on being recaptured:—*Held*, that the elephant was not a 'wild animal,' and that the property in it never ceased with the original owner. *Chytun Churn Doss* v. *The Collector of Sylhet, 21 W. R. 75*, and *Peel* v. *Campbell, 3 C. L. R. 515*, referred to. MAHADAR MOHANTA *v.* BALARAM GAGOI (1908) **I. L. R. 35 Calc. 413**
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ADOPTION—WHO MAY OR MAY NOT ADOPT **I. L. R. 26 Bom. 491**

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5 C. W. N. 383

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I. L. R. 6 Bom. 73

1. ATTESTATION.

1. ——— **Directions as to attestation** —*Succession Act, s. 50—Probate.* An unprivileged will will not be recognized by the Court and admitted to probate unless executed in accordance with the directions contained in Part VIII, Act X of 1865, such directions being imperative and not merely declaratory. *Held*, that the words "in the presence of the testator," in cl. 3 of s. 50 of the Succession Act, may receive the same construction that has been put upon them in the English Courts, but cannot receive larger interpretation. ESAIS *v.* GABRIEL. 3 N. W. 32

2. ——— **Presence of witnesses**—*Succession Act (X of 1865), s. 50.* Where the testator does not himself sign the will, but some other person signs it in his presence and by his direction, then besides this other person, there must be two witnesses who must sign the will in the presence of the testator. *In the goods of Roymoney Dossee*, *I. L. R. 1 Calc. 150*, and *Hurro Sundari Dabia* v. *Chunder Kant Bhattacharjee*, *I. L. R. 6 Calc. 17*, cited. *In the matter of the petition of* HEMLOTA DABEE . . . . I. L. R. 9 Calc. 226

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WILL—*contd.*

1. ATTESTATION—*contd.*

s.c. GRISH CHUNDER BANERJEE *v.* HEMLOTA DEBI . . . . **11 C. L. R. 359**

3. _____ Attesting witness—*Succession Act, s. 50—Signature made for testator by party afterwards attesting.* The person making the signature of a will for the testator is not competent as an attesting witness of its execution under the provisions of the Succession Act. *In the goods of Bailey 1 Curt. 914,* and *Smith* v. *Harris, 1 Rob. 262,* distinguished. *In the goods of* NANABHAI SORABJI MESTRI. AVABAI *v.* PESTANJI NANABHAI **11 Bom. 87**

4. _____ Mode of attestation—*Execution of will—Wills Act, XXV of 1838, s. 7.* S. 7 of the Wills Act, XXV of 1838, enacts "that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned: (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." A testator signed his will in the presence of a witness who subscribed it in his presence, and some time afterwards, upon the arrival of another witness, the testator, in the joint presence of the former witness, and the other subscribing witness, acknowledged his subscription at the foot of the will. The second witness then subscribed the will, and the first witness in his and the testator's presence acknowledged his subscription, but did not re-subscribe. *Held,* by the Judicial Committee (affirming the decision of the Supreme Court at Calcutta), that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the testator and jointly subscribe it in his presence. CASEMENT *v.* FULTON **3 Moo. I. A. 395**

5. _____ Acknowledgment of signature by testator. It is a sufficient acknowledgment by a testator of his signature to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it, or observe any signature to the paper which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it. MANICKBAI *v.* HORMASJI BOMANJI **I. L. R. 1 Bom. 547**

6. _____ Sufficiency of attestation—*Succession Act (X of 1865), s. 50—Probate—Hindu Wills Act (XXI of 1870), s. 2.* By the Succession Act, s. 50, no particular form of attestation is necessary: therefore, where, to a document purporting to be her last will and testament, the name of the testatrix was written by *A*, and the testatrix then in the presence affixed her mark, and *A* in her presence wrote beneath it "by the pen of *A*," and the testatrix was then identified to the Registrar, who was present, by *B*, who had seen her affix her mark to the document, and who in her presence put his signature as having identified her. —*Held,* a sufficient attestation; and probate was granted. *In the goods of* ROYMONEY DOSSEE. **I. L. R. 1 Calc. 150**

7. _____ *Succession Act (X of 1865), s. 50, cl. 3—Initials of witness. Semble:* If the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is a sufficient compliance with the terms of s. 50 of the Succession Act. AMMAYEE *v.* YALUMALAI **I. L. R. 15 Mad. 261**

8. _____ *Will not attested by two witnesses—Succession Act (X of 1865), s. 50, Hindu Wills Act ((XXI of 1870), s. 2, cls. (a) and (b).* The Hindu Wills Act (XXI of 1870) applies s. 50 of the Indian Succession Act (X of 1865) to those wills only that are mentioned in s. 2, cls. (*a*) and (*b*), of the former Act. A will which was not such a will as there mentioned was *held* to be valid, though not attested by two witnesses. *In re* BAPUJI *v.* JAGANNATH. **I. L. R. 20 Bom. 674**

9. _____ *Pardanashin lady —"In the presence of"—Succession Act (X of 1865), s. 50.* After execution of her will by a testatrix, a pardanashin lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the Registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the Registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the Registrar, and the person who identified her, at the same time. *Held,* that the witness was "in the presence of" the testatrix within the meaning of s. 50 of the Succession Act (X of 1865). HORENDRANARAIN ACHARJI CHOWDHRY *v.* CHANDRAKANTA LAHIRI **I. L. R. 16 Calc. 19**

10. _____ *Succession Act (X of 1865), s. 50—Proof of due attestation of will —Strict proof of due attestation whether necessary.* *S*, the widow of *J*, the testator, applied for probate of his will. The writer of the will deposed that he had signed the will before the testator signed, and that the testator signed immediately after him, and that none of the witnesses signed in his presence. *D*, one of the witnesses, said that he signed the will after the testator had personally acknowledged his signature to it, and that, when he signed, other witnesses' names were on the will. Of the other witnesses, three were proved to have been dead, and the remaining witness was not examined, but his signature as well as the signatures of the

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WILL—*contd.*

1. ATTESTATION—*contd.*

witnesses who were dead were proved. There was no direct evidence that the testator had acknowledged his signature to these witnesses, or that the will was otherwise properly attested by a second witness. *Held*, that strict affirmative proof of due attestation is not absolutely necessary in cases of this class : and if the circumstances are such as to warrant the Court in reasonably concluding from those circumstances that the will has been duly attested, probate may be granted. That upon the whole evidence it could reasonably be concluded that the will had been duly attested in accordance with law. *Right* v. *Sanderson, L. R. 9 P. D. 149*, referred to. SIBO SUDARI DEBI *v.* HEMANGINI DEBI . . **4 C. W. N. 204**

11. ——— *Grant of probate—Signature—1 Vict., c. 26 (Wills Act), s. 9—Succession Act (X of 1865). s. 50.* To the will of *A*, a British-born subject and a member of the Bengal Civil Service, who died in India possessed of personal property only, a native servant of the testator, purporting to attest the will, appended words in the Persian character signifying "this is *A's* signature." *Held*, on an application for probate, that this was not a sufficient subscription of the will. *Semble :* A signature by mark would be a sufficient signature to a will by a witness under the Succession Act. *In the goods of* WYNNE.
13 B. L. R. 392

12. ——— *Attesting witness, when he should sign—Succession Act (X of 1865), s. 50.* The signatures of two or more attesting witnesses to a will required by s. 50 of the Succession Act (X of 1865) must be attached to the will after, and not before, the testator's signing or affixing his mark to it. *Quœre :* Whether a will can be properly attested by a marksman. BISSONATH DINDA *v.* DOYARAM JANA
I. L. R. 5 Calc. 738 : 5 C. L. R. 565

13. ——— *Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.* S. 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names after the testator or testatrix shall have executed the will. *Bissonath Dinda* v. *Doyaram Jana, I. L. R. 5 Calc. 738*, and *Fernandez* v. *Alves, I. L. R. 3 Bom. 382*, followed. If a testatrix admits a signature on a will to be hers before a Registrar of Assurances, and is identified before him by one of the witnesses to the signature, and both the Registrar and the identifier sign the names as witnesses to the admission made :—*Held*, that such an attestation would be sufficient to satisfy s. 50 of Act 10 X of 1865. *In the goods of Roymoney Dossee, I. L. R. 1 Calc. 150*, followed. *In the matter of the petition of* HURRO SUNDARI DABIA. HURRO SUNDARI DABIA *v.* CHUNDER KANT BHUTTACHARJEE
I. L. R. 6 Calc. 17 : 6 C. L. R. 303

14. ——— *Succession Act (X of 1865), s. 50—Witness—Signature—Mark.*

WILL—*conta.*

1. ATTESTATION—*contd.*

The direction contained in s. 50, cl. 3, of the Succession Act (X of 1865) as to the signature of witnesses attesting an unprivileged will is not satisfied by the witnesses affixing their marks. It is necessary for the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses should appear on the face of the will. FERNANDEZ *v.* ALVES **I. L. R. 3 Bom. 382**

15. ——— *Will attested by marksmen—Witness—Signature—Mark—Succession Act (X of 1865), s. 50.* The direction contained in s. 50, cl. 3, of the Succession Act, as to each of the witnesses signing the will, is not satisfied by the witnesses affixing their marks, and it is necessary for the validity of a will that the signatures, distinguished from a mere mark, of at least two witnesses should appear on the will. *Fernandez* v. *Alves, I. L. R. 3 Bom., 382*, followed. *In the goods of Wynne, 15 B. L. R. 392*, dissented from. If a testator, on presenting his will for registration, admits a signature on the will to be his before a Registrar, and is identified before him by a witness, and both the Registrar and the identifier sign their names on the will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirement of cl. 3 of s. 50, Act X of 1865. *In the matter of Hurro Sundari Dabia, I. L. R. 6 Calc. 17*, followed. NITYE GOPAL SIRCAR *v.* NAGENDRA NATH MITTER
I. L. R. 11 Calc. 429

16. ——— *Acknowledgment of signature by testator—Attestation—Witness—Succession Act (X of 1865), s. 50.* The signature of a testator at the commencement of his will when the witnesses attested it, and his admission to the attesting witnesses that the paper which they attest is his last will, constitute sufficient acknowledgment of his signature to his will, even though the witnesses do not see him sign it, or observe any signature to the paper which they attest. The registration of his will by a testator and his signature to the certificate of admission of execution, testified by the signatures of the Sub-Registrar and of a witness, is sufficient attestation to satisfy the requirements of s. 50 of Act X of 1865. *Manickbai* v. *Hormasji Bomanji, I. L. R. 1 Bom. 547, Hurro Sundari Dabia* v. *Chunder Kant Bhattacharjee, I. L. R. 6 Calc. 17 ;* and *Nitye Gopal Sircar* v. *Nagendra Nath Nitter Mozumdar, I. L. R. 11 Calc. 429*, referred to and followed. AMARENDRA NATH CHATTERJEE *v.* KASHI NATH CHATTERJE
I. L. R. 27 Calc. 169

17. ——— *Unattested alterations in a Hindu Will—Letters of administration—Succession Act (X of 1865), s. 58.* In a will properly attested, some subsequent alterations were made by the testator in the presence of the Registrar, but these alterations were unattested. *Held*, that, under s. 58 of the Indian Succession Act, made applicable to the Hindus by the Hindu Wills Act, the alterations should have been attested, as the will itself, by two persons signing in the

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WILL—*contd.*

1. ATTESTATION—*concld.*

presence of the testator, and so letters of administration should issue, not with the copy of the will, but with the copy of the will without the alterations. RAGHUBAR DYAL *v.* RAM RAKHAN LALL **1 C. W. N. 428**

18. ——— Repudiation of signature by attesting witness. The mere fact of an attesting witness to a will repudiating his signature does not invalidate a will, it if can be proved by the evidence of other witnesses of a reliable character that he has given false evidence. If he does repudiate it uncontradicted, the mere fact of there being two witnesses purporting to have witnessed the testator's signature is not a compliance with s. 50 of the Succession Act. NUBO KISHORE DOSS *v.* JOY DOORGA DOSSEE **22 W. R. 189**

19. ——— Forged attestations, effect of—*Effect on title given under genuine portion of will.* *C*, under a power given to her by the will of *L*, her husband, a Hindu, sold certain land to *R*. After the sale, certain forged attestations were added to the will. In a suit brought by the heir of *L* to recover the property sold by *C* to *R*, *R* relied on the will which was produced by other defendants in the suit. *Held*, that *R's* title could not be affected by the forgery. PARAMMA *v.* RAMACHANDRA . . . **I. L. R. 7 Mad. 302**

2. CONSTRUCTION.

1. ——— Construction of will—*Powers to construe will without administration suit—Chancery practice.* A testator by his will devised certain house property, first for the celebration of pujahs and the worship of an idol, and then that his children with their families should be allowed to live there. One of the sons used the premises for the purpose of his business as akauiraj, which was objected to by the other sons as being contrary to the terms of the will. One of the defendants also contended that, before the Court could construe the terms of the will to ascertain the meaning of the testator, it was necessary to bring a proper administration suit. *Held*, that, considering the character of the consequential relief sought, the Court could construe the will without an administration suit. That questions between trustees and beneficiaries and between trustees and strangers requiring the construction of provisions in a trust-deed have been determined without the Court being asked to undertake the entire administration of the trust. *In re Weall, L. R. 42 Ch. D. 674*, approved. BHUGGOBUTTY PROSONNO SEN *v.* GOOROO PROSONNO SEN **I. L. R. 25 Calc. 112**

2. ——— Rules of construction—*Intention of testator—Meaning of "purchase."* The rule of construction applicable to a will is that words in general are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another can be collected. If the language of a will is perfectly unambiguous and

WILL—*contd.*

2. CONSTRUCTION—*contd.*

precise, it cannot be strained for the purpose of giving effect to what possibly might have been the intention of the testator, but is not expressed or implied in the terms of the testament. *G* by a clause in his will, gave his wife a life-interest in the house in his possession, and in those which he might afterwards "purchase." In *G's* lifetime his younger brother died, and *G* thereby acquired a house by inheritance. *Held*, there being nothing to show that *G* had used the word "purchase" in any other than its ordinary sense, that the language of the will could not be strained in order to give effect to what possibly might have been the testator's desire had he foreseen the death of his younger brother in his own lifetime, but was not expressed or implied in the terms of the testament, and that the house did not pass under the will to the testator's widow. GEORGE *v.* GEORGE **6 N. W. 219**

3. ——— Appointment of executors by implication—Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named. *Held*, that the plaintiffs were not appointed executors by implication. SESHAMMA v. CHENNAPPA **I. L. R. 20 Mad. 467**

4. ——— Effect of words excluding from inheritance—*Heir-at-law.* *A*, a Parsi inhabitant of Surat, died there on the 13th February 1879, leaving him surviving the following relations, *viz.*, A daughter *J* (the respondent) by his first wife, who had predeceased him; his second wife Dhanbai, who lived apart from him; his third wife, who had been divorced by him, and whose son *A* he did not recognize as his own; and his three sisters, *D*, *S* and *G*, the first-named of whom had been married to *K* and whose son *E* was the appellant. By his will *A* expressly directed that neither his daughter *J* nor his widow Dhanbai should take any share of his property, the whole of which he bequeathed to his brother *R*, who, however, predeceased him. *Held*, that the use of mere negative words, unaccompanied by any effective disposition of his property, could not exclude his daughter *J* or his widow Dhanbai from succeeding to their shares of the estate. ERASHA KAIKHUSRU *v.* JERBAI **I. L. R. 4 Bom. 537**

5. ——— Commission of manager of estate how calculated—*Intention of testator.* Other questions disposed of in the Court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

there had or had not been shown any good reason for reversing or varying the order of the original Court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the shares, was *held* to be settled by the indication of the latter mode of calculation in the will. ORDE *v.* SKINNER

I. L. R. 3 All. 91 : 7 C. L. R. 295
L. R. 7 I. A. 197

6. ——— **Armenian will**—*Devise—Absolute estate—Estate for life.* An Armenian, by his will in the Bengali language, made a gift to his son in the following terms : "I bequeath to *A* as salamati my talukhs (which he named) and R6,000 in cash. He shall enjoy the profits of the aforesaid talukhs. On his demise his sons shall get. The mukhtears shall make over to the satisfaction of *A*." *Held*, that the will was to be construed according to equity and good conscience, and not according to English law. The rule applicable was that, unless a contrary intention appeared, the estate given was an absolute one. *A* took an absolute estate under the devise. BROUGHTON *v.* POGOSE

12 B. L. R. 74 : 19 W. R. 181

7. ——— **Superstitious uses, English law against**—*Application of English law to India. Semble :* The English rule of law which prohibits the bequest of money for superstitious uses has no application in India. JUDAH *v.* JUDAH

5 B. L. R. 433

8. ——— **Bequest for performance of masses**—*Validity of bequest.* A bequest in a will of a sum of money for the performance of masses in Calcutta is valid. ANDREWS *v.* JOAKIM

2 B. L. R. O. C. 148

9. ——— *Validity of bequest—Gift to superstitious uses.* A bequest by a Roman Catholic of Portuguese descent, born and domiciled in Calcutta, for the performance of masses, is not a gift to superstitious use. DAS MERCES *v.* CONES . . . **2 Hyde 65**

10. ——— Bequest for masses held void as infringing the rule against perpetuities. COLGAN *v.* ADMINISTRATOR-GENERAL OF MADRAS . . . **I. L. R. 15 Mad. 424**

11. ——— **Legacy to attesting witness**—*Succession Act, s. 54.* A legacy to the attesting witness of a will is void under s. 54 of the Succession Act, whether or not the attestation of the witness is indispensable to the validity of the will. ADMINISTRATOR-GENERAL *v.* LAZAR

I. L. R. 4 Mad. 244

12. ——— **Legacy to minor**—*Absolute gift—Discretion of executor.* Where there is an absolute bequest and power to executor to delay making over the legacy at discretion :—*Held*, that, on attaining majority, the legatee should at once be put in possession. DE SILVA *v.* DE SILVA

1 Ind. Jur. N. S. 16 : Bourke O. C. 281

WILL—*contd.*

2. CONSTRUCTION—*contd.*

13. ——— **Legacy whether to be paid out of particular fund or out of general assets**—*Demonstrative legacy.* Payment of legacies, or gifts of stipends, having been refused by the representatives of the testatrix, on the ground that she had no power to dispose of the fund out of which the will must be construed to direct their payment :—*Held*, on a consideration of the whole will, that the words of the gift were wide enough to charge them upon the whole of her moveable estate ; also that, if the words of the will were to be taken in a more restricted sense, the gift of the stipends must be regarded as a demonstrative legacy, and in that view they would be payable out of the general estate, on failure of the particular fund pointed out. MIRZA *v.* UMDA KHANAM. MIRZA *v.* GUNNA KHANAM

I. L. R. 19 Calc. 444
L. R. 19 I. A. 83

14. ——— **Devise of one kani out of an estate**—*Right of selection by the devisee.* The owner of land, measuring one kani and three-quarters, died, leaving a will by which he devised one kani thereof to the plaintiff who now sued to recover one kani selected by him out of the land in question. *Held*, that plaintiff had the right to make his selection and was entitled to a decree. NARAYANASAMI GRAMANI *v.* PERIATHAMBI GRAMANI

I. L. R. 18 Mad. 460

15. ——— **Domestic servant**—*Legacy, suit for—Sirang.* The testator, a Hindu, made a will in the English form and language, in which he bequeathed, *inter alia*, as follows : "To each of my domestic servants in Calcutta who shall have been in my service ten years and upwards at the time of my death R100 for every rupee of monthly salary drawn by them from me respectively." The plaintiff had been in the service of the testator for about forty years as sirang on board a steamer which the testator kept on the river, and in which he used to visit his zamindaris and perform other journeys by water. The plaintiff was in the habit of daily attending at the testator's residence, and there obeying any orders that might be given him. If the steamer was not needed, the plaintiff used to attend at the testator's residence from early in the morning to about one in the afternoon, returning to take his meals and stop on board the steamer. *Held*, that he was entitled to take under the legacy as a domestic servant of the testator. DHANNO SIRANG *v.* UPENDRA MOHAN TAGORE

8 B. L. R. 244

16. ——— *Washerman. Held*, on the evidence, that the plaintiff had failed to prove he was a domestic servant of the testator, so as to entitle him to take a legacy under this clause. BHIM DAS *v.* UPENDRA MOHAN TAGORE

9 B. L. R. Ap. 4

17. ——— **Husband and wife**—*Trustee—Sole use and benefit.* A testator made the following bequest in his will : "I give devise, and

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

bequeath to my dearly beloved wife all the stock-in-trade, furniture, mourning coaches, horses belonging thereto, stones, marbles, tools, implements, and materials connected with my trade and business, and all my right and interest therein; and after payment of my debts and other expense I give, devise, and bequeath the rest and residue of my outstandings and collections for her sole use and benefit, with liberty to continue and carry on such trade and business.'' The testator's widow married a second husband, and they carried on the business of the deceased together. They afterwards separated, and she brought a suit against her husband for a declaration of her right under the will, and for an account from her husband of the profits, etc., of the business during their marriage. *Held* (reversing the decision of the Court below), that, on the true construction of the will, the stock-in-trade, etc., was not bequeathed to the wife for her sole and separate use independent of any future husbands; her husband did not become a trustee for her in respect of such stock-in-trade or the profits of the business and he was not bound to render an account. ORD *v.* ORD

4 B. L. R. O. C. 53

18. _____ **Dedication to religious purposes**—*Rule against perpetuities.* If there is a valid dedication of premises for religious purposes this is not invalid merely because it transgresses against the rule forbidding the creation of perpetuities. BHUGGOBUTTY PROSONNO SEN *v.* GOOROO PROSONNO SEN . . **I. L. R. 25 Calc. 112**

19. _____ **Charitable bequest**—*Bequest for spiritual benefit—Uncertainty—Superstitious uses. NEJ*, a Hebrew merchant domiciled in Calcutta, and possessed of both real and personal property, died, leaving a will, by which, after appointing his mother, *K E J*, and his brother *JEJ* executrix and executor thereof, and making various bequests and provisions, he made the following bequest of the residue of his property: ''And what may remain after payment of the above-mentioned sums, as well as the debts, shall remain under the control of my brothers, *S E J* and *J E J*, for the purpose of defraying therewith the expenses for the year, and making charitable distributions as commanded, and giving alms for my spiritual benefit according to their judgment.'' *Held*, assuming that the High Court should act in conformity with the English Court of Chancery in carrying out charitable bequests, that, as far as the bequest related to giving of alms for the testator's spiritual benefit, it was void for uncertainty. The ''defraying expenses and making charitable distribution'' were limited by the bequest to the year within which the testator died. JUDAH *v.* JUDAH

5 B. L. R. 433

20. _____ *43 Eliz., c. 4—Mortmain, Statutes of—Hospital—Clause prohibiting alienation.* A testator left his personal property to trustees in trust to pay thereout certain annuities

WILL—*contd.*

2. CONSTRUCTION—*contd.*

to his son and daughter, and, after bequeathing some pecuniary legacies, devised certain immoveable property to the trustees in perpetuity in trust for the support of hospitals in the North-West Provinces, with directions that the surplus income (if any) from his personalty during the lives of his children, and on the death of either of them his or her annuity, and on the death of both of them the whole income of the personalty, should be applied in support of the hospitals. The will also contained a provision that the property should never be sold. In a suit for the construction, and for declaration of the trusts, of the will, it appeared that the income of the personalty was not more than sufficient, after payment of the legacies, to pay the annuities to the testator's children, and that the immoveable property was greatly in need of repairs and did not produce enough for the support of the hospitals, or to enable the trusts of the will relating thereto to be carried out. *Held*, that the devise for the support of the hospitals was a valid devise, and one to which the Court would give effect, as being a charitable trust within the scope of 43 Eliz., c. 4. The statutes of Mortmain not applying to India, the Court will carry out such a trust when the subject is immoveable property, just as it would if it had been personal property. *Held*, also, that, if the prohibition against sale were a valid one, the Court could not order a sale merely because it would be advantageous to the charity that the property should be sold, but held that the prohibition against sale was void as being repugnant to the devise, and, notwithstanding such prohibition, the trustees had power to sell, or otherwise alienate, the property for the purpose of maintaining the hospitals. BROUGHTON *v.* MERCER

14 B. L. R. 442

21. _____ *Void bequests—Uncertainty—''Surplus''—General residuary bequest.* A testator by his will directed as follows: ''I do hereby direct my trustee to feed the really needy and poor at Gopeenathjee out of a separate expense out of my estate, to be contributed to the worship of Lukeejonardunjee, my ancestral goddess. I do direct my trustee to spend suitable sums for the annual sradhs or anniversaries of my father, mother, and grandfather, as well as of myself after my demise, for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, Pundits holding tolls for learning in the country at the time of the Doorga Pooja; to spend suitable sums for the perusal of Mohabharat and Pooran and for the prayer of God during the month of Kartick. Should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution towards the marriage of the daughters of the poor in my class and of the poor Brahmins, and towards the education of the sons of the poor amongst my class, and of the poor Brahmins, and other respectable castes, as my

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

trustee will think fit to comply.'' *Held*, that the gifts were valid testamentary bequests, and that the words ''should there be any surplus after the above expenditure'' created a general residuary bequest. *Held*, on appeal (affirming the decision of the Court below), that a general residuary bequest was created by the concluding words of the clause, which would absorb any of the preceding bequests, if they should happen to be invalid. *Quære:* Whether the bequests to pundits holding tolls, and for the reading of the Mohabharat and Pooran and for prayer to God, were valid. DWARKANATH BYSACK *v.* BURRODA PERSAUD BYSACK
I. L. R. 4 Calc. 443

22. ——— *Cy près, doctrine of.* A testatrix bequeathed the interest of a Government promissory note to ''The Calcutta Armenian Orphans College Funds for the Relief and Enjoyment of the poor families, Widows, Orphans, and Schools of the Armenian Nation,'' to be received half-yearly by the wardens of the funds for the time being. Although there was a charity in Madras, called ''The Armenian Orphans' College,'' there was none in Calcutta or elsewhere answering the description of the Calcutta Armenian Orphans' College, but there were two, and only two, charitable, institutions in Calcutta which provided for the relief and enjoyment of the poor families, widows, orphans, and schools of the Armenian nation. Of these, one, the Church of St. Nazareth, distributed money amongst, and gave relief to, the poor families, widows, and orphans of the Armenian community; and the other, the Armenian Philanthropic Academy, educated gratuitously the poor and orphans of the same community. The note was invested by order of the Court, and there had been a large accumulation of interest thereon. The governors of the two institutions concurred in asking that each should receive a moiety of the accrued and future interest of the fund. *Held*, that the *cy près* doctrine applied; that the accumulated interest should remain invested; but that the accruing interest on the accumulated fund should be paid half-yearly, one moiety to the wardens of St. Nazareth's church, and the other to the managers of the Armenian Philanthropic Academy. LONGBOTTOM *v.* SATOOR
1 Mad. 429

23. ——— **Failure of object**—*Cy près performance—Construction of will.* The doctrine of *cy près* as applied to charities rests on the view that charity in the abstract is the substance of the gift, and the particular disposition merely the mode, so that, in the eye of the Court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse. It cannot be laid down as a general principle that the *cy près* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object

WILL—*contd.*

2. CONSTRUCTION—*contd.*

of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. On the failure of a specific charitable bequest, jurisdiction arises to act on the *cy près* doctrine, whether the residue be given in charity or not unless upon the construction of the will a direction can be implied that the bequest if it fails, should go to the residue. In applying the *cy près* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *cy près* scheme to benefit that locality. Unless the *cy près* scheme framed by the lower Court be plainly wrong, a Court of Appeal should not interfere with it. MAYOR OF LYONS *v.* ADVOCATE GENERAL OF BENGAL.
I. L. R. 1 Calc. 303: 26 W. R. 1
L. R. 3 I. A. 32

24. ——— **Charitable gift**—*Cy près doctrine—Lapse—Construction of will.* A testator directed his executor to set apart a sum of R7,000 to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, such boys to be natives of Calcutta, of poor and indigent parents, or fatherless children of Armenian or other Christian religion. The testator died in 1867. In 1864 the St. Paul's School, Calcutta, was removed to Darjeeling. In the St. Paul's School, Calcutta, the fees for day scholars and day boarders were R8 and R10 respectively. In the St. Paul's School, Darjeeling, there were no day scholars nor any day boarders, and the cost of a regular boarder would be about R400 per annum *Held*, that the gift did not lapse, being a general charitable bequest, and that under the circumstances it must be executed *cy près*. MALCHUS *v.* BROUGHTON . . **I. L. R. 11 Calc. 591**

25. ——— *Gift—Cy près, doctrine of—Lapse of legacy—Costs.* Under the will of *A*, who appointed the Administrator-General of Bengal his executor, *B* had a life-interest in the residue of the testator's estate. *B* brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal. On the question of costs:—*Held*, that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit. MALCHUS *v.* BROUGHTON
I. L. R. 13 Calc. 193

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

26. ———— *Appointment of trustee—Failure to carry out wishes of testator.* Where a testator had made a bequest for charitable purposes and had made no express provision for the management of the charitable trust so created, except by directing that, in the event of his heirs failing to carry out his wishes in respect of the trust fund, the Civil Court should take the fund and the management of the trust summarily into its own hands:—*Held*, that, in the absence of misconduct, the widow, and not the Collector, was the proper person to be appointed trustee. HORI DASI DABI *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 5 Calc. 228 : 4 C. L. R. 77

27. ———— *Bequest to charity—Public charity—Trust affecting land—Perpetuity—Parsi religious ceremonies : baj rozgar, nirangdin, yezashni, ghambar, and dosla—Civil Procedure Code (Act XIV of 1882), s. 527.* A Parsi by his will directed that the income arising from a one-third share of a bungalow in Bombay, to which he was entitled, should be devoted in perperpetuity to "the performance of the *baj rozgar* ceremonies and the consecration of the *nirangdin* and the recitation of the *yezashni* and the annual *ghambar* and *dosla* ceremonies." He further directed that the said share should not be sold or mortgaged. Evidence was given, which showed that the above-mentioned religious ceremonies were performed among Parsis rather with a view to the private advantage of individuals than for the public benefit. *Held*, that the trusts of the will were void, and that the direction that the property should not be sold was invalid. LIMJI NOWROJI BANAJI *v.* BAPUJI RUTTONJI LIMBUWALLA
I. L. R. 11 Bom. 441

28. ———— *Bequest to a person with a direction that it should be used in good works (sárá kám)—Direction void as being vague and indefinite—Succession Act (X of 1865), s. 125.* A testator left a legacy to his wife in the following terms: "R2,000 to be credited in our shop in the name of my wife Bai Bapi. Interest at 6 per cent. to be paid to her every year. If in her lifetime she demands the money to use in a good work (sárá kám), it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagubhai are to dispose of it according to their own pleasure after death." *Held*, that this was not a bequest in favour of good works (sárá kám), but a bequest to the testator's wife, with a direction to use it in good works (sárá kám), and as that direction was void for uncertainty, she was entitled to the money as if the will had contained no such direction. BAI BAPI *v.* JAMNADAS HATHISANG
I. L. R. 22 Bom. 774

29. ———— **Children**—*Domicile—Rules for interpretation—Accretions to property from rents.* Where a testator has an ascertained domicile, the construction of his will must depend on the law of that domicile; but if no particular law is applicable, the will is to be interpreted by principles of natural justice. In such cases, in applying the rules of Hindu, Mahomedan, or English law to the wills of Hindus, Mahomedans, or East Indian Christians respectively, their particular habits and modes of life may be looked to as a guide to the interpretation. From the context of the will and surrounding circumstances, "children" may be interpreted as illegitimate children. Where by the will the income of estates was left to devisees for life, with a gift over of the corpus on their death, and a portion of the income, instead of being divided among the tenants-for-life, was applied to the purchase of other estates:—*Held*, that those estates did not pass to the remainder men, but formed the absolute property of the tenants-for-life, and passed to their devisees. BARLOW *v.* ORDE.
5 B. L. R. 1, 13 W. R. P. C. 41
13 Moo. I. A. 277

30. ———— **Contingent gift**—*Puttro poutradi, meaning of—Absolute estate.* A Hindu, *B L M*, died in 1874, leaving a widow, *K K D*, a daughter's daughter, *H D D*, and a brother, *R L M*, with whom he was on bad terms. By his will, which was made on the 9th of August 1870, and at a time when there was no reason to abandon all expectation of his leaving male issue of his own, *B L M*, directed that, in the event of his dying without leaving a son, grandson, or son's grandson, his widow, *K K D*, should take the whole of his estate according to the shastras, and enjoy the profits thereof for her life, and that on her death, in the event of a daughter or daughters having been born to him, then she or they, and on the death of her or them, then her or their son or sons (the testator's daughter's sons) should in like manner take and become the owner or owners of the estate according to the shastras, and that in the event of there being no daughter or daughter's son of the testator living at the time of the death of his widow, then his granddaughter (daughter's daughter), *H D D*, should take the whole estate absolutely from generation to generation (*puttro poutradi*); and that in the event of no son or daughter being born to the testator after the execution of his will, and of his granddaughter (daughter's daughter), *H D D*, dying childless, or being a barren or childless widow, or otherwise disqualified, then the whole of his property should go to the Government, to be employed by it for charitable and philanthropic purposes. The main object of the testator *B L M*, in making these dispositions of his property was admittedly to exclude *R L M*, from the inheritance. *Held*, that *H D D*, if she survived the testator's widow *K K D*, and was not then a barren or childless widow or otherwise disqualified, would take, not a life-interest, but an absolute estate, to the exclusion of *R L M*. *Held*, also, that the words "puttro poutradi" has generally the effect of defining the estate given as an estate of inheritance, and did not by themselves

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

necessarily denote that the estate given was to be one descendible to heirs male only. *Held*, also, that in case of *H D D* not surviving *K K D*, or of her being at the time of the death of *K K D* for any reason disqualified from taking the estate, then upon the death of *K K D* the gift to the Government of the reversion to the exclusion of *R L M*, would take effect, and was a good and valid gift. HORI DASI DABI *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 5 Calc. 228 : 4 C. L. R. 77

31. ——————— *Gift to children on thier attaining 21.* Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those "who shall attain the age of 21," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction. In the case of words of contingency occurring in the description of the class of persons to take a mere gift over is not sufficient to change their meaning. BALLIN *v.* BALLIN . **I. L. R. 7 Calc. 218 : 8 C. L. R. 28**

32. ——————— *Period of distribution—Survivorship.* *A*, a Hindu, made the following provisions by his will : " I have two sons living, *B* and *C*, they, and an infant son of my eldest son, the late *D*, and my wife *E* (four persons) shall succeed to the whole of my estate : these four persons will receive equal shares. If any of these four persons happen to die, which God avert, the survivor of them will receive this estate in equal shares ; but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share : if there be a daughter or granddaughter in the female line surviving, such survivor shall receive a share of the property ; the expense of the marriage of such female child only shall be defrayed out of the estate," and also provided that, " so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided." All the persons named survived the testator. *Held*, that they took absolute interests in the shares named, and that the estate became divisible on the infant son of *D* attaining majority. ELLOKASSEE DOSSEE *v.* DURPONARAI BYSACK . . . . **I. L. R. 5 Calc. 59**

33. ——————— *Vesting of estate in executors—Directions to executors, effect of.* A testatrix, after appointing certain persons to be executors of her will in respect of the whole of her property, directed that they should " take possession of the whole of her property, and keep the same under their protection ;" that they should pay out of her estate the charges of interment, etc., that they should repair four houses annually

WILL—*contd.*

2. CONSTRUCTION—*contd.*

out of the income thereof, having let them out to hire, and after paying taxes and ground-rent divide the proceeds every three months between the testatrix's two sons, that the executors should not give the rents to the creditor, because the bequest of the income to the sons was "not an entire gift to them, but a mere provision for their support." The will proceeded as follows : " Should my son *M* happen to die before the decease of his wife, then I give the share of *M* to his widow *H M*, etc., and after the death of *H M*, should my son *M* not have left any legitimate male child, then I give the above share to my son, *J*, etc. After the death of *M* (and his wife), should he have left legitimate male children, such male children shall in the same manner receive the income once in every three months till they attain the age of 21 years, and then the amount of their share shall be divided into equal portions, and each of them having become the owner of his portion shall receive the same from my executors, but if *H M* die before *M*, and *M* die without having had legitimate male children then I give and bequeath the shares of my son *M* to my son *J* as a provision for his support, etc. If my sons *M* and *J* die without having male issue, and if their wives, that is to say, *H M* and *C J*, die without having male issue begotten by my sons, then I give my garden, etc., actually and entirely to the sons and daughter of my daughter *G*, begotten by her first husband, *G A*, that is, to *A M B* and *N* or in case of their death to their sons and daughters, lawfully begotten, or to such of them as shall survive at the time. My said garden shall be divided into equal shares, and each of them having received his share in equal proportion as a legacy from me, shall enjoy the same." *M* and *H M*, his wife, died without having left any children ; *J* died in the lifetime of *M A*, and one of the sons of *G*, died without leaving children in the lifetime of *H M*. *Held*, *first*, that the direction to the executors to lease the property indefinitely and out of the income to make repairs, pay taxes and ground-rent, and apply the rent to the maintenance of the sons, was sufficient to vest the legal estate in the trustees. *Secondly*, that such estate was an estate in fee. *Thirdly*, that the children of *G* took equitable estates in remainder in fee, defeasible in case of their death in the lifetime of the first taker for life, in which event there was substituted a devise to their children in fee. *Fourthly*, that the children of *G* took as tenants-in-common, and not as joint-tenants, and therefore, that, as there was nothing from which cross remainders between the children of *G* could be implied, the share of *A* reverted to the heir-at-law of the testatrix. *Fifthly*, that wherever any estate in fee is devised to a trustee in trust without any limitation of the estate of the *cestui que trust*, the latter takes the beneficial estate in fee. SHIRCORE *v.* ADMINISTRATOR-GENERAL

1 Ind. Jur. O. S. 50

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

34. _____ *Gift to children.* A testator, after providing for payment of debt, etc., directed that the whole of his property should be disposed of and the proceeds placed in the Oriental Bank with power to the executors to invest the same in mortgages, and to leave existing mortgages untouched. The will then contained this direction: "That a monthly stipend of R15 be paid to my daughter *E S* for her own benefit, and R20, for the benefit of her two children (during their minority), and in the event of the demise of any of the said children occurring, the sum of R10 to cease rateably as being the allowance for each child; that on each of the children attaining their age of majority, I request that my executors pay to each of them severally and proportionably the full amount of interest accruing from my estate (the existing provision for my two daughters to continue during their natural life), and after their demise the said interest in like manner to revert to their heir or heirs in succession." *Held, first,* that a direction to pay a monthly stipend to *E S* and *M D* respectively was simply a charge upon the testator's estate to pay the said stipends to *E S* and *M D* for their respective lives. *Secondly,* that *E S* and *M D* were severally entitled during the lifetime and minority of their children to a monthly stipend of R10 in respect of each child, such payment to cease upon the death of each child or on its attaining majority, till which latter event the said children took no interest under the will. *Thirdly,* each child upon attaining its majority took a share of the residue, proportioned to the number of children then living, and a contingent proportionate interest in the shares of each of the other children which would become vested on the death of each one dying under twenty. *Fourthly,* the limitation of the gift, "during their natural life and after their demise, the said interest in like manner to revert to their heir or heirs in succession," did not prevent the children from taking their several shares absolutely under the will. *Semble:* The rule in *Wild's Case, 6 Rep. 17,* is not applicable to personality. AGNEW *v.* MATHEWS
1 Ind. Jur. O. S. 74 : 1 Mad. 17

35. _____ *Gift over —No mention of time for the occurrence of specified uncertain event—Succession Act (X of 1865), s. 111, ills. (d) and (e), application of.* A testator by his will bequeathed to one *K* a legacy with the proviso that if "after the expiration of nine years from my death . . . . *K* should die without son or grandson, then *M* shall get his (*K's*) properties." The uncertain event, namely, the death of *K* without son or grandson, did not happen before the expiry of nine years from the testator's death, that is, before the period of distribution. *Held,* that where a will fixes the nearer limit of time beyond which the specified uncertain event is to happen, but does not fix either any definite point of time at which or any further limit of time within

WILL—*contd.*

2. CONSTRUCTION—*contd.*

which that event is to happen, it does not amount to the mentioning of a time for the occurrence of that specified uncertain event. That s. 111 of the Succession Act lays down a hard-and-fast rule regulating the validity of certain classes of contingent bequests, which must be applied wherever applicable without speculating on the intention of the testator. *Norendra Nath Sircar* v. *Kamalbashini Dasi, I. L. R. 23 Calc. 563,* followed, that this case came under s. 111 of the Succession Act, and the gift over, that is, the legacy to *M,* could not take effect, as the specified uncertain event contemplated did not happen before the period of distribution, and that *K* took an absolute indefeasible estate in the legacy. *Edwards* v. *Edwards, 15 Beav. 357; Tagore* v. *Tagore, 18 W. R. 359;* and *Soorjee Money Dassee* v. *Denobundoo Mullick, 9 Moo. I. A. 123,* referred to. That the language of the ills. (*d*) and (*e*) does not control the hard-and-fast rule laid down by s. 111. MONOHUR MOOKERJEE *v.* KASISWAR MUKERJEE. MOHENDRO NATH MUKERJEE *v.* KASISWAR MUKERJEE . . . . **3 C. W. N. 478**

36. _____ *Gift over on failure of prior devise.* A testator made the following disposition by his will: "I appoint my brother *N* sole executor of my estate and effects after my decease, who shall pay all my debts and collect all outstandings. My wife is supposed to be in the family way; should she bring forth a male; in that case he will be the sole heir of my property and effects on his attaining proper age. If, on the other hand, she is delivered of a female child, all the expenses of her marriage or maintenance till that period should be defrayed from my estate. I also wish that she should receive a legacy of a Government 4 per cent. promissory note for R2,000 on her attaining proper age. *In case my son dies before attaining proper age, all my estate and property should be taken possession of by my brother.* My wife is to receive a Government 4 per cent. promissory note for R1,000 as a legacy, and is to be maintained from my estate if she continues to live in our family dwelling-house under my brother's protection." The child with which the widow was *enciente* turned out to be a daughter. *Held,* that the clause in italics was one purporting to give the property, and not only the management of it to *N,* the power of management having already been given him in appointing him executor; that the provisions for maintenance of the widow, and for the marriage expenses of the daughter, tended to show (putting aside the legacies) that the widow and daughter were not to take the larger estate which they would have successively taken as heiresses, and that the wife of the testator having borne to him a son, and the apparent intention of the testator having been to give the estate to *N,* if the son did not take, or if the estate to the son failed by reason of his not attaining proper age, the gift over to *N,* on the principle laid down in *Jones* v. *Westcomb, 1 Eq. Cas., Abr., 245,* took effect on

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

failure of the gift to the son, even though such failure was not in the precise manner expressed in the terms of the gift. OKHOYMONEY DASEE NILMONEY MULLICK **I. L. R. 15 Calc. 282**

37. ——— *Vesting—Period of distribution—Gift of dividends.* *S*, a Portuguese inhabitant of Bombay, by his will dated 19th March 1866, devised all his estate, real and personal, to his executors in trust to realize the same, and invest the proceeds thereof in the public funds, and directed as follows: "(i) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of my sons attains the age of twenty-one years, when his or their share shall be paid unto him or them; (ii) I desire further that whatever may be remaining, of the moneys collected by my executors, after all my sons shall have attained the age of twenty-one years, and after my daughters shall have been married, shall be distributed, after deducting R2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time; (iii) in case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them." *Held*, that the gift to the sons, contained in the first clause, was a gift of his share of the dividends to each son on his attaining twenty-one years of age, and that by such gift his share of the corpus became vested in each son when he attained that age. *Held*, further, that the provisions of the third clause, which related to the distribution, did not divest the shares so vested. Clear words must be used to divest an estate once vested. *Held*, also, that only such of the daughters as were surviving at the period of distribution specified in the second clause of the will were entitled to a share in the estate. DESOUZA *v.* VAZ **I. L. R. 12 Bom. 137**

38. ——— *Vesting—Postponement of enjoyment—Accumulation until the age of thirty.* The testator by his will constituted his two disciples, *S* and *J* (aged eighteen and eleven years respectively), his heirs, "subject to the conditions written below," and he directed that out of the net income of his estate his trustees should expend R500 every year, for the maintenance of each disciple, or pay that amount to each disciple every year, and that when *J* should attain the age of thirty years, the trustees should give to *J* the net residue of his property remaining at that time, or, in the case of *J's* decease, should give the same to *S*. *Held*, that the property vested in *J* on the testator's death, but only for a life-estate. *Held*, also (reversing the decision of JARDINE, *J.*), that the direction for postponement of enjoyment, after the coming of age of the devisee must be disregarded, and that (subject to the payment of R500 a year to *S*) the income of the property (including all income accrued since his

WILL—*contd.*

2. CONSTRUCTION—*contd.*

majority) must be paid to *J*, the respondent retaining the corpus until *J* should attain the age of thirty years. *Gosling* v. *Gosling*, *Johns. 265*, followed. GOSAVI SHIVGAR DAYAGAR *v.* RIVETT-CARNAC . . . **I. L. R. 13 Bom. 463**

39. ——— *Perpetuities, Rule against—Superstitious uses—Trust for masses—Executor—Assent of—Vesting of bequest.* An Armenian died in Madras in 1836, leaving a will whereby she appointed executors and bequeathed a certain sum "that the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory," and she also bequeathed, *inter alia*, R42,000 to her granddaughter, for life, and provided that in the event of her marrying and having children she could bequeath to them the said R42,000, but in the event of her dying without issue, R14,000 out of the said R42,000 should be subtracted and given to her husband, and the remaining R28,000 should be added to the first-mentioned bequest, and the income thereof be similarly given for masses. The executor with probate gave effect to the first-mentioned legacy. By a settlement made in contemplation of the marriage of the granddaughter, the subject of the second legacy was settled as provided in the will except as to the R14,000, as to which it was declared that in the event of there being no issue of the marriage, and of the wife surviving the husband and dying without marrying again, it should be divided between the residuary legatees of the testatrix. The husband was a party to the settlement, as also was the executor of the testatrix who was one of the trustees of the settlement. The marriage having taken place, a suit was brought by the husband and wife against the trustees, and a decree was passed under which the trustees were relieved of their office, and the trust funds paid into Court with the direction that interest accruing thereon be paid to the wife until further order. The husband died without issue, and subsequently in 1890 the wife died, not having re-married. The Administrator-General of Madras took out letters of administration to administer the estate left unadministered of the testatrix, and the R42,000 above referred to were paid over to him. *Held*, by SHEPHARD, *J.*, that the sum of R14,000 by reason of the settlement, but not otherwise, fell into the residue of the estate of the testatrix. *Held* by COLLINS, *C. J.*, and HANDLEY, *J.*, affirming SHEPHARD, *J.*, (i) that the sum of R28,000 formed unadministered assets of the estate of the testatrix; (ii) that the bequest for masses was void as infringing the rule against perpetuities. GOLGAN *v.* ADMINISTRATOR-GENERAL OF MADRAS **I. L. R. 15 Mad. 424**

40. ——— *Succession Act (X of 1865), ss. 68, 105, 159—Trust fund to be called after testator's name—Perpetuities—Rule against—Creation of fund, and dispositions except directions for making it a perpetuity, held valid—*

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

"Personæ designatæ," bequest to persons as—Vesting of legacy, time of—Income of fund, gift of—Tenancy-in-common—Joint tenancy—Advancement out of minor legatees' share for his benefit, power of—Vested interest, liable to be divested by condition subsequent—Precatory trust, expression of wish held not to create—Patent deficiency as to objects of bequest—Failure of legacy—Charitable uses, void bequest to. Where by his will a testator directed the establishment in the Bank of Madras by the executor and trustee of the will, of a fund to be called after the testator's name, the "Garratt Trust Fund," and directed "that such trust fund shall never be removed from deposit in the said bank of Madras at Madras so long as that Bank shall exist," and "that 'The Garratt Trust Fund' shall be a continuing fund to all time," and that the interest therefrom should be enjoyed by certain legatees and "the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another in accordance with all legal rights :"—*Held*, that there was nothing illegal about the creation of this fund, except the direction that the securities representing it should never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, was invalid ; but that this did not prevent the intention of the testator to create and endow the fund from being carried out, and that the legatees took an absolute interest. The testator bequeathed "to my grandchildren by my said late daughter *E W*, also to my grandson *F W M* and to his step-brother *G W M*" in equal shares a certain fund. *Held*, that this was a bequest to the testator's grandchildren by his late daughter *E W* not as a class, but to them invidually as *personæ designatæ*. *Held*, also, that, under the terms of the will, the testator's said grandchildren by the late *E W* and *F W M* and *G W M* took vested interests in their respective shares in the said fund from the death of the testator ; that the gift to them of "the benefit, interest and profit" of the fund was a gift of the corpus of the fund by virtue of s. 159 of the Indian Succession Act ; that they took as tenants-in-common, not as joint tenants ; and that under a power given to the executor to make disbursements from the said fund for certain purposes for the benefit of *F W M* in connection with his going to and returning from England the executor was not authorized to apply, towards those purposes, more than *F W M's* one-ninth share in the said fund, as it was not the intention of the testator to give *F W M* a benefit out of that fund over and above that share, and that the executor, in making disbursements for the purposes specified, was only empowered to trench upon the principal of that share if the income, as applied under the power of disbursement for *F W M's* support and maintenance in England, were not sufficient. *Held*, also, that under the terms of the devise in the third and fourth clauses of the will of a certain house and

WILL—*contd.*

2. CONSTRUCTION—*contd.*

Premises to *F W M*, the devisee took on the testator's death a vested interest in that property, liable to be divested in the event of his dying under the age of twenty-one years. *Held*, also, that under the terms of the devise in the fifth and sixth clauses of the will of a certain house and premises and furniture to the children of the testator's late daughter *E W* (who was dead at the date of the will), there was an absolute gift to the children of *E W* of the testator's whole interest in that property, and that such gift was not controlled by the directions in the latter part of the fifth clause that the house should not be sold until the youngest grandchild attained the age of eighteen years, which must be regarded merely as an expression of the wish of the testator and not as a precatory trust, and was of no legal effect ; and that the children of *E W* who were living at the testator's death did not take as joint tenants, but took as *personæ designatæ*, each an equal share in the property, which vested in them on the death of the testator, and therefore the share of one of them, *E G W*, who had survived the testator, but died subsequently, having vested in *E G W*, passed to *E G W's* representative, the ninth defendant. In the sixteenth clause of the will the testator directed his executor and trustee out of a certain sum of R500 to "disburse various petty pensions to some poor people who have been mentioned to him" (the executor and trustee) "by me." *Held*, that there was a deficiency on the face of the will as to the objects of this bequest, and by s. 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator, and that this legacy therefore failed and fell into the undisposed of residue. *Held*, also, that the bequest in the seventeenth clause of the will of R10,000 to the support of the testator's Temperance and Reading Rooms for European pensioners and the Poor Widows' Quarters attached thereto, being a bequest to charitable uses, was void under s. 105 of the Indian Succession Act, as the testator had nearer relatives than nephews. and the will was executed less than twelve months before his death. ADMINISTRATOR-GENERAL OF MADRAS *v.* MONEY

I. L. R. 15 Mad. 448

41. _____ *Joint tenancy-in-fee—Life estate—Intention of testator—Restricted enjoyment, direction as to.* A testator devised his state should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that, should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death her children and their descendants should take *per stripes* ; and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage, and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children the testator's wife should take the whole estate. The testator's wife remained his widow until her death, her children having all predeceased her without being married. *Held*, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift. HALIBURTON *v.* ADMINISTRATOR-GENERAL OF BENGAL

I. L. R. 21 Calc. 488

42. ——— *Duress—Forfeiture—Condition of residence.* A testator by his will directed that if any of the female members of his family, either from misunderstanding or from any other cause, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will. The plaintiff, a widowed daughter-in-law of the testator, and a minor, was removed from his house by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother. *Held*, that under the circumstances the plaintiff's absence did not work a forfeiture. *Clavering* v. *Ellison*, *7 H. L. Cas. 707*, referred to. TIN COURI DASSEE *v.* KRISHNA BHABINI

I. L. R. 20 Calc. 15

43. ——— *Vested interest—Conditions repugnant—Condition restricting immediate enjoyment—Commission allowed to trustees, calcutation of.* Where a testator who died in 1896 bequeathed the whole of his property, with the execution of an annuity to his wife of £250 per annum and some other specific legacies, to his only son, who had attained majority at the date of his father's death, but subject to the restriction that he should not be allowed to enjoy it until the end of the year 1900, and appointed two trustees to carry out his wishes:—*Held*, that the son took an immediate vested interest in the estate of the testator. *Held*, also, that the condition restricting immediate enjoyment was a condition repugnant and was invalid. *Gosling* v. *Gosling*, *John. 265*; *Weatherall* v. *Thornburgh*, *L. R. 8 Ch. Div. 261*, followed. Where commission is allowed to trustees annually, such commission should be calculated on the income of the estate, and not on the corpus. LLOYD *v.* WEBB

I. L. R. 24 Calc. 44

44. ——— **Absolute gift**—*Repugnant gift over—Indefiniteness of gift—Reputed wife—Marriage, proof of.* On the construction of a will which was as follows: "I hereby declare all former wills cancelled. I desire that my wife should obtain possession of all my property and enjoy the benefit of all moneys that may accrue until her death, when I wish that whatever may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered by the Official Trustee of Madras." *Held*, (i) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage; (ii) that the gift to the wife was absolute and the gift over bad for repugnancy. ADMINISTRATOR-GENERAL OF MADRAS *v.* WHITE. **I. L. R. 13 Mad. 379**

45. ——— *Restriction on legatees—Enjoyment—Residuary estate.* Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatees' enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails, and does not fall into the residue of the testator's estate. Therefore, where a testator gave legacies to certain of his grandsons and granddaughters but nevertheless declared that such legacies should be held upon trust (as to the legacies to the grandsons) to invest the same and to apply the income during the minority of the legatee towards his maintenance and education, and upon his attaining the age of 21 years to pay him the income during his lifetime, and after his death to pay such income unto the widow of such grandson, and after the death of both of them to transfer the capital unto the child or children of such grandson, as being a son or sons should attain the age of 21 years, or being a daughter should attain that age or marry, in equal shares as tenants-in-common; and where the testator especially provided as to the legacy left to one grandson that upon the happening of certain events it should be paid to his other garndchildren:—*Held*, that the gift to the grandsons were absolute, and that the subsequent provisions were simply a qualification of the gifts for the benefit of the legatees; and that therefore upon the death of one of the grandsons unmarried, his legal representative was entitled to the legacy left to him. ADMINISTRATOR-GENERAL OF BENGAL *v.* APCAR

I. L. R. 3 Calc. 553

46. ——— **Proviso for cesser**—*Condition—Conditional limitation—Breach of condition—Residence.* *P C T*, a Hindu, died living an only son, *G M T*, and having first made his will in the English form, whereby, after declaring that he had already made sufficient provision for his son *G M T*, and that *G M T* was to take nothing under the will, he gave all his property to trustees, upon trust, as to the prosonal estate, "to collect and get in the same" with certain specified exceptions, and thereout to pay his funeral expenses and debts "and such legacies as were not by the will postponed in payment;" and to invest the residue, and out of

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

the annual proceeds of such investments, so far as the same would extend, to pay certain annuities and postponed legacies as they became due, and to pay such surplus income as might from time to time exist to the person entitled to the beneficial enjoyment of the real property or the surplus rents or profits thereof, with an ultimate trust, after all the legacies and annuities had been satisfied, for the person or persons entitled to the beneficial enjoyment of the real property. And as to the reality upon trust until all the debt and legacies had been paid, and all the annuities had fallen in, to receive the rents, and thereout in the first instance to pay the unsatisfied legacies and annuities, and to pay the surplus rents to the person or persons for the time being to whom the real estate (subject to the devise to the trustees) was given by the will. And as a first charge on the net income of the real property (after satisfying the expenses of establishments), the testator directed the trustees to pay R30,000 per annum to the person for the time being entitled to the beneficial enjoyment of the real property or the surplus income thereof. He further directed them, after all the annuities and legacies had fallen in and been satisfied, to convey the real estate, so far as the then condition of circumstances would permit, unto and to the use of the person entitled, under the limitations contained in the will, to the beneficial interest therein. The first limitation was to *J M T* for life. At the end of the limitations of the real estate, the will contained the following proviso : " Provided always, and I hereby declare if any devisee, or tenant-for-life . . . . . shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said baithakhana house and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, etc., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed," as if the person committing a breach of such conditions had then died. The testator died in August 1868. In December 1868 his son *G M T* instituted a suit for the purpose of avoiding and setting aside the trusts and limitations of the will, except so far as they were for payment of debts, legacies, and annuities. This suit was dismissed on the 1st of April 1869. *G M T* appealed, and on the 1st September 1869 the Appeal Court declared him to be absolutely entitled to the personality, subject to the trusts for payment of debts, legacies and annuities, and entitled, on the death of the defendant *J M T*, the tenant-for-life, to the reality. *J M T* and others, claiming under the limitations in the will, appealed

WILL—*contd.*

2. CONSTRUCTION—*contd.*

to the Privy Council ; and *G M T* filed a cross-appeal in which he claimed that the gift of the life-estate to *J M T* ought to be declared void. By the order of Her Majesty in Council, which was dated the 9th August 1872, and which arrived in Calcutta in September 1872, all the limitations after the limitation to *J M T* were declared void and inoperative, and it was further declared that *J M T* was beneficially entitled to a life-interest in the reality, and also in the personality directed to be conveyed or converted into a fund, subject to the payments on the will directed to be made, and to the provisions in the will not thereby declared to be void ; and also until the legacies and annuities fell in and were satisfied, to R2,500 a month out of the net rents of the reality, and also to the surplus rents of the same and the surplus interest of the personality ; and that, upon the failure or determination of *J M T's* life-interest, *G M T* was entitled as heir-at-law to the real and personal property. The proviso for cessor was not among the provisions of the will which were declared void. *J M T* was one of the trustees under the will. After the testator's death, the business of the estate continued, as theretofore, to be carried on in a portion of the baithakhana house ; and *J M T*, who had a family dwelling-house of his own, used, up to November 1869, to attend at the baithakhana daily for the transaction of business. In November 1869 *J M T* quarrelled with his co-trustees, and ceased to go to the baithakhana. In April 1870 he demanded from the other trustees that possession of the baithakhana should be given to him and upon their insisting on the right to occupy the portion of the baitkakhana used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favour. The trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J M T* should enter into possession ; and the trustees were ordered to deliver to him possession of the baithakhana, except the portion of the ground floor occupied for the business of the estate. After obtaining his decree, *J M T* found that the baithakhana was in a very bad state of repair and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, *J M T*, in December 1871, brought a suit to compel them to effect necessary repairs ; the trustees contested the suit, but in March 1872 a decree was passed directing them to make their repairs. Subsequently repairs were begun which were completed in October 1872. In a suit by *G M T*, alleging that *J M T* had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the baithakhana house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the plaintiff was entitled to take advantage :—*Held*, that the clause containing the provisions for cessor and shifting of the estate was intended to come into operation as a whole and not piecemeal, and there.

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

fore that, until *J M T* came into full beneficial enjoyment of the life-estate given him by the will, or at all events until he became entitled to the surplus rents, the time had not arrived when that clause was intended to apply. *Held*, further, that, assuming that such time had arrived, the action of the plaintiff, in contesting the right of *J M T*, under the will, to occupy the baithakhana house and premises, debarred him from claiming that effect should be given to the clause of forfeiture for non-residence. Even apart from any action by the plaintiff, the conduct of the trustees in disputing the right of *J M T* to possession of a portion of the baithakhana house, and refusing to repair, would suspend the operation of the forfeiture clause until October 1872, inasmuch as it prevented him until that time from obtaining such a possession as was contemplated by the forfeiture clause. The forfeiture clause was not brought into operation by the judgment and order of the Judicial Committee of 9th August 1872. *Held*, on the evidence, that *J M T* had complied with the conditions as to residence. GANENDRO MOHUN TAGORE *v.* JUTTENDRO MOHUN TAGORE . . . . **12 B. L. R. 1**

On appeal to the Privy Council :—*Held*, that, as the clause provided for the cesser and determination of the life-interest of *J M T* in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened. *Held*, that the clause could not be constructed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and *J M T's* state perfected by a conveyance. But held on the evidence that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872, was not unreasonable. Where, in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition exclusive residence is not supposed to be meant ; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence is a sufficient compliance with the condition. GANENDRO MOHUN TAGORE *v.* JUTTENDRO MOHUN TAGORE
14 B. L. R. 60 : 22 W. R. 377
L. R. 1 I. A. 387

47. ——— **Power of appointment**—*Execution of power—Marriage settlement.* A testator, after giving certain specific bequests, disposed of his property as follows : " I request that the interest of my property, invested in Government securities, be disposed of from time to time as follows : First, to my dear son *A* two shares ; to my two dear daughters, *B* and *C*, each one share ; the interest to be paid to them quarterly or half-yearly as may be most convenient. Second, I request that these shares shall not be transferable during their lifetime. Third, at the demise of any of my children without issue, any such share to be divided in the

WILL—*contd.*

2. CONSTRUCTION—*contd.*

above proportion to the survivors. Fourth in the event of issue, they may bequeath their share to any one of their children they may select, subject to the above conditions." *C* married in 1874, and, by a settlement made in consideration of the marriage, her share was assumed to be assigned to trustees upon certain trusts. In 1875 *C* and her husband made the following joint will : " We do hereby constitute the survivor of us to be executor or executrix in our estate and sole heir of the same, together with the child or children begotten in our marriage." She died shortly after the execution of the above will, leaving one child. In a suit by *C's* husband and the trustees of the settlement of 1874 for the administration of the testator's estate and for the construction of his will :—*Held*, that the settlement of 1874 could not operate upon *C's* share in consequence of the direction of the testator, that it should not be transferred in the lifetime of *C*, and that the plaintiffs took nothing under the settlement. *Held*, also, that the power of appointment given by the will of the testator had not been properly exercised by the joint will, and that the child of *C* took the whole of her mother's share. FEHRSEN *v.* SIMPSON.
I. L. R. 4 Calc. 514

48. ——— *Gift of income for life with power to appoint—Invalid power of appointment—Gift over in default of appointment—Gift of residue equally between two sons and then to next-of-kin.* A Parsi by his will devised a certain house to his executors on trust after payment of repairs, etc., out of the income thereof to pay the balance of such income to his daughters, *C* and *J*, in equal moieties, and after their death " to the use of such of the issue only of the said *C* and *J* as they should respectively appoint, such appointment to affect their own respective moiety only and not that of the other of them," and in default of appointment on trust to sell the house and divide the proceeds as directed in the will. *Held*, that each daughter took half the house in question for her life with power to appoint it among her children as she thought fit. Even if the power to appoint had been invalid, the gift over on default should be upheld, on the authority of *Peacock* v. *Frigout*, [*1893*] *1 Ch. 54*. A Parsi testator by his will bequeathed the residue of his moveable property to his executors in trust out of the income thereof to apply the sum of R50 for the maintenance of his son *R* until he should attain 21 years of age and to invest the surplus of such income in Government securities, which should be added to the original corpus of his moveable property for the benefit of his said son *R*, and upon his attaining the age of 21 to pay over to him " the whole of the interest, dividends, and produce only of the corpus of the whole of the moveable property," and after the death of *R* in trust to divide the said corpus of the moveable property with all its additions and accumulations among the next-of-kin of the said *R*. By a codicil subsequently executed the testator

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

directed that the above bequest should extend and be applicable to his son *N*, and that the executors should divide the income of the moveable property between *R* and *N* instead of giving the whole to *R*. The Court was of opinion that, under the will and codicil, *R* and *N* were each to have a moiety of the income for their respective lives, and that on their death one moiety of the corpus was to go to their next-of-kin. The Court, however, declined to make a declaration to that effect, as *R* who at the date of suit was unmarried, might afterwards marry and have children who would not be bound by a declaration made in this suit. BYRAMJI JEHANGIR LAMNA *v.* RATNAGAR JAMSETJI RATNAGAR . **I.L. R. 18 Bom. 1**

49. ———— *Bequest of power of management to widow and daughter for life—Estate—Gift to two persons as joint tenants or tenants-in-common.* *N. W.* a Parsi, died in 1843, leaving a widow *A* and a daughter *M* and two grandsons (sons of *M*) him surviving. By his will (written in the Gujarati language) he directed that during her life his widow and daughter were "to agree together and to manage the affairs with unanimity," and after *A's* death he gave the whole power over his estate to his daughter *M* "and so long as *M* enjoys her natural life, everything is to remain with her." The will then continued; "After the death of *M*—*M* has two sons, namely, Bhai Navroji and Bhai Nusserwanji—these two boys are the owners of whatever property and estate there may be belonging to me. They are considered as my children. No one is to offer them any hindrance or impediment. I have presented all to my wife and to my daughter, *M*." *Held*, (i) (confirming FULTON, *J.*), that *A* and *M* took only a life-interest in the estate. (ii) (Varying the decree of FULTON, *J.*) that *M's* two sons took the estate as joint tenants subject to the life-interests of *A* and *M*, and not as tenants-in-common. NAVROJI MANOCKJI WADIA *v.* PEROZBAI

I. L. R. 23 Bom. 80

50. ———— **Gift in remainder expectant on termination of estate for life**—*Devise of talukh—The Oudh Estates Act (I of 1869)—Registration—Acceleration of remainder on failure of life-estate.* A gift in remainder expectant on the termination of an estate for life does not fail, but is accelerated by reason of gift of such prior life-estate not taking effect. The principle of the decision in *Lainson* v. *Lainson, 5 De Gex M. & G., 754 : 18 Beav. 1, held* applicable to a will made by a Hindu testator. A talukhdar, whose talukh was entered in the third of the six lists prepared in conformity with s. 8 of "The Oudh Estates Act," I of 1869, devised his estate by a will which was not registered to one of his wives for life, and after her death to his younger son by her. *Held*, as a consequence of the above rule, that it was not necessary to decide, upon a claim by the elder son as heir-at-law whether the widow, as a person "who would have succeeded to an interest" in the talukh, if

WILL—*contd.*

2. CONSTRUCTION—*contd.*

the talukhdar had died intestate, would have been within the exception, in reference to the effect of non-registration of will contained in s. 13 of the same Act. AJUDHIA BAKSH *v.* RAKMAN KUAR

I. L. R. 10 Calc. 462 : L. R. 11 I. A. 1

51. ———— **Vesting of interest**—*Divesting—Executory trust.* *H*, by his will, bequeathed to his daughter *A M H*, "on her attaining her 18th year the sum of Company's R10,000, with any interest that may have accrued thereon, if she marries, to be settled upon herself and children solely; should she die unmarried, her money to be equally divided between her brothers; and if either of them die, the whole of deceased's money to go to the survivor." *Held*, that *A M H* (who had attained her 18th year) had a vested interest in the legacy subject to be divested upon her dying at any time unmarried, and further, subject to an executory trust in favour of her children in the event of her marrying at any time, and therefore that she was not entitled to have the capital of the legacy paid to her. *In the matter of the will of* HUNTER. *In the matter of* ACT XXVIII OF 1866

I. L. R. 4 Calc. 420

52. ———— *Interest not subject to be divested.* A testator nominated *A B*, etc., "to be executors and trustees of this my will, and eventually guardians of my dear children and estate, until such time as my children shall severally attain the age of 25 years, when I request the aforementioned gentlemen (my wife being dead), their heirs or executors, will divide, or cause to be divided, into shares agreeably to the number of our surviving children, giving to the boys two shares and to each of the girls one, or to their lawful issue or husband, the whole of my estate, each child to be put in possession of his or her share when they shall respectively attain the age of 25 years; and whenever either of my daughters shall enter into the holy state of matrimony, I request that a proper settlement may be made upon her and her children, and in the event of either of my children departing this life without leaving husband, wife, or lineal descendants, or her share shall be divided equally amongst our other children or their lawful issue; but on no account shall any division of the principal of my estate take place till after the death of their mother. *Held* (reversing the decision of PHEAR, *J.*) that after the mother's death, each child took a vested interest on attaining the age of 25 years,—that is, at the time when possession is to be given,—and not an interest subject to be divested in the event of the child dying without husband, wife, or lawful issue. TAYLOR *v.* PHILLOTT. PHILLOTT *v.* MORRIS . . . **1 Ind. Jur. N. S. 375**

53. ———— *Divesting clause—Gift over on legatee's death "prior to division" of the estate—Gift not void for uncertainty—Succession Act (X of 1865), ss. 75, 91, 106.* A testator directed his trustees and executors to hold

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

his real and personal estate upon trust to sell the real estate either together or in parcels, and either by public auction or private contract, and to call in, sell, and convert into money such part of his personal estate as should not consist of money, and to divide the said moneys, and the ready money which might belong to such estate, amongst the several persons named in the schedule to the will, and to pay the same to them in the shares and proportions therein mentioned, as and when they should respectively attain the age of 21 years in the case of males, or, in the case of females, when they should respectively attain that age or marry. He directed that, in the event of any of such persons dying in his lifetime, or at any time thereafter "prior to the said division," leaving lawful issue, such issue should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of 21 years at the testator's death died five months after him, before payment of the legacy, and left lawful issue. *Held*, that the legacy vested in interest in the legatee at the testator's death, but that the legatee having died prior to the division of the estate, it became divested; that the "division" of the testator's estate meant, in this will, the ascertainment of the amounts allottable to the share of each legatee, after the conversion of the estate into money; and that the gift over in favour of the legatee's issue was not void for uncertainty, but took effect. *Johnson* v. *Crook, L. R. 12 Ch. D. 639*; *Collison* v. *Barber, L. R. 12 Ch. D. 834*; *Bubb* v. *Padwick, L. R. 13 Ch. D. 517. Chaston* v. *Seago, L. R. 18 Ch. D. 218, Spencer* v. *Duckworth, L. R. 18 Ch. D. 634*, referred to. BACHMAN v. BACHMAN . . . . **I. L. R. 6 All. 583**

54. _____ *Bequest to orphan in Military Orphan Asylum—Direction to trustees.* A special case was stated for the opinion of the Court as to whether *S M* took a vested interest in the sum of R6,325 under the following clause of will: "I paid to the M O Society R6,000 for *S M*, and invested R6,826 the interest on which I directed to be paid to the mother of *S M*. Now I directed my trustees after the death of the mother of *S M*, to realize the latter sum and pay it to the M O Society, for *S M*, in terms of the regulations of the Society." *Held*, that the bequest was *primâ facie* for the benefit of the daughter. That having regard to the regulations of the M O Society, the bequest was a gift for the benefit of the Society generally. That if the will had given the mother the interest for life, instead of saying it had been given, it would have vested. That the interest vested in *S M* at once, and formed part of her estate. *In the matter of the goods of* COLLINS.

Bourke O. C. 104

55. _____ *Gifts of life interest or corpus—Discretion of executors to hand over corpus—Costs.* *C*, a Portuguese inhabitant of Bombay, died in April 1884, leaving three sons, *M*, *S*, and *J* (defendant No 3), and two daughters,

WILL—*contd.*

2. CONSTRUCTION—*contd.*

R and *C*. By her will she directed that her daughter *R* should enjoy the rents and profits of certain immoveable property for her life, and that after her death the said property should be sold and the sale-proceeds (after payment of two legacies thereout) be divided equally between her two sons *S* and *J*. The seventh clause of the will was as follows: "7. I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (c) of paragraph 6 above should be held in trust by my executors hereinafter named and converted by them into Government securities; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and take off all his evil tendencies, and lead a steady, quiet, and orderly life, or should he, on account of illness or other reasonable cause, be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above or such part or parts thereof as to my executors may appear proper." *S* died in 1885, unmarried and intestate, leaving his two brothers, *M* and *J*, and his two sisters, *R* and *C*, him surviving. *M* died in 1889, leaving a widow and children. In 1891 *J* mortgaged all his interest under the said will to the plaintiffs to secure a loan of R6,100. In 1893 *R* died, and in 1894 *C* died. Subsequently the executors were proceeding to sell the property mentioned in the will when the plaintiffs filed this suit praying for a declaration that they had a valid charge upon *J's* interest therein, and that his interest should be ascertained and declared, and he himself ordered to pay the amount of their claim; that the property should be sold and their claim paid out of the funds; that the executors should be restrained from selling, save subject to their (plaintiff's) rights, etc. The plaintiffs and *J* contended that he (*J*), in the event that had happened, was entitled to the whole of the proceeds of the property absolutely, and that the gift in the sixth clause of the will could not be cut down by the provisions of the seventh clause. *Held*, (i) that the defendant *J* had no interest in the house mentioned in the will. He was only entitled to a share of the proceeds after it had been sold. (ii) That his interest in his share of such proceeds was merely a life-interest with power to appoint to his widow or issue, and that he was not entitled to be paid the corpus of such share, but that the executors might, under certain circumstances and at their discretion, hand over to him the said corpus. (iii) That neither the plaintiffs nor *J* could interfere in the sale of the said property. (iv) That the plaintiffs had a valid charge upon *J's* interest in the sale-proceeds of the said property to the extent of their mortgage. (v) That *J's* interest was (after deducting the

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

legacies given by the sixth clause) an absolute interest in one-fourth share of *S's* moiety and a life-interest in his (*J's*) moiety, subject to the contingency of the executors in their discretion handing over the corpus of the share, or part thereof, for his absolute use, in which event the plaintiffs had the right to the same so far as their debt was unsatisfied. (vi) As to costs, the plaintiffs and third defendant *J* should pay their own costs; that the executors and defendants Nos. 4 to 12 should have their costs paid out of *J's* share in *S's* moiety of the sale-proceeds, and, if that fund were not sufficient to pay such costs, the plaintiffs and the third defendant J to pay the deficiency. BECHAR AKHA *v.* DECRUZ.

I. L. R. 19 Bom. 221

Held, in the same case on appeal, confirming the decree of the lower Court, that under the above clause of the will there was a clear gift to the wife or issue of *J*, but that *J* was to have the power of designating how they were to take. To that extent the absolute gift to *J* was qualified. Should the gift over fail, the absolute gift to *J* would remain unimpaired. *Held*, as to the costs (varying the decree of the Court below), that the executor's costs, taxed as between attorney and client, be paid out of the estate as well as the costs of the defendants 4 to 12. Plaintiffs and *J* to bear their own costs respectively: plaintiffs to be at liberty to add their costs to their mortgage-security. In other respects the decree of the lower Court to be confirmed with costs other than the costs of defendants 4 to 12 whose costs may be added to their costs in the Court below. BECHAR AKHA *v.* DECRUZ.

I. L. R. 19 Bom. 770

56. ——— *Bequest to executors and trustees in trust for son of testator and his widow—Life-interest—Estate in fee—control and management of executors and trustees.* A Hindu by his will bequeathed certain property to his executors and trustees "upon trust for my son *T* and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof, and after the death of my son *T*, in trust to allow his widow to occupy and use the same and enjoy the income during her life; but if the said *T* shall die without leaving male issue him surviving, then in trust after the death of the survivor of them without leaving such male issue to my son *T* and his heirs according to the rules of Hindu law." The sons *T* and *P* both survived the testator and *T* had a wife and three sons living at the date of suit. In a suit by the executors and trustees against *T* for construction of the will, *T* contended that under the above clause, he was absolutely entitled to the property subject to the interest of his widow for her life. The plaintiffs contended that *T* had only a life-interest in the property. *Held*, that the defendant *T* took only an interest for life in the property. The words "in trust for *T* and his heirs," which, standing alone, would give the property in fee, were to be read with the words immediately following, which showed a clear intention that *T* should only take a life-interest, to be followed by the same interest in his widow, after whom the heirs of *T* would take as purchasers. *Held*, also, that the trustees were intended to take the legal estate any to have the control of the property, allowing *T* to enjoy the income of it. SMITH *v.* TRIVHOVAN DAS MANGALDAS . . **I. L. R. 19 Bom. 401**

57. ——— *Bequest to wife with obligation of maintaining and educating children—Interest taken under such bequest.* *B* died in 1891 leaving a widow (defendant No. 1) and two sons, *P* and *D* (defendants Nos 4 and 5). By his will he bequeathed the residue of his property to trustees (of whom his widow was one) in trust to pay the rents and income thereof to his widow for life, "she thereout maintaining, educating, and bringing up" his children in a manner suitable to their degree in life. After his death, the property moveable and immoveable, was to be divided, among his sons equally when *D* should attain the age of twenty-five. He attained majority in October 1895. At the date of suit *D* was eighteen years old and *P* was twenty-five. It was contended that the widow was only a trustee of the rents for the benefit for her sons *P* and *D*. *Held*, that under the will the widow took a life-interest in the rents subject to the obligation of maintaining, educating, and bringing up the children. The only two surviving children (*P* and *D*), having attained majority and having received property under the will of an uncle, were now no longer in need of being maintained by the widow. The obligation imposed upon her therefore by her husband's will was discharged, and she was now entitled to a life-interest free from all further obligation to maintain his children. NATHA KERRA *v.* DHUNBAIJI.

I. L. R. 23 Bom. 1

58. ——— **Trust**—*Creation of trust—Uncertainty.* A Hindu by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions: "You should give my brothers, their wives and children, according to your wishes." *Held*, that no trust was created by these words. KUMARASAMI *v.* SUBBARAYA.

I. L. R. 9 Mad. 325

59. ——— *Validity of trust—Direction as to debt due from attesting witness.* Where a testator directed that a debt due to him by an attesting witness of his will should not be claimed, demanded, or enforced, but that his wish was that the sum should be specially devoted to the education of the children of such attesting witness:—*Held*, that there was no release of the debt or legacy to the attesting witness, but a valid trust in favour of the children. ADMINISTRATOR GENERAL *v.* LAZAR . . . **I. L. R. 4 Mad. 244**

60. ——— *Precatory trust.*—*W. R.* by his will, made the following gift to his wife, *M A R*: "I give to my dearly beloved wife

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

the whole of my property both real and personal (described), feeling confident that she will act justly to our children in dividing the same when no longer required by her." *M A R*, by her will, left to the children certain portions of such property, leaving to the child *A C R*, amongst other things certain banking shares. These shares were attached in the execution of a decree against the executors to her estate as belonging to such estate. *Held*, by the High Court, that she took under her husband's will a life interest only in his property with a power of appointment in favour of the children, and that the shares belonged to *A C R*, and could not be sold in execution of the decree as part of the estate of *M A R*. RAYNOR *v.* MUSSOORIE BANK.

I. L. R. 2 All. 55

Held, by the Privy Council, reversing the decision of the High Court, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created. In order to create a precatory trust, the words must be such that the Court finds them to be imperative on the first taker of the property ; and the subject of the gift over must be well defined and certain. MUSSOORIE BANK *v.* RAYNOR.

I. L. R. 4 All. 500 : L. R. 9 I. A. 70

61. ——— Expression of wish—*Bequest.* A testatrix, entitled to Government notes under a gift, coupled with the condition that she was to receive only the interest during her life, and that after her death, the notes were to be held in trust for all her heirs, gave the following directions to *S K*, whom she made her principal legatee : " I direct *S K*, under this will, to pay every month R644-7-1 (being one-third of R1,933-5-4, my monthly pay allowed by the Government for notes, which are deposited) to my dependents and personal servants, as detailed below. . . . . Be it known that the expenses of the imambarra, etc., will be continued for ever ; and also the pay of *G K* and *M A* will be defrayed for ever, *i.e.*, generation after generation. The rest of the servants will be paid for life only." *Held*, that these words constituted a bequest, and were not merely the expression of a wish. Also that the bequest was not one of legacies payable out of a specified sum and no other ; the statement that the monthly payments to be made amounted to one-third of the sum received monthly by the testatrix not limiting the source of the legacies. SULEMAN KADR *v.* DORAB ALI KHAN.

I. L. R. 8 Calc. 1 : L. R. 8 I. A. 117

62. ——— Will confirming trust-deed—*Construction of deed—Forfeiture.* *S*, being desirous of securing and settling his property, executed a deed of trust whereby he conveyed and assigned all his real and personal property unto trustees, upon (among others) the following trust : that immediately after his death the trustees should convey, assign, transfer, and make over all the premises mentioned in the deed unto such person or persons as *S* should, by his last will, attested by two witnesses, direct and appoint, and in default of such direction and appointment, unto the next heirs of *S*, their heirs and assigns, for ever, and in the meantime to pay the Government revenue out of the rents and profits of the real property, and employ the residue and accumulations as well as the produce and accumulations of the personal property " in such a manner as may procure the daily worship of the household idols " mentioned in the deed and pay what they considered a fair and proper sum to the wives and family of *S* living at his death and residing in the family dwelling-house. By his will, dated the same day as the deed, *S* declared that he ratified and confirmed the deed, subject to such provisions as were contained in his will, which were that the trustees should not charge the fund for the maintenance of those who should not live in the family dwelling-house and for the appointment of new trustees. *Held*, *first*, upon the authority of *Wilson v. Pigott*, *2 Ves. Jun.*, that the powers of the trustees (under the deed) did not cease on the death of *S*, and that the directions in the will, although not strictly within the words, amounted to a good appointment in equity, so that instead of the trustees of the deed conveying the property on the death of *S* to his son, they should contrive to hold subject to the trusts of the deed as modified by the will. *Secondly*, that the words " in such a manner as may procure the daily worship," etc., meant in such manner as shall be sufficient to procure the daily worship, etc., and that the trustees were not authorized to apply such portion of the trust funds as they in their discretion might think fit, but only such portion as was reasonably sufficient for those purposes. General debts and liabilities are not charges against property forfeited upon conviction of felony. HURRYDOSS BONERJEE *v.* HOGG.

1 Ind. Jur. O. S. 86

63. ——— Gift of residue to a class—*—Postponement of period of distribution—Vested interests—Succession Act, ss. 98, 101, 102.* A testator gave his residuary estate to trustees upon trust to invest and " to pay, transfer, or divide the same unto, between, or among the children of my brothers *A* and *B* respectively, to be paid, transferred to, and divided among, them in the proportions and at the times hereinafter mentioned, that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the share of each daughter to be paid to her or them on her or their respectively attaining that age or previously marrying, with benefit of survivorship between and among all the said sons and daughters." The testator left him surviving his two brothers and a sister, *C A* and *B*, both died before the eldest of the testator's nephews or nieces attained 21 or married In a suit instituted by the widow and executrix of

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

A to have it declared that the above bequests were void under ss. 101 and 102 of the Succession Act, and the testator died intestate as to the residue of his estate, and that she as executrix of *A* was entitled to receive a one-third share of the said estate and the accumulations thereof :—*Held*, that the legatees took vested interests subject to be divested on death before the contingencies mentioned in the will happened ; that the period of distribution alone was postponed ; and that the bequests were valid. *Semble :* S. 98 of the Succession Act applies only to vested interests. MASEYK *v.* FERGUSSON.
I. L. R. 4 Calc. 304

64. _____ *Postponement of period of distribution—After-born child, share of —Lapsed bequest—Succession Act, s. 98.* A testator gave his residuary estate to trustees upon trust to invest and " to pay, transfer, or divide the same unto, between, or among the children of my brothers *A* and *B* respectively, to be paid, transferred to, and divided among, them in the proportions and at the times hereinafter mentioned, that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of 21 years, and the shares of each daughter to be paid to her or them on her or their respectively attaining that age or previously marrying, with benefit of survivorship between and among all the said sons and daughters." After the death of the testator, and before the period of distribution arrived, a son was born to *B* and one of the sons of *A* died intestate and unmarried. *Held*, that the after-born son of *B* was entitled to a double portion as one of the male children of the testator's brother, and that the share of the son of *A* was divisible among the surviving male and female children in equal shares. MASEYK *v.* FERGUSSON.
I. L. R. 4 Calc. 670

65. _____ **Residuary estate of moveable and immoveable property**—*Claims to, against executors and trustees.* If a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express device to them. TREEPOORASOONDERY DOSSEE *v.* DEBENDRONATH TAGORE.
I. L. R. 2 Calc. 45

66. _____ **Attesting legatee**—*Succession Act (X of 1865), ss. 90, 94—Bequest to three children " or the survivors or survivor of them "—Incapacity of one to take by his attestation of the will—Residuary bequest to widow—Construction—Doctrine of acceleration.* By his will, a testator, after giving a life interest in certain property to his wife, directed that after her death the property should be divided into equal shares between his " three children, James, Cornelius and Florence, or the survivors or survivor of them ;" and the will contained a resi-

WILL—*contd.*

2. CONSTRUCTION—*contd.*

duary bequest in favour of the wife. James (who was appointed a trustee) was an attesting witness to the will. The widow having died, Florence brought this suit, seeking to have it declared that James was incapacitated from taking under the will (by reason of his having attested it) and that she was entitled to a moiety of the property bequeathed. *Held*, that the share of the legacy to James, which had lapsed, fell into the residue. The effect of the bequest to the three children " or the survivors or the survivor of them " would, in case James had predeceased the testator, have been to take the case out of the ordinary rule that a legacy lapses where the legatee dies during the lifetime of the testator. But, as the two children had not survived James, the contingency on the happening of which they were to take had not happened. The testator having made a testamentary disposition which was incapable of taking effect, the share of James fell into the residue. The doctrine of acceleration could not be applied to such a case. CAMANI *v.* BAREFOOT (1902).
I. L. R. 26 Mad. 433

67. _____ **Bequest to " eldest son to be born "**—*Bengali will—Terms of art—Words, of direct and simple gift—Vesting of a bequest, words necessary for—" Parjyapta haibek," meaning and effect of—Appointment of guardian with direction to make over gift on legatee attaining majority, effect of —Judges trying a cause consulting another Judge, propriety of—Ex parte hearing—Re-hearing, application by respondent for—Unconscionable bargain.* In construing Bengali wills, it must be remembered that there is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. The only safe course is to give to the words their plain and ordinary meaning. There are no particular words necessary to the vesting of a bequest or a legacy. The words " *parjyapta haibek*; " whether they mean " descend to " or " devolve or go " or " shall become vested," have the effect of vesting the legacy at once. Where there is a bequest in favour of a person simply, it confers a vested interest, and the appointment of an executor and guardian to that person while he is a minor with a direction to make over the property to him on his attaining majority, does not postpone the vesting of the bequest. Judges who have heard the arguments and who are responsible for the decision, can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision though he also may be a Judge of the High Court. *F* had in August 1892, sold her interest in a certain moiety under a will, together with an allowance of R50 per month, which, she took under the will, to one *A L B*, and *W* on the same date disposed of all his interest in the said moiety to *A L B* who assigned the interest he took under both sales to *H* for R9,000. In a suit by *H* in 1895 for construction of the will, and for a declaration

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

of the rights of the parties under it the High Court, on the view that *F* would, on their construction of the will, be entitled to a large amount of accumulations of the moiety, which together with her allowance she had been induced to part with to *A L B* for only R3,000: *Held*, on the facts, that the bargain was an unconscionable one and could not be sustained. On the construction put on the will by the Judicial Committee on appeal *F* took no interest in the moiety of the residuary estate, and had assigned nothing but her allowance; there was therefore no ground for holding the assignment to *A L B* to be an unconscionable bargain. HARRISS *v.* BROWN (1901).

I. L. R. 28 Calc. 621
s.c. 5 C. W. N. 729
L. R. 28 I. A. 159

68. _____ **Charitable gift**—*Succession Act (X of 1865), ss. 90 and 105—Hospitals, gifts to—Registration of gifts to hospitals—Corporate bodies, gifts to hospitals not—"For the benefit of the inmates of the Hospital," meaning of—Personal bounty, motives of—Residue—Property subject to trust incapable of taking effect.* Charitable gifts to hospitals which are recognised as existing public institutions are good charitable gifts, provided always, when the Succession Act applies, that the provisions of s. 105 as to registration and deposit are complied with. To validate such a gift, it is not necessary that the institution to be benefited should be a corporate body; it is sufficient if there be some responsible authority charged with the general administration of the funds of the institution. Under s. 90 of the Succession Act, property which is the subject-matter of a trust which is incapable of taking effect *primâ facie* falls into the residue, and it can only be prevented from so doing by the express directions of the testator. *In re Bagot*, [*1893*] *3 Ch. 348*, and *Blight* v. *Hartnell*, *L. R. 23 Ch. D. 218*, referred to. On the construction of the will:—*Held*, that the gift "for the benefit of the inmates of the Campbell Hospital" does not indicate any motive of personal bounty on the part of the testatrix, but was intended to provide for the general maintenance of the Hospital named. The gift was accordingly valid. FANINDRA KUMAR MITTER *v.* ADMINISTRATOR-GENERAL OF BENGAL (1901).

6 C. W. N. 321

69. _____ *Charitable purposes—Uncertainty.* A testator directed that after the death of his wife and in default or on failure of issue, his trustees should bestow certain trust premises and the interest, dividend and income thereof "upon some one or more charitable, educational or other philanthropic institutions or institution calculated to promote the public good, as they shall in their discretion select." *Held*, that the gift to charity was void for uncertainty. *Williams* v. *Kershaw*, *5 Cl. & F. 111 n*, followed. BAI CHADUNBAI *v.* DADY NUSSSERWANJI DADY (1901).

I. L. R. 26 Bom. 632

WILL—*contd.*

2. CONSTRUCTION—*contd.*

70. _____ *Succession Act (X of 1865) s. 105—Bequest to charitable uses by a testator leaving a widow him surviving—Validity—"Nearer relative" than a nephew or niece.* By s. 105 of the Indian Succession Act, no man having a nephew or niece or any "nearer relative" shall have power to bequeath any property to charitable uses, except by will executed not less than twelve months before his death and deposited as by the section is provided. A testator by his will bequeathed property to charitable uses, and died two days thereafter, leaving to widow him surviving. On question being raised as to the validity of the bequest:—*Held*, that the bequest was valid. The term "relative" in s. 105 of the Succession Act refers to kindred only, as set forth in the table of consanguinity annexed to s. 24 of the Act, and has no application to any relationship by marriage. ADMINISTRATOR-GENERAL OF MADRAS *v.* SIMPSON (1902) . . **I. L. R. 26 Mad. 532**

71. _____ **Executor**—*Suit by legatee against executor for arrears of rent—Limitation.* A Hindu died leaving a son, a daughter, a widow and a brother's widow. He left a will whereby he directed that the two widows should receive "half and half" the annual income realized from the four houses which he specified, and that on the death of one of them the survivor should take the whole for her life. The son was to make repairs and to pay the municipal taxes payable in respect of the said houses, but he was to have "no manner of right whatever to the income" thereof. He was also to provide the widows with food and clothing for their life, and to provide the expenses of the marriage of the testator's daughter. Except as abovementioned, the whole of the testator's property, movable and immovable, was left to the son. The plaintiff (one of the widows) sued to recover the rent of the four houses which had accrued since the testator's death. It was contended that by the will the four houses were given to the widows. *Held*, that the son was the sole owner of the whole property. The will, however, had imposed upon him the duties of an executor, and he should be treated as such. There was thus a fiduciary relation established between him and the widows, and they were entitled to the arrears of rent for the whole period claimed. RAMDHAN *v.* MANIBAI (1900) . . . . . **I. L. R. 25 Bom. 429**

72. _____ The testator in his will made use of the following expression with reference to expenses for *pujahs*, etc.—"You (*i.e.*, the executors) are to pay my share of the expenses whatever that may be." *Held*, that the testator did not intend thereby to give the executors (they being the parties to decide what those expenses should be) such an absolute discretion in the matter as might deprive the beneficiary under the will of any beneficial interest in the estate. *Mullick* v. *Mullick*, *1 Knapp 245*, referred to. NISTARINI DASSI *v.* NUNDO LAL BOSE (1902).

I. L. R. 30 Calc. 369
s.c. 7 C. W. N. 353

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

73. ——— Executor by implication—*Probate and Administration Act (V of 1881), s. 7—Will, construction of—Osees—Co-adjutor—Overseer.* On a construction of the will, held that the *shebait* was appointed executor of the will by necessary implication, within the meaning of s. 7 of the Probate and Administration Act, and that the persons appointed as *osees* were merely co-adjutors or overseers. BROJO CHUNDER GOSWAMI *v.* RAJ KUMAR ROY (1901) . . . . **6 C. W. N. 310**

74. ——— Time of payment to legatee—*Absolute gift—Age of majority of legatee—Direction in will for postponement of payment until a later period, than majority, effect of—Privy Council, leave to appeal to—Civil Procedure Code (XIV of 1882), s. 596—Value of subject-matter.* Where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, unless the will confers an interest in the property upon some person for the intervening period ; and the legatee is entitled to have the property handed over to him as soon as he attains his majority. A question arose between an executor and a residuary legatee as to whether, under a will, the legatee was entitled to have the residue handed over to him on his attaining majority or whether such payment was not to be postponed until he reached the age of twenty-five, the executor in the meantime having a right to the income. The Court held that payment should be made to the legatee on his attaining majority, and that the will conferred on the executor no right to the income. The executor applied for leave to appeal to the Privy Council, and contended that the matter in dispute was of the value of R10,000, as required by s. 596 of the Civil Procedure Code, inasmuch as it involved the right to the whole fund. *Held*, refusing leave, that the subject-matter of the dispute was only the income, and was not of the requisite value. The case had proceeded on the hypothesis that the executor had the *corpus* of the estate as a trustee, and the only question was as to the income. HUSENBHOY AHMEDBHOY *v.* AHMEDBHOY HABIBBHOY (1901) **I. L. R. 26 Bom. 319**

75. ——— *Will—Bequest to religious and charitable purposes.* The residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu Law was as follows : "And as to the rest and residue of my estate, I give and device the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may, in his discretion, think proper." The bequest of the residuary estate was *held* to be a valid charitable bequest. The direction to spend and give away the whole of the residue in charity governs the words that immediately follow, and therefore the purposes for which the fund is to be spent must be charitable, although they may at the same time

WILL—*contd.*

2. CONSTRUCTION—*contd.*

be religious. *Ram Gopal Bonnerjea* v. *Sibkissen Bonnerjea, 1 Bom. H. C. 76 note* followed. *In re White, [1893] 2 Ch. 41 ; Baker* v. *Sutton 1, Keen 224 ; Pocock* v. *Attorney-General, L. R. 3 Ch. D. 342 ; Morarji Cullianji* v. *Nenbai, I. L. R. 17 Bom. 351 ; Deb Shankar Naranbhai* v. *Motiram Jageshwar, I. L. R. 18 Bom. 136 ; Runchordas Vandrawandas* v. *Parbatibhai, L. R. 26 I. A. 71 ; Morice* v. *Bishop of Durham, 10 Ves. 522, Gangbai* v. *Thabai Mulla, 1 Bom. H. C. 71 ; Advocate-General* v. *Damothar Madhowji, 1 Bom. H. C. 76 note, Blair* v. *Duncan, [1902] A. C. 37 ; Sib Chunder Mullick* v. *Treepoora Soondry, 1 Fulton 98 ;* and *Townsend* v. *Carus, 3 Hare 257,* referred to. PARBATI BIBEE *v.* RAM BARUN UPADHYA (1904) . . **I. L. R. 31 Calc. 895 s.c. 8 C. W. N. 653**

76. ——— *Will—Charitable bequest—Residuary bequest—Shebait, appointment of—Bequest to poor relatives—Uncertain bequest.* A testator by his will appointed *B* shebait for life and directed that after *B's* death the eldest male issue of *B*, or if no issue, the adopted son of *B*, or if no adopted son, then such person as *B* should by deed or will appoint, should become shebait. *Held*, that the limitation to *B* was valid. A direction to the executors to set apart a specific sum for distribution among the testator's "poor relations, dependants and servants," is a valid charitable bequest. *Morice* v. *Bishop of Durham, 10 Ves. 522,* distinguished. *Attorney-General* v. *Duke of Northumberland, 7 Ch. D. 745,* and *Horde* v. *Earl of Suffolk, 2 Mylne & Keene, 59,* referred to. Where a testator devised specific immoveable property to *C* for life only, and further directed his executors to sell the residue of his moveable and immoveable properties and transfer it to a University :—*Held*, that the reversion in the property devised to *C* for life passed on his death, under the specific residuary device, to the University. MANORAMA DASSI *v.* KALI CHARAN BANERJEE (1904) **I. L. R. 31 Calc. 166**

77. ——— *Construction of will—Conditional bequest—Condition that legatees should "humbly apply for subsistence"—Condition precedent—Application made by letters not in substance or spirit "humble request"—Hindu Law—Void bequest—Attempt to create perpetuity—Legacy for "as long as there are male heirs."* To his brother, the father of the respondent, and another relative, by both of whom a suit against him was then pending for partition of his zamindari, the father of the appellant in his will made a bequest, not as a duty, but as an act of grace, on the condition that, "should this suit which is brought by them under an allusion be disposed of against them, and should they after the final Court's decision humbly apply for subsistence," they should receive a certain allowance from land to be purchased for the purpose of maintaining them to be "enjoyed as long as there are male heirs and then revert to the zamin" :—*Held*, by the Judicial Committee,

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

that this condition was not complied with by a letter from the respondent's father to the Collector of the district, who was administering the estate, not containing any language of humility, but asserting the zamindar's duty to maintain the applicant and demanding a sum considerably larger than that given by the will; nor by another letter from the respondent to the Collector protesting against the inadequacy of the bequest, and demanding "something suitable to our dignity," the letters neither in substance or spirit evidencing a humble request for subsistence in the sense of the will. In this view it was held necessary to decide a contention that the bequest was void as coming within the prohibition laid down in the *Tagore Case, L. R. I. A. Sup. Vol. 47 : 9 B. L. R. 377.* VEERABHADRA RAJU BAHADUR GARU *v.* CHIRANJIVI RAJU GARU (1905). **I. L. R. 28 Mad. 173 s.c. L. R. 32 I. A. 105**

78. ——— *Will—Genuineness—Procedure to be followed in deciding—Consideration of contents if should precede proof of execution.* A Judge concluded that a will was a forgery primarily from a consideration of its contents, which he thought to be so extraordinary as to overbalance altogether the evidence of witnesses, who spoke to having been present and seen the testator sign the will and to having themselves signed the will as witnesses. *Held*, that the method of procedure adopted was erroneous. It was not permissible to the Judge first to make up his mind about the contents of the will and then look at the positive evidence in favour of its execution from that standpoint. BULLI KUNWAR *v.* MUSSAMMAT BHAGIRATHI (1905). **9 C. W. N. 649**

79. ——— *Repugnancy in words—Construction of deeds—Indenture—Construction of indenture—"Absolutely," interpretation of—Held*, that the rule that, if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision. ADVOCATE-GENERAL OF BOMBAY *v.* HORMUSJI (1905) . . **I. L. R. 29 Bom. 375**

80. ——— *Will suppressed—Void—Sale, if valid.* A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio* and a sale of a property of the deceased by the administrator, who has obtained a grant of an administration under such circumstances to a purchaser, who was ignorant of the suppression of the will, is valid, even where the grant is revoked after the sale. *Ellis* v. *Ellis*, [1905] *1 Ch. 613*, referred to. *Boxall* v. *Boxall*, *27 Ch. D. 220*, followed. The defence of purchase for valuable consideration without notice is available against a claim based on an equitable title, but not against one based on a legal title. The will in this case contained the clause "On my demise *G*, son of *P*, or any full brother of *G*, that shall be born in equal shares, shall become the owner of the share or shares left by me and until the said *G* attain majority *P* and *B*, wife of *P*, shall remain trustee, *i.e.*, guardians and next friends." :—*Held*, that there was neither an express nor implied appointment of executors under that clause. GOPAL DAS AGARWALLA *v.* BUDREE DASS SURREKA (1906) **10 C. W. N. 662**

81. ——— *Construction—Rule against perpetuity—Succession Act (X of 1865), s. 101.* Clause 13 of the will produced in this case was as follows :—"As to my other property, which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal share should there be (any such son or sons). In case he leaves no son behind him my mukhtears shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years. *Held*, on a construction of the above clause, that the bequest in favour of a son of Mahadev, who might be adopted at any time after Mahadev's death by a widow, who might not have been living at the testator's decease, was void under s. 101 of the Succession Act (X of 1865). KASHINATH CHIMNAJI *v.* CHIMNAJI SADASHIV (1906) . **I. L. R. 30 Bom. 477**

82. ——— *Fund specified, liable for debts and expenses even when there is a residue undisposed of.* Where a will directs that the funeral and testamentary expenses should be paid out of a legacy, but makes no disposition of the residuary estate, such expenses will nevertheless be payable out of the fund specified and the fact that the testator at the time she made the will was not aware that she had a residue to dispose of, will not justify the Court in speculating upon what she would or might have done had she been aware of it, and departing from the express directions of the will, to make a new will for her. CAMANI *v.* ADMINISTRATOR-GENERAL OF MADRAS (1906). **I. L. R. 29 Mad. 290**

83. ——— *"Such debts and liabilities as aforesaid"—"Such," meaning of—Time no part of the discretion.* A will contained a clause providing—"11. As regards the remaining one equal fourth share of the said residue I direct that, if at the time the said residue is divisible, my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trusts, until the said Ardeshir shall be free from such debts and liabilities or until he shall die, to

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education or other benefit of such children including their marriage, but when and so soon as the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely.'' A question having arisen as to whether the expression '' when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid '' had reference only to debts and liabilities existing at the time when the residue was divisible. *Held*, that the debt, and liabilities to which the clause related were debts or any liabilities likely to result in a debts or debts of more than Rupees five thousand and it was with debts of that description that a comparison was implied by the word '' such.'' Time was no part of their description and reference was made to time only to indicate the event on which certain consequences were to follow according as debts and liabilities of the description indicated did or did not exist. BAI JAIJI *v.* MACLEOD (1906) . . **I. L. R. 30 Bom. 493**

84. ——— *Will—Appointment by general bequest—Power created subsequently to the will—Indian Succession Act (X of 1865), s. 78—Civil Procedure Code (Act XIV of 1882), s. 527, case stated under.* A general power of appointment may be well exercised by a will executed previously to the creation of the power and that too by a mere residuary gift. DINSHAW SORABJI *v.* DINSHAW SORABJI (1907).

I. L. R. 31 Bom. 472

85. ——— *Will—Construction of will—Uncertainty—Bequests of purposes of popular usefulness, or for purposes of charity.* By her will *N*, after making various bequests bequeathed the residue of her estate as follows:—''As to whatever immoveable (and) moveable (property) and property in cash belonging to me may be in excess or may remain over as surplus after a disposition shall have been made in accordance with what is stated in the clauses above written, my abovementioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of charity. And I give to them (*i.e.*) my abovementioned trustees full authority to use the same in that manner.'' *Held*, that the gift of the residue was bad for uncertainty. *Runchordas* v. *Parbatibai, I. L. R. 23 Bom. 725*, relied on. TRIKUMDAS *v.* HARIDAS (1907) . . **I. L. R. 31 Bom. 583**

86. ——— *Technical words to have their legal effect, unless intention to the contrary apparent on the face of will—The words "in trust" do not always create a trust—Merger*

WILL—*contd.*

2. CONSTRUCTION—*contd.*

—Where trust in favour of party in whom legal estate vested, equitable estate merges in the legal estate—General disposition of whole estate will not be cut down, unless intention so to cut down is clear. Will must be construed as a whole—The words "as she may require" mean, "as may be necessary." In construing wills, the test to be applied is what did the testator mean, having regard to the words used. Technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. *Per* LORD DAVEY in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy, I. L. R. 24 Calc. 834, 846*, referred to. The words '' in trust '' do not invariably create a trust. The principle that a trustee cannot take beneficially has no application where the trust is in terms in favour of the party, in whom the legal estate is vested. Where both the legal and equitable estate are given to the same person, the two estates merge, and the person to whom they are given, takes the legal estate. Where a testator devises *all* his property, the generality of the disposition will not be cut down, unless the intention so to cut down is clear. The will must be construed as a whole and in a manner consistent with the intentions of the testator and its general tenor. The words '' as to her may seem best '' mean '' as she may think fit.'' Where a person is authorised to draw money for certain purposes '' as he may require,'' he can draw only such amounts '' as may be necessary '' for the purpose and not any amount '' as he may think fit. '' A will contained the following, *inter alia*, clauses:—(I) ''I will and bequeath to my dear wife Annie in trust and for her maintenance and support during her life all the money, property, goods and chattels, of which I may die possessed whatsoever and wheresoever situated and I appoint my dear wife Annie sole administratrix of this my last will and testament.'' (X) ''I further will that my dear wife Annie as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or in Great Britain such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property, and that she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interest of the property and I empower her to sell all or any part of the property at any time, when it may appear to her that a favourable opportunity occurs.'' On the question whether the widow of the testator took an absolute life estate or whether the words '' in trusts,'' in clause (1) read with the words '' she shall receive and dispose of . . . in the interest of the property '' in clause (X) constituted her a trustee in respect of such portion of the income as was not required by her for her maintenance and support. *Held* (i), that the words '' in

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

trust" in clause (1) were not intended to create any trust, but only to indicate the nature of her estate and that she should enjoy only the income for her life and should not deal with the *corpus* except as authorised by the will. (ii) That clause (X) did not create any trust, and that the words 'she shall receive and dispose . . . in the interests of the property' were simply enabling words, which authorised her to apply, as she thought fit, the income of the property, upon the property. The testator intended that she should have an unfettered discretion in the maintenance and development of the property, without being questioned by any one interested in the reversion. (iii) That a life estate was given to the widow by the words "during her life" and such estate was not cut down by the words "for her maintenance and support" which were simple words of description or motive, and that, if a trust was intended, it was for her benefit only, in which case the legal and equitable estate merged and she took the legal estate. (iv) The words "as she may require" in clause (X) did not authorise the widow to draw any amount "as she thought fit," but only such amount as should be "necessary for the purposes stated." (v) That there was nothing in clause (X) which showed a clear intention on the part of the testator to cut down the estate given by clause (I) and the widow accordingly took a life-estate. WILSON *v.* OAKES (1908).

I. L. R. 31 Mad. 283

87. ——— *Construction of document—"Money"—General personal estate*—Where a testator after clearly indicating an intention to exclude entirely certain of his relations from succession to his property, proceeded to bequeath his "money" to two legatees, with directions as to its disposal, it was *held* that the intention of the testator being apparently, from a perusal of the whole will, to bequeath all his personal property to the legatees, it was not necessary to construe the term used in its strict limited signification, but the whole of the testator's personal estate passed. *Cadogan* v. *Palaji, L. R. 25 Ch. D. 154*, referred to. CHEDA LAL *v.* GOBIND RAM (1902).

I. L. R. 30 All. 455

88. ——— *Gift to charitable purpose—Unnecessary and useless object—Cy-près doctrine—Trust incapable of being carried out at testator's death—Diversion of funds to useful and beneficial purpose—Power of Court.* On the authority of *In re Campden Charities, L. R. 18 Ch. D. 310*, and of other cases it is clear that when, under altered circumstances through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme, which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as

WILL—*contd.*

2. CONSTRUCTION—*contd.*

nearly as possible to the original intentions of such donor. Each case in which an application is made to divert charity funds into other channels *cy-près* must necessarily depend upon its own facts and circumstances and upon the evidences adduced before the Court. *In the matter of* HORMUSJI FRAMJI WARDEN (1907).

I. L. R. 32 Bom. 214

89. ——— *Bequest to a charity—General charitable intention—Death of executors—Charity not established—Accumulations of interest on fund—Residue of estate—Cy-près doctrine.* Where a testator has manifested a general charitable intention, the bequest will not fail merely because the executors are dead, and the land which the testator desired for his charity is not available for the purpose. The fact that a charity has not been established earlier does not render the interest accrued on the fund applicable as a portion of the residue of the estate. Accumulations of interest form part of the capital for the purpose of carying out the object of the charity. ADVOCATE-GENERAL OF BENGAL *v.* BELCHAMBERS (1908) . **I. L. R. 36 Calc. 261**

90. ——— **Secret Trusts—Indian Trusts Act, ss. 5, 81**——*"Attendant circumstances" under s. 81, what are—Admissibility of extrinsic circumstances to prove that legatee took as trustee or to prove resulting trust in favour of next-of-kin—Benamee, proof of, in case of wills governed by English law.* On the 19th April 1892, *W. T.* executed a will in the following terms :—This is the last will and testament of Mr. William Taylor, of Parlakimedi, Ganjam, India. I give, devise and bequeath unto S. S. S. Gourachandra Gajapati Narayana Deo, Zamindar of Parlakimedi, all that I may possess at the time of my death, including my property at Kodaikanal, and shares and other property in the Commercial Land Mortgage Bank, Madras, also books, furniture and other property movable and immovable and I appoint the said S. S. S. Gourchandra Gajapati Narayana Deo to be my sole executor. I have no doubt he will carry out my wishes. In witness whereof I, the said William Taylor, have to this, my last will and testament, set my name this 19th day of April one thousand eight hundred and ninety-two (1892). *W. T.* died in January 1902. Subsequent to his death, a letter written by him bearing date 28th April 1895 and addressed to the then zamindar of Parlakimedi (the legatee under the will) and containing an endorsement that it was to be opened after the death of *W. T.* was found. The letter directed the legatee to convert the testator's property into money and remit the proceeds to *R. T.*, brother of *W. T.* The legatee proved the will and died in 1905 and this letter was not communicated in the lifetime of *W. T.* In a suit brought by the next-of-kin of the testator for the administration of the estate against the son and heir of the legatee :—*Held, per* SIR ARNOLD

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WILL—*contd.*

2. CONSTRUCTION—*contd.*

WHITE, *C.J.*, and SANKARAN-NAIR, *J.*, that the letter of the 28th April 1895, not having been communicated in the testator's lifetime did not operate to create a trust in favour of *R. T.*, either under the rule of English Law or under section 5 of the Trusts Act. The Legislature in enacting the proviso to section 5 of the Indian Trusts Act did not intend to depart from the English Law and the Court will impose a trust on a legatee only when there is fraud according to English Law. *Manuel Louis Kunha* v. *Jnana Coelho, I. L. R. 31 Mad. 187*, referred to. *Per* SIR ARNOLD WHITE, *C. J.* —The letter is not admissible to show that the testator did not intend the legatee to take the interest which the will purported to give him. "Attendant circumstances" in section 81 of the Trusts Act means the same as surrounding circumstances and it is only when the latter can be considered for the purpose of ascertaining the intention of the testator under the English Law that evidence of an attendant circumstance can be given to show that the testator did not intend to dispose of the beneficial interest in property devised by will. Under the English law the letter could not be looked at to show that the legatee under the will was not intended to take the beneficial interest and the Indian law is the same. *In re Boyes Boyes* v. *Carritt, 26 Ch. D. 531*, distinguished. Where the "attendant circumstances" show an intention to dispose of the beneficial interest to any one, whether he is or not the legatee named in the will, there will be no resulting trust under section 81 of the Trust Act. The words "I have no doubt he will carry out my wishes" do not show that it was not the intention of the testator to dispose of the beneficial interest. In the case of wills executed by an English testator, the law of "benami" cannot be applied so as to override the provisions of the Trusts Act or the Succession Act or the English principles of equity on which these provisions are based. *Per* SANKARAN-NAIR, *J.*, that the letter may be looked at for the purpose of determining whether the legatee was only a benamidar or trustee for some other person. It is also admissible to show that the legatee was only a trustee under section 81 of the Trust Act. An "attendant circumstance" under section 81 of the Trust Act, means a circumstance that accompanies or follows the transfer or bequest. The letter was intended to accompany or follow the will and may therefore be taken into consideration to discover the intentions of the testator. The letter must be read with the words of the will that the testator had no doubt that the legatee would carry out his wishes; and the two read together clearly show that the legatee was not intended to take any beneficial interest. RICHARD TAYLOR *v.* THE RAJAH OF PARLAKIMEDI (1909).

I. L. R. 32 Mad. 443

91. ——— —**"Malik," meaning of**—*Construction of—Absolute interest—Hindu widow.* Unless there is something in the context

WILL—*contd.*

2. CONSTRUCTION—*concld.*

qualifying it the word *malik* used in a will bears its technical meaning. When a testator bequeathed his property to his issue if he happened to have any, and if he had no issue then to his mother and wife who were to be "*malik aur kabiz*":—*Held*, that the ladies obtained an absolute interest. *Surajmani* v. *Rabi Nath, I. L. R. 30 All. 84*, referred to. THAKUR PRASAD *v.* JAMNA KUNWAR (1909).

I. L. R. 31 All. 308

3. EXECUTION.

1. ——— **Succession Act s. 50**—*Signature of testator—Nature of executien required.* To entitle the executor to probate, the signature of the testator must be that of a conscious person, and not the results of mere mechanical movement of the hand. KALEE TARA DOSSIA *v.* NOBIN CHUNDER KUR . . . **21 W. R. 84**

2. ——— *Execution of will by impression of facsimile of the name—Succession Act, s. 50.* A testator, who for a number of years, was, as he was unable to write, in the habit of using a name stamp, which used to be attached by a servant, to any document or paper he wanted to sign, executed a will, and under his direction a servant affixed the impression of his name stamp on the said document. *Held*, that the execution of the will in this case was proper and came strictly within the meaning of the words used in s. 50 of the Indian Succession Act. NIRMAL CHUNDER BANDOPADHYA *v.* SARATMONI DEBYA.

I. L. R. 25 Calc. 911
2 C. W. N 642

3. ——— *Want of proof of due execution and of knowledge by testatrix of contents of will.* Where the defendant claimed the property in dispute under the will of a Hindu widow but kept back the evidence which would have clearly established that the mark purporting to be made by the widow was really made by her or at her desire, and that at the time of the execution the nature and contents of the documents were well known to her, the Court refused to act upon it. HARILAL HARJIVANDAS *v.* PRANVALAVDAS PARBHUDAS . . . . **I. L. R. 16 Bom. 229**

4. ——— *Probate and Administration Act (V of 1881), s. 50—Evidence as to the execution of a will by a person near death.* On a question of fact raised in 1887, whether an alleged testator had or had not been able to duly execute his will, as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. The judgment of the High Court which would have revoked the probate granted in 1882 was reversed, upon the consideration of conflicting evidence as to the mental capacity of the testator, and as to the genuineness of his signature. ROMESH CHUNDER MUKERJI *v.* RAJANI KANT MUKERJI.

I. L. R. 21 Calc. 1

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WILL—*contd.*

3. EXECUTION—*contd.*

5. _____ *Evidence as to execution—Duty of Judge.* The question whether an alleged Hindu will was genuine or not was raised by the relations of the deceased, on an application, under the Probate and Administration Act (V of 1881), for administration with the will annexed, filed by the proponent. It was *held* upon evidence, which was very conflicting, in some respects obscure and unsatisfactory, and in reference to which the Court below had differed, that the will was genuine, and that the High Court was not justified in reversing a decree to that effect. It was also *held* that it is the duty of a Judge in such cases patiently to investigate the actual facts, placing himself as it were in the position of the alleged testator with all his actual surroundings; not to approach the subject from the point of view of what a testator ought or would be likely to have done on some preconceived idea of Hindu usages and habits of thought. DOWLAT KOER *v.* RAMPHUL DAS . **I. L. R. 25 Calc. 459**
L. R. 25 I A. 21
2 C. W. N. 177

6. _____ *Proof of due execution of will where the mental capacity of testator is in dispute—Rules for decision of such cases—Presumption—Duty of Appellate Court in deciding on evidence of witnesses.* In all cases in which the evidence is conflicting, it is the duty of a Court of appeal to have great regard to the opinion formed by the Judge, in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value where there is conflict between them as to the mental capacity of a person whose conduct they have observed, and whose state of mind they depose to: for the original Court had not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends, much of the value of evidence given in good faith, *viz.*, power of observation, power of judgment, accuracy of expression, and general intelligence, which are of special importance in cases where the execution of a will is disputed on the ground that at the time the will was alleged to have been made, the mental capacity of the testator was such that it was doubtful whether the will could have been "duly executed." "Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorizing the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved of the contents of the will. Also under

WILL—*contd.*

3. EXECUTION—*contd.*

ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption: ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence, which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have "duly executed" the will as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. Where this had not been done, the Appellate Court, after considering the whole evidence, *held*, contrary to the decision of the lower Court, that the will was not proved and refused probate. WOOMESH CHUNDER BISWAS *v.* RASHMOHINI DASSI.
I. L. R. 21 Calc. 279

On appeal to the Privy Council: On the weight of the evidence the Judicial Committee decided that the proponent had not discharged the burden of proving him to have been capable. The present case did not resemble one where a testator, near death, might, with the requisite degree of knowledge, have executed a disposition of his property for which, previously and while his mind was still in vigor, he might have given instructions. RASH MOHINI DASI *v.* UMESH CHUNDER BISWAS . . . **I. L. R. 25 Calc. 824**
L. R. 25 I. A. 109
2 C. W. N. 321

7. _____ *Proof of execution of will—Probabilities—Evidence.* The fact of the execution of a will was disputed by a testator's relations. They impugned the will mainly on the theory of the improbability of its having been executed by him under the circumstances existing at the time, and in the presence of the witnesses alleged to have attested it. They admitted his intention to execute such a will, but contended that, having long deferred the execution, he had died without having effected it. To outweigh the strong and satisfactory evidence upon which the affirmative of due execution rested, it would have been necessary that the improbabilities should have been cogent and clearly made out. But in their Lordship's opinion, it was neither the one nor the other, and was based on an exaggerated view. The suggested inferences against the will were not borne out; and, on the other hand, the testimony in support of it was good. The judgment of the High Court, maintaining the will, was affirmed. CHOTEY NARAIN SINGH *v.* RATAN KOER . . . . **I. L. R. 22 Calc. 519**
L. R. 22 I. A. 12

8. _____ *Suit by testator's son contesting validity of will—Alleged testamentary incapacity.* Although the mental faculties of a person suffering from partial paralysis may have been affected by his physical weakness, he

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WILL—*contd.*

3. EXECUTION—*contd.*

may still be capable of devising and of executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement. In one sense the testator may not have been in the state which the witnesses, described as "his full senses." He was feeble in body. The vigour of his mind was impaired, and his utterance was defective. On the other hand, there was nothing in the evidence which could reasonably lead to the inference that he was incapable of understanding such business as fell to his lot, or of regulating the succession to his property. At the hearing of the suit, it was alleged that he was subject to insane delusions, as to which, however, the Courts below concurred in finding that they had not been shown to have existed. The statements made by him alleged to have been the result of delusion, had not been shown to be altogether without foundation. As to this, their Lordships' opinion was that, in order to constitute an insane delusion affecting the question of testamentary capacity, it should have been shown, not only that it was unfounded, but also that it was so destitute of foundation that no one, save an insane person, would have entertained it. The judgment that this testator had not testamentary capacity appeared to them to have had the unsafe basis of speculative theory derived from medical books and judicial *dicta* in other cases, and not to have been founded on the facts proved in this. SAJID ALI *v.* IBAD ALI . **I. L. R. 23 Calc. 1**
L. R. 22 I. A. 171

9. _____ *Incapacity from illness—Influence not amounting to coercive influence.* A Khoja Mahomedan resident in Bombay made his will in 1886, appointing his wife, and his eldest son by a former wife, to execute it. The testator died on the 9th February 1891, having at different times, in the interval, made four codicils. The widow, applying for probate, of all the above, propounded a fifth codicil, alleging it to have been made by her husband on the 6th February 1891. The son petitioned for probate to be delivered to him and to the widow, but only of the will and of the first two codicils, contesting the three later codicils as having been made under undue influence exercised by the wife. He disputed the last codicil, not only on the ground of undue influence, if the codicil had been in fact executed, but because at the time of the alleged execution his father was almost unconscious, and unable to understand what he was doing. The High Court, in its original testamentary jurisdiction, refused probate of the three disputed codicils, granting probate of the will and of the first two codicils only. The Appellate High Court granted probate of the will and of the five codicils, finding that no undue influence had been exercised, and that the fifth had been executed by the testator with knowledge and comprehension of its contents and of his free volition. The Judicial Committee affirmed the judgment of the Appellate Court as to the absence of undue

WILL—*contd.*

3. EXECUTION—*contd.*

influence. In their opinion, if there was not evidence, and there was not, to show coercion in the special matter of the codicils, general assertions of the wife's commanding character, and of the husband's weakness, and of their differences went for little. But in regard to the fifth codicil, they affirmed the judgment of the original Court, finding the evidence to have left open the inference that the testator had been at the time when it was alleged by the widow that he had made this codicil too exhausted and ill for such a testamentary act. SALA MAHOMED JAFFERBHAI *v.* DAME JANBAI.
I. L. R. 22 Bom. 17
L. R. 24 I. A. 148
1 C. W. N. 481

10. _____ *Execution of will—Evidence on the question of whether the testator was of sound disposing mind at time of execution—Reversal by Appellate Court of decision of Judge who heard evidence and entirely disbelieved their testimony—Onus of proof.* On a contested application for probate in which the question was whether a testator was of sound disposing mind on two separate occasions when he was alleged to have executed a will and a codicil, the Judge who saw and heard the witnesses decided that the only reliable evidence was that of the doctor who attended the testator and attested the two documents, and that if the doctor's evidence was true, then that of the principal witnesses in support of the will could not be; and he therefore disbelieved their story as to the execution of the documents, and dismissed the application for probate. The Appellate Court being of opinion that he had not given adequate consideration to the possibility that in spite of the testator's physical infirmity, his mental capacity was sufficient, reversed the decision and granted probate of the will and codicil. *Held*, by the Judicial Committee (reversing the judgment of the Appellate Court), that the medical evidence entirely justified the view of the Judge who heard the evidence, namely, that it left the onus on the plaintiff who propounded the will quite undischarged, so that in the absence of other reliable evidence he had no alternative but to dismiss the application. It is always difficult for Judges who have not seen or heard the witnesses to refuse to adopt the conclusions of fact of those who have, but that difficulty is greatly aggravated when the Judge who heard them has formed the opinion not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of the truth. *Coghlan* v. *Cumberland*, [*1898*] *1 Ch. 705*, referred to. SHUNMUGAROYA MUDALIAR *v.* MANIKKA MUDALIAR. (1909) . . . **I. L. R. 32 Mad. 400**

11. _____ *Will—Execution—Testamentary capacity—Will drafted according to instructions and signed by testator without at the time understanding all its provisions. Semble:* Where it was proved that a will was prepared

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WILL—*contd.*

3. EXECUTION—*concld.*

according to the testator's instructions by the person entrusted with its preparation, who moreover was fully conversant with the testator's affairs and was apparently on intimate terms with him, so that the testator would have ample reason for believing that the will placed before him for signature was drawn up in accordance with his instructions, it should be considered his will if he set his hand to it, and it would not be necessary to prove that at the time he was capable of understanding all its provisions. *Perera* v. *Perera*, [1901] A. C. 354, referred to. *Held*, on the facts of the case, that the testator was not merely supposing that he was executing a will but possessed at the time sufficient intelligence to be able to understand the provisions of the will, which were of the simplest character, though he might not possibly have been able to follow every sentence of the will. KUSUM KUMARI DASSI *v.* SATISHENDRA NATH BOSE (1909) . . . **13 C. W. N. 1128**

4. FORM OF WILL.

1. _____ **Buddhist will**—*Probate—Succession Act* (*X of 1865*), *s. 331.* Probate may be granted of the will of a Buddhist made after the 1st January 1866. It is not necessary that the will of a Buddhist should be executed according to the formalities prescribed by the Succession Act. *In the matter of* KOKYA DINE.
2 B. L. R. A. C. 79: 10 W. R. 417

2. _____ **Testamentary document**—*Will to have effect on contingency—Probate.* *A*, being ill and away from home, wrote to his brother *B* certain directions as to the management of his property, and concluded: "Brother, if I die of this sickness and *C* survive me, then whatever property I have you will give one half to *C*," etc. In another and subsequent letter he wrote to *B*: "I don't think that the illness I am now suffering from will terminate fatally; but in case I should die, then you will give to *C* one half of my Company's papers," etc. "I appoint you turney (executor) in all matters relating to *C*," etc. *A* recovered from the fever, but died suddenly a year later, without having made any other testamentary disposition of his property. In a suit brought by *B* as executor of *A*, according to the tenor of these documents against the widow of *A*, for the purpose of having probate of them granted to him as of the will of the deceased:—*Held* (reversing the judgment of MACPHERSON, *J.*), that the documents were only intended to have a testamentary effect in the event of *A's* having died of the sickness he was suffering from at the time of writing, and therefore probate which had been granted by the Court at the original hearing was ordered to be brought in and cancelled. KAMEENEE DOSSEE *v.* BISSONATH GHOSE . . . . **2 Ind. Jur. N. S. 6**

3. _____ *Imperfect form of will—Will unexecuted by testator—Blank spaces*

WILL—*contd.*

FORM OF WILL—*concld.*

in body of will—Application for probate. A testator died leaving as his will a printed form of will imperfectly filled in, and having omitted to insert his name and description at the head of the document, and to append his signature thereto. He had, however, written his name in the attestation clause and completed the disposition clause bequeathing all his property to his wife and appointing her sole executrix. *Held*, that this was sufficient, and the will should be admitted to probate. *In the goods of Pasmore*, *L. R. 1 P. & D. 653*, referred to. *In the goods of* PORTHOUSE.
I. L. R. 24 Calc. 784

4. _____ **Document intended to take effect partly in the lifetime of the executant and partly after the executant's death**—*Probate and Administration Act* (*V of 1881*), *s. 3.* There is no objection to one part of an instrument operating *in præsenti* as a deed and another *in futuro* as a will. *Cross* v. *Cross*, *8 Q. B. 714: 15 L. J. N. S. Q. B. 217*, referred to. CHAND MAL *v.* LACHHMI NARAIN.
I. L. R. 22 All. 162

5. _____ **Codicil**—*Probate, application for—Document referring to will.* After letters of administration with the will annexed had been granted, the administrator found a book containing memoranda in the testator's handwriting, made after the date of the will, and directing certain dispositions of his property. One entry referred in express terms to the will. The testator was a domiciled Scotchman. *Held*, on a petition by the administrator, asking that the memoranda might be admitted to probate, that the memoranda were not testamentary documents, and the petition was therefore dismissed. *In the goods of* WEMYSS . . . . **I. L. R. 4 Calc. 721**

5. INSPECTION OF WILL.

_____ **Practice**—*Application by next-of-kin of deceased.* The Court, on the application of one who is next-of-kin of a deceased Hindu, ordered a person in possession of an alleged will of the deceased to bring in and deposit the same with the officer of the Court for the purpose of being inspected, and a copy thereof taken by such applicant. *In the case of* BALKRISHNA GANPATJI.
1 Bom. 114

6. NUNCUPATIVE WILL.

1. _____ **Validity of nuncupative will**—*Roman Catholics of Portuguese extraction—Intestate succession.* *Quære:* Whether a Roman Catholic or Portuguese extraction can, under the law current amongst members of that church in Chittagong, take under a nuncupative will; and if not, to what is a wife entitled under the law regulating succession of intestates amongst members of that church? REBEIRO *v.* REBEIRO.
3 W. R. 63

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WILL—*contd.*

6. NUNCUPATIVE WILL—*concld.*

2. ——— *Nuncupative will of a Mahomedan—Probate and Administration Act (V of 1881), ss. 3, 24, 25, 26, 62—Succession Act (X of 1865), s. 244 and Ch. IX.* Probate may be granted of a nuncupative will. *In the matter of the will of* MAHOMED ABBA. *In re* MARIAMBAI.
I. L. R. 24 Bom. 8

7. RENUNCIATION BY EXECUTOR.

1. ——— **Procedure after renunciation** —*Proof of execution of will in Court—Administration accounts.* A Hindu testator empowered his executor to lay out such portion of his estate as the executor might think fit towards charitable purposes, and did not dispose of the residue of the estate. The executor renounced, and no probate of the will or letters of administration, with the will annexed, was granted. In a suit by the testator's sole heiress for construction of the will and for administration, the Court allowed the execution of the will to be proved in Court, declared that it was void for uncertainty, and directed the usual administration accounts to be taken. SURBOMUNGOLA DABEE *v.* MOHENDRONATH NATH.
I. L. R. 4 Calc. 508

2. ——— *Executor—Intermeddling with estate—Degree of interference necessary to charge executor—Suit for account against executor—Account on footing of wilful default —Practice—Limitation—Limitation Act (XV of 1877), s. 10, Sch. II, Art. 120.* In law a very small interference or intermeddling with the estate of his testator on the part of a party appointed executor under a will is sufficient to charge him with liability as executor. An executor once having acted unquestionably as an executor cannot renounce that character and all the liabilities which attach to it, and, having once acted, the subsequent renunciation is void, and he continues liable to be sued in the character of an executor *Rogers* v. *Frank, 1 Y. & J. 409*, followed. Modern practice allows of an order charging wilful default being made at any time during the action on a proper case being shown. The plaintiff brought a suit against the executors of the will of her grandfather, praying for a declaration that she was absolutely entitled to the property of her grandfather and for an account of the property in the hands of the executors. The plaintiff claimed as heir and not under the will. *Held*, that she was only entitled to accounts for six years preceding the suit as she took no interest in the property under the will, and the executors were not trustees for *her* and the property did not vest in them for any specific purpose in her favour. Such a suit is not a suit for the purpose of following such property in the hands of the executors and trustees. AYESHABAI *v.* EBRAHIM (1908).
I. L. R. 32 Bom. 364

WILL—*contd.*

8. REVOCATION.

1. ——— **Evidence as to revocation of a will**—*Onus of proof of revocation of will.* A will duly executed is not to be treated as revoked either wholly or in part, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the will contained either words of revocation or disposition so inconsistent with those of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier one, if it cannot be shown, in what the difference consisted. It is also settled that the burden of proof lies upon him who challenges the existing will. These propositions are of general application. MIRZA *v.* UMDA KHANAM. MIRZA *v.* GUNNA KHANAM . **I. L. R. 19 Calc. 444**
L. R. 19 I. A. 83

2. ——— **Revocation of portion of will**—*New page of will not duly executed substituted by testator after execution of will—Dependant relative revocation—Probate.* After the death of the testator (H. G. Meakin), his will was found among his private papers in a sealed envelope with the words "H. G. Meakin's will, not to be opened until after death," written in his handwriting on the face of the envelope. The will was wholly in his writing, and was written on four separate sheets of paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator and by two witnesses. The fourth page stated the date of the will and was signed by the testator and was duly attested by the said two witnesses. The actual execution of the will took place (as was proved by evidence) in March or April 1894. The second page, however, was of a different kind of a paper from the other pages and of smaller size, and was signed by the testator, but not by witnesses. This second page contained a bequest to a child who was born in May 1894, *i.e.*, some months after the will was executed. The executors propounded the will. *Held*, that probate must be refused. KER *v.* MEAKIN . **I. L. R. 20 Bom. 370**

3. ——— *Lost Will—Presumption of revocation—Secondary evidence—Onus of proof—Probate and Administration Act (V of 1881), ss. 20, 24.* If a will, shown to have been in the custody of the testator, is not forthcoming at the time of his death, it is presumed to have been destroyed by him, unless there is sufficient evidence to rebut the presumption. *Welch* v. *Phillipps, 1 Moo. P. C. 299; Brown* v. *Brown, 27 L. J. Q. B. 173; Sugden* v. *Lord St. Leonards, L. R. 1 P. D. 154*, referred to. But such presumption of revocation does not arise, unless there is evidence to satisfy the Court that the will was not in existence at the time of the testator's death. *Finch* v. *Finch, L. R. 1 P. & D. 371*, referred to. Having regard to the habits of the people of this country and specially those of wandering fakirs,

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WILL—*contd.*

8. REVOCATION—*concld.*

another presumption may well arise, namely, that when such a document is not forthcoming after the testator's death, it has been mislead. If a will is found to have been validly executed and not been revoked, and yet is not forthcoming, it may be proved by a certified copy, and letters of administration limited, until the original will is produced, may be granted. ANWAR HOSSEIN *v.* SECRETARY OF STATE FOR INDIA (1904).

I. L. R. 31 Calc. 885
s.c. 8 C. W. N. 885

4. ——— *Will—Separated Hindu domiciled in the United Provinces—Revocation of will—Evidence—Presumption.* A separated Hindu residing at Meerut executed a will on the 20th of January, 1885, and registered the same in the office of the District Registrar on the 22nd of January of the same year. The testator died on the 16th of October, 1899. On the 8th of July 1902, a suit was instituted by certain persons who claimed the property of the testator as his next-of-kin against the Collector of Meerut who had taken possession of the property as trustee under the terms of the will for purposes therein set forth. The plaintiffs alleged that the testator had revoked the will of the 20th of January 1885, and tendered evidence to prove that on a certain occasion the testator had said that he had revoked his will. On the death of the testator the original will was not to be found; but, on the other hand, it was shown that persons interested in the disappearance of the will had had access to the house of the testator since his death. *Held*, that evidence that the testator had said that he had torn up the will was not admissible. *Staines* v. *Stewart and Jones, 2 Sw. & Tr. 320, Doe dem. Shallcross* v. *Palmer, 16 Q. B. 757*, and *Keen* v. *Keen, 3 P. & D. 105*, referred to. *Held*, also, that the presumption of English law that if a will is traced to the testator's possession and is not forthcoming at his death it has been destroyed by him, *animo revocandi*, would, at least, not be so strong in India as in other countries where wills are taken greater care of, and under the circumstances disclosed by the evidence in the present case did not arise at all. *Podmore* v. *Whatton, 3 S. W. & Tr. 449; Finch* v. *Finch, 1 P. & D. 371*, and *Brown* v. *Brown, 8 E. & B. 876*, referred to. SHIB SABITRI PRASAD *v.* THE COLLECTOR OF MEERUT (1906).

I. L. R. 29 All. 82

9. CANCELLATION, SUIT FOR.

——— *Will—Suit for cancellation of will brought during the lifetime of the testator.* *Held*, that no suit for the cancellation of a will can lie in the lifetime of the testator RAMBHAJAN KUNWAR *v.* GURUCHARAN KUNWAR (1905).

I. L. R. 27 All. 14

10. PRACTICE.

——— *Practice—Civil Administration—Further directions—Advocate General*

WILL—*contd.*

10. PRACTICE—*concld.*

by consent, added as party—Right to question validity of legacies—Estoppel—Laches—State demand—Khoja Mahomedan Will—Gift to a class—construction. *M*, *A* Khoja Mahomedan, died in 1864. By his will and codicil he left his property to trustees, upon trust, *inter alia*, to pay his daughter *L*, a monthly sum during her life and, after her death, to pay it to her children. *M's* residuary estate was charged in favour of certain charitable objects. In 1868 the Advocate General commenced a suit (962 of 1868) for the administration of *M's* estate. In 1869 *L* died, leaving four children surviving her. In 1871 a decree for the administration of *M's* estate was granted to *R*, the husband of *L*, in another suit (370 of 1870). In 1873 a decree for administration was passed in the Advocate General's suit (962 of 1868). By the decree the Advocate General was given liberty to join in taking the accounts and making the enquiries directed in suit 370 of 1870. In 1899 the Commissioner made his final report in suit 370 of 1870, to which, however, exceptions were filed. In 1902 the case came before TYABJI, *J.*, for further directions. Up to this date the validity of the gift to *L's* children had not been questioned by the parties and the Commissioner's report was based on the assumption that it was valid. The Advocate General was now, by consent of the parties, joined as a co-defendant, to simplify and regularize the suit. He thereupon contended that the gift to *L's* children was bad as transgressing the rule laid down in the Tagore case and claimed that the fund was applicable to the charitable purposes indicated in the residuary gift. The Division Court ruled that the Advocate General was not entitled at this stage to raise the point. *Held* (reversing TYABJI, *J.*), that the Advocate General was not precluded, even at this stage, from questioning the validity of the gift to *L's* children. Where the accounts actually taken and completed in one suit are adopted in another, the ordinary practice is to allow the result of those accounts and enquiries to be questioned in the suit, wherein they are adopted. A beneficiary is generally taken as sufficiently represented by his trustees; but this does not hold good, where the contest lies between the beneficiaries themselves. *Held*, on further hearing, on the construction of the will, that such of *L's* children as were in existence at the death of the testator were entitled to the annuity at *L's* death. ADVOCATE GENERAL *v.* KARMALI (1905) . . **I. L. R. 29 Bom. 133**

11. PROBATE.

1. ——— *Probate and Administration Act (V of 1881)—Will—Document by a shebait appointing another shebait.* Where the *shebait* of an endowed property executed a document appointing another person as a *shebait* for the purpose of carrying out the *sheba* and other rites after the death of the former:—*Held*, that it was not a Will and Probate of such a document

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WILL—*contd.*

11. PROBATE—*contd.*

could not be applied for. CHAITANYA GOBINDA PUJARI ADHICARI *v.* DAYAL GOBINDA ADHICARI (1905) . . . **I. L. R. 32 Calc. 1032**
s.c. 9 C. W. N. 102

2. _____ *Probate—Deed-poll executed at same time as will and referred to in it—Will giving benefit to solicitor, who prepared it—Onus of proof—Testamentary writing—Succession Act (X of 1865), s. 51.* A will made reference to a deed-poll which was executed at the same time, and also contanied clauses under which the solicitor, who prepared it, took some benefit, and was appointed an executor of the will, and a trustee of the testator's estate. The first Court granted probate of the whole will, but the High Court on appeal varied that order by directing that the passage referring to the deed-poll and that giving remuneration to the solicitor should be omitted in the grant of probate. *Held*, by the Judicial Committee, that the onus was on the solicitor to show that the deed-poll and the disputed parts of the will expressed the true intention of the testator, who understood and approved of them, and that on the evidence and under the circumstances of the case he had discharged that onus. The law relating to the case of person taking a benefit under a will prepared by himself as laid down by Lord Wensleydale in *Barry* v. *Butlin, 2 Moo. P. C. 480*, and approved of in *Fulton* v. *Andrew, L. R. 7 H. L. 448*, followed. *Held*, also, that the deed-poll was not a testamentary document requiring probate, the reference to it in the will not being for the purpose of making, or so as to make, its contents parts of the will; it was, therefore, not within s. 51 of the Succession Act (X of 1865). BAI GANGABAI *v.* BHUGWANDAS VALJI (1905) . . **I. L. R. 29 Bom. 530**

3. _____ *Will—Execution, proof—Probate, delay in taking—Probate taken on necessity arising—Revocation, application for, made after the death of persons competent to give best evidence—Probate and Administration Act (V of 1881), s. 50.* *K* died leaving an infant son, a daughter and a widow and some property of very trifling value. The son claimed to be heir through his mother to a large estate and this claim was then under litigation. The son died 5 years after *K's* death having shortly before obtained a decree for the said estate. The widow thereupon adopted *K's* brother's son, and then proved in common form a will purporting to be *K's*, which contained provisions for the prosecution of his son's claim under litigation, and directed his widow, to adopt *K's* brother's son should his son die, provisions being also made for his daughter out of his estate. On an application made 12 years later on behalf of *K's* daughter's son for revocation of the probate, the High Court held the terms of the will to be reasonable and the evidence sufficient to establish the will considering the difficulty of establishing a will so long after its execution, the persons who would be expected to give the best evidence in the matter having died. The Judicial Committee affirmed that decision and pointed out that the delay in taking out probate was accounted for by the fact that, until *K's* son's death and the adoption in his place, there was no very urgent necessity for taking out probate, *K's* estate being of itself of trifling value. KALI DAS CHUCKERBUTTY *v.* ISHAN CHUNDER CHUCKERBUTTY (1905) . **9 C. W. N. 49**

4. _____ *Will—Execution—Solicitor-executor preparing and attesting Will—Clause permitting him to charge for professional and other services—Proof—Onus—Independent advice—Fiduciary relation—Deed referred to in Will—Probate—Succession Act (X of 1865), s. 51.* If a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed and it is judicially satisfied that the paper pronounced does express the true will of the deceased. *Barry* v. *Butlin, 2 Moo. P. C. 480*, and *Fulton* v. *Andrew, L. R. 7 E. & I. Ap. 448*, approved. But there is no rule of law as to the particular kind or description of evidence, by which the Court must be satisfied. The degree of suspicion excited and the weight of burden of removing it must depend largely on the nature and amount of the benefit taken and all the circumstances of the case. The question is a pure question of fact and one to be decided on consideration of the whole of the evidence and the circumstances of the case. A clause in the will in this case permitted the solicitor, who prepared and attested the will and was also appointed one of the executors, to charge for professional services done by him or his firm. It also allowed him a further remuneration of one per cent. on the profits of the testator's business, for services in connection with the management of the business. The Judicial Committee was satisfied that there was circumstances which showed that the testator understood and approved of the clause, although it appeared that the testator had no independent advice in this matter and no independent evidence was adduced that this clause in particular was called to the testator's attention. Where a deed-poll previously executed by the testator was referred to in the will, but not for the purpose of making its contents a part of the will :—*Held*, that it was not a testamentary document requiring probate, although the will in terms purported to confirm the deed. BAI GUNGABAI *v.* BHUGWANDAS VALJI (1905).
I. L. R. 29 Bom. 530
9 C. W. N. 769

5. _____ *Forgery—Probate—Executor.* When a probate having been granted in the name of several persons as executors, one of them applied for revocation on the ground

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WILL—*contd.*

11. PROBATE—*concld.*

that the will was a forgery and that he himself did not apply for probate and was not cited and that the probate was obtained behind his back: *Held*, that he was entitled to have his name struck out of the probate, but he had no *locus standi* to challenge the will. SRINATH GHOSH *v.* MUKUNDARAM CHUCKERBUTTY (1908) . **12 C. W. N. 573.**

6. _____ *Probate—False Will—Costs.* A beneficiary who successfully resists an attempt by another beneficiary to prove a false will is not as a matter of right entitled to be paid his costs out of the estate. The costs are in the discretion of the Court and may be directed to be paid out of the estate of the deceased in a suitable case. S. 102 of the Probate and Administration Act does not justify a contrary inference. BARADA PROSHAD BANERJEE *v.* GAJENDRA NATH BANERJEE (1909) . **13 C. W. N. 557**

12. VALIDITY OF WILL.

1. _____ **Military testamentary document**—*Application for probate—Lapse of time—Invalidity of will.* A military testament valid in its inception may be deprived of its privilege by lapse of time. *In re* GODBY. **1 Hyde 196**

2. _____ **Will of Cutchi Memon**—*Will disposing of ancestral property.* Wills made by members of the Cutchi Memon community, whereby the testators disposed of property which was proved to be ancestral, *held* to be invalid. MAHOMED SIDICK *v.* AHMED. ABDULA HAJI ABDSATAR *v.* AHMED . **I. L. R. 10 Bom. 1**

3. _____ **Will of East Indian testatrix out of civil jurisdiction of High Court**—*English law.* The provisions of the English law as to the administration of and succession to the estate of a British subject dying testate apply to the will of an East Indian testatrix (the illegitimate daughter of a Mahomedan woman) who resided and died without the limits of the ordinary civil jurisdiction of the High Court. HOGG *v.* GREENWAY. GREENWAY *v.* HOGG.
Cor. 97 : Bourke A. O. C. 111

4. _____ **Question of due execution and validity of will**—*Disposition of immoveable property in British India.* The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India. BHAURAO DADAJIRAO *v.* LAKSHMIBAI.
I. L. R. 20 Bom. 607

5. _____ **Will procured by importunity of wife**—*Succession Act, s. 48—Undue influence.* The wife of the testator persuaded him to execute a will in supersession of a former will less favourable to her, but the influence which she exerted was not such as to deprive the testator of the exercise of his judgment and volition. *Held*, that the conduct of the wife did not amount to

WILL—*contd.*

12. VALIDITY OF WILL—*contd.*

undue influence. MORISON *v.* ADMINISTRATOR-GENERAL OF MADRAS . **I. L. R. 7 Mad. 515**

6. _____ **Proof of genuineness of will**—*Registration and attestation.* When a document propounded as a will is proved to have been executed and registered by the alleged testator it is still essential to enquire into the circumstances connected with its execution and registration, when the will is inofficious and there are other suspicious matters connected with it. KISTO CHURN MOJOOMDAR *v.* DWARKA NATH BISWAS.
10 W. R. 32

7. _____ **Blank spaces left in body of will**—*Alterations and erasures in will—Presumption—Pencil writing subsequent to the execution of the will—Intention of testator.* The circumstance that blank spaces are left in the body of a will is no objection to its being a valid will. If a will contains alterations and erasures, the presumption will be that they were made after the will was executed; and if there is no evidence rebutting that presumption, they will form no part of the will. The lower Court, having declined to grant probate of a will (which it held to be proved), on the ground that it was an incomplete will, being of opinion that the blanks, alterations and cancellations in the will showed that the deceased intended it to be a draft, and not the final expression of his wishes:—*Held*, that, the will being one which did not require to be signed by the testator, probate should be granted to include a pencil addition proved to have been made by an attesting witness at the desire of the testator, but excluding all other additions, erasures, or cancellations. PANDURANG HARI VAIDYA *v.* VISHNU VINAYAK KANE.
I. L. R. 16 Bom. 652

8. _____ **Will in excess of power of Hindu widow.** A Hindu widow made a will disposing of property, of which under an award she had only the use during her life, and to which the plaintiff, her son, was entitled after her death. While she was still living, the plaintiff filed this suit, praying that the will might be declared invalid. The defendants were the testatrix and those who took under the will. While the suit was pending, the testatrix died. *Held*, that the will should be declared to be invalid so far as it operated to defeat the award. MAGANLAL PURUSHOTTAM *v.* GOVINDLAL NAGINDAS.
I. L. R. 15 Bom. 697

9. _____ **Addendum**—*Will of Oudh Talukdar not registered under Oudh Estates Act (I of 1869), s. 13—Subsequent addendum executed and duly registered, referring to and explaining will.* Where a will made by an Oudh *Talukdar* was executed on the 29th of April, 1881, but was not registered within one month of its execution, under s. 13 of the Oudh Estates Act (I of 1869), and on the 26th of April, 1883, an *addendum* was made to it, in which the will was referred to and explained, and the *addendum* was then duly executed as a will and registered on the same day, an objection

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WILL—*contd.*

12. VALIDITY OF WILL—*contd.*

that the original will had not been registered in accordance with s. 13 of the Oudh Estates Act, and was therefore invalid, was overruled, and the document was *held* to be effective as a testamentary instrument, whether the *addendum* was regarded as a codicil or a will. SATRUPA KUNWAR *v.* HULAS KUNWAR (1902) . . **I. L. R. 25 All. 121**

10. ——— **Forged will**—*Probate and Administration Act (V of 1881), s. 84.* Acts done by a person under a title created by a will which has been declared to be a forgery are void. But any lawful payments made by a person to whom probate of such a will was granted but subsequently revoked may be re-imbursed out of the estate of the deceased, under s. 84 of the Probate and Administration Act. PUNDIT PRAYRAG RAJ *v.* GOUKARAN PERSHAD TEWARI (1902). **6 C. W. N. 787**

11. ——— **Unsoundness of mind**—*Application for probate—Plea of unsoundness of mind on the part of the testator—Burden of proof.* If a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will; and it is only where this is done that the *onus* is thrown upon those who oppose the will to prove fraud, or undue influence, or whatever they rely on to displace the case for proving the will. *Barry* v. *Butlin, 2 Moo. P. C. 480; Fulton* v. *Andrew, L. R. 7 H. L., 448; Tyrrell* v. *Painton, [1894] P. D. 151,* and *Farrelly* v. *Corrigan, L. R. (1893) A. C. 563,* referred to. LACHHO BIBI *v.* GOPI NARAIN (1901). **I. L. R. 23 All. 472**

12. ——— **Test of ascertaining whether a document is a will or not—Irrevocability**—*Will.* In ascertaining whether a document is a will one of the tests is to ascertain whether the document is revocable or not. The irrevocability of a document is perfectly inconsistent with its being a will. On the construction of a document propounded as a will:—*Held,* that it was not a will, but an erkrarnamah, the irrevocability of the document being perfectly inconsistent with its being a will, and the fact that it was registered as a non-testamentary document and was stamped further showing that the parties did not regard it as a will. SITA KOER *v.* DEO NATH SAHAY (1904) . . **8 C. W. N. 614**

13. ——— **Undue influence**—*Probate—Caveat—Validity of will—Objection to a particular clause of will.* In a suit for probate, the caveators assailed the whole of the will on the ground of undue influence, but the Probate Court granted Probate disallowing that objection. *Held,* that in a subsequent suit it was not competent for the caveators to show that any particular

WILL—*contd.*

12. VALIDITY OF WILL—*contd.*

clause in the will had been inserted through undue influence. *Allen* v. *M'Pherson, 1 H. L. 191,* referred to. NUZHATUDDOWLA ABBAS HOSSEIN *v.* MIRZA KURRATULAIN (1904). **I. L. R. 31 Calc. 186**

14. ——— **Application for revocation**—*Validity of will, Proof in common form—Probate, delay in taking out—Will in solemn form—Onus of proof—Probate and Administration Act (V of 1881), s. 50—"Just cause."* A will was executed the day before the death of the testator in 1878, and probate was obtained in 1884 in common form with issue of citations. On an application made in 1896 by the appellants for revocation of probate on the ground that the will was not genuine, the District Judge placed the onus on the respondents to prove the will and holding that the evidence was unreliable and insufficient, granted the application for revocation. The High Court reversed that order, being of opinion that, if the application were regarded as one to obtain proof of the will in solemn form it was without precedent after so long an interval from the date of probate. That the appellants should at least have shown when they became aware of the probate, and that considering the difficulty of proving the will in solemn form after the long time that had elapsed, there was sufficient evidence of its due execution. Also that, if the application was one under s. 50 of the Probate and Administration Act (V of 1881), in which case it was doubtful whether the burden of proof was not on the appellants to show that the will was fictitious, no "just cause" had been shown for revoking the probate. *Held,* on the evidence, that, under the circumstances of the case there was no ground for differing from the decision of the High Court. KALI DAS CHUCKERBUTTY *v.* ISHAN CHUNDER CHUCKERBUTTY (1904) . **I. L. R. 31 Calc. 914**

15. ——— **Evidence as to due execution and registration properly obtained**—*Proof of will—Presumption as to official acts duly performed.* The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, and are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed be presumed to be done duly and in order. A will propounded in this case was upheld as being genuine on the evidence as to due execution and registration, and on the other circumstances and probabilities of the case and the decree of the High Court, which had reversed that of the Subordinate Judge, was affirmed. Evidence of the general reputation, of character of the identifiers in the Registration Office was inadmissible to refute the *bonâ fides* of

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WILL—*contd.*

12. VALIDITY OF WILL—*contd.*

the transaction. GANGAMOYI DEBI *v.* TROILUCKHYA NATH CHOWDHRY (1905).
I. L. R. 33 Calc. 537
s.c. 10 C. W. N. 522
L. R. 33 I. A. 60

16. ——— **Execution under pressure** —*Free agency—Importunity—Indian Succession Act* (*X of 1865*), *s. 48, Illus.* (*g*) *and* (*h*). A will is not invalidated on the ground of its having been executed under pressure, unless the pressure was such as the testator could not resist. Illus. (*g*) and (*h*) of s. 48 of the Succession Act practically lays down the rule which should guide all Courts on the question of importunity. They indicate the law as stated in "Williams on Executors and Administrators." JAJNESHWARI SAHA *v.* UGRESHWARI DASSYA (1907) **11 C. W. N. 824**

17. ——— *Succession Act* (*X of 1865*), *ss. 101, 102—Hindu Wills Act* (*XXI of 1870*), *s. 3, para. 4.* A power to distribute property conferred by a testator under his will, which is exercisable "when my grandsons may attain their age" is void under ss. 101 and 102 of the Indian Succession Act, as extending the period beyond the limit allowed by s. 101, whether the point of time referred to is taken to be the attaining of age by the grandsons in existence at the date of the testator's death or such attaining of age by all his grandsons. If the intention of the testator to benefit *all* his grandsons is clear from the will, the latter view ought to be adopted, and a secondary intention to benefit such grandsons at least as should be in existence at his death ought not to be assumed. The rule applicable to such cases in India is that "if the exercise of a power is made contingent on the happening of an event, which, may by possibility happen beyond the limits of the rule, the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limit does not validate the power." S. 3, para. 4 of the Hindu Wills Act, has not the effect of making s. 101 of the Succession Act inapplicable to Hindu wills, when s. 2 makes it applicable in terms. S. 3 may have the effect of invalidating a disposition, which may be valid under s. 101, but it cannot have the effect of validating a disposition invalid under s. 101. SIVASANKARA PILLAI *v.* SOOBRAMANIA PILLAI (1908) . . **I. L. R. 31 Mad. 517**

18. ——— *Privy Council—Practice—Decision on facts—Genuineness of Will—Onus on Appellant—failure to discharge—Statement of reasons by the Judicial Committee.* Where a Division Bench of the High Court after a prolonged and elaborate enquiry arrived at the conclusion that it could not believe the evidence of the principal witnesses called before it in support of a will propounded by the appellant before the Privy Council:—*Held*, that the onus was on the appellant who invited Judges who had not heard or seen the witnesses to overrule the decision

WILL—*concld.*

12. VALIDITY OF WILL—*concld.*

of Judges who had, to show that the decision was erroneous. That in this case that onus had not been discharged. Having regard to the intricacy of the case and the elaborate arguments presented the Judicial Committee thought it desirable to state in outline the salient features of the evidence and the reasons for their conclusion, although it might have sufficed if they had only said that the appellant had not succeeded in discharging the onus that lay on him. NOGENDRA NATH MITTER *v.* KUMUDINI DASI (1909).
13 C. W. N. 782

WILLS ACT (XXV OF 1838).

——— **s. 3**—*Application of Act—East Indians domiciled out of the jurisdiction of High Court.* The Wills Act, XXV of 1838, applied to the wills of East Indians, whether domiciled within or beyond the testamentary jurisdiction of the High Court. HOGG *v.* GREENWAY . **2 Hyde 3**

Held, on appeal, that the Wills Act only applied where the High Court had an exclusive jurisdiction analogous to that of the Ecclesiastical Court in England. It did not apply in the case of a person who was not entitled by birth or domicile to have applied to him the actual law of England. Therefore it did not apply to the case of an East Indian testatrix (the illegitimate daughter of a Mahomedan woman) who resided and died outside the limits of the ordinary civil jurisdiction of the Court. GREENWAY *v.* HOGG. HOGG *v.* GREENWAY.
Bourke A. O. C. 111; Cor. 97

WINDING UP.

See COMPANY—WINDING UP.

See COMPANIES ACT.

——— *Companies Act* (*VI of 1882*), *s. 128, cl.* (*e*)—"*Other reason of a like nature.*" When the law requires the fulfilment of one or more of several conditions before an order could be made, the part fulfilment of two or more of such conditions should not be taken as having cumulative effect justifying the order. If the Court comes to the conclusion that the main original object for which the Company was formed has substantially failed or that the substratum of the Company is gone it will consider that it would be just and equitable to wind up the Company and will make an order for its compulsory winding up. The Court would not be justified in making a winding up order merely on the ground that the Company has made losses and is likely to make further losses. SHAH STEAM NAVIGATION COMPANY, *In re* (1908) . **I. L. R. 32 Bom. 415**

WINDOWS OR DOORS.

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR . **I. L. R. 26 Bom. 374**

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WINDOWS AND DOORS—*concld.*

——— suit to close—

See JURISDICTION OF CIVIL COURT—PRIVACY, INVASION OF.

See RIGHT OF SUIT—PRIVACY.
I. L. R. 18 Mad. 163
5 C. W. N. 147

See TRESPASS—GENERAL CASES.
3 B. L. R. A. C. 411

WITHDRAWAL OF APPEAL.

See APPEAL—OBJECTIONS BY RESPONDENT . . I. L. R. 17 All. 518

See APPEAL—OBJECTIONS BY RESPONDENT—WITHDRAWAL OF APPEAL.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT. I. L. R. 15 Bom. 370

See PAUPER SUIT—APPEALS.
I. L. R. 18 Bom. 464

WITHDRAWAL OF APPLICATION FOR EXECUTION.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT. I. L. R. 12 All. 179; 392
I. L. R. 17 All. 106
L. R. 22 I. A. 44
I. L. R. 18 Calc. 462; 515; 635
I. L. R. 15 Mad. 240

See LIMITATION ACT, 1877, SCH. II 2, ART. 179—STEP IN AID OF EXECUTION.
I. L. R. 23 Calc. 817

WITHDRAWAL OF CRIMINAL PROCEEDINGS.

See COMMITMENT . 5 C. W. N. 411

See MAGISTRATE, JURISDICTION OF—WITHDRAWAL OF CASES.

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—TRANSFER OR WITHDRAWAL OF PROCEEDINGS.
I. L. R. 22 Calc. 898

WITHDRAWAL OF PETITION FOR INSOLVENCY.

See INSOLVENCY ACT (11 and 12 Vict. c. 21), s. 7 . I. L. R. 32 Bom. 321

WITHDRAWAL OF SANCTION TO BUILD.

See CALCUTTA MUNICIPAL CONSOLIDATION ACT (II OF 1888), ss. 247, 250, 427
I. L. R. 30 Calc. 317

WITHDRAWAL OF SUIT.

See APPELLATE COURT—EXERCISE OF POWERS IN VARIOUS CASES—PLAINT.
I. L. R. 9 All. 191
L. R. 13 I. A. 134

WITHDRAWAL OF SUIT—*contd.*

See APPELLATE COURT—OBJECTIONS TAKEN FOR FIRST TIME ON APPEAL—SPECIAL CASES—WITHDRAWAL OF SUIT.
I. L. R. 3 All. 528

See CIVIL COURTS ACT, ss. 22, 23.
10 C. W. N. 902

See CIVIL PROCEDURE CODE, 1882, ss. 43, 373 . . . 10 C. W. N. 8

See CIVIL PROCEDURE CODE, 1882, s. 373 I. L. R. 35 Calc. 990
I. L. R. 32 Bom. 345
12 C. W. N. 921

See CIVIL PROCEDURE CODE, 1882, ss. 373, 622 I. L. R. 33 Bom. 722

See CIVIL PROCEDURE CODE, 1882, ss. 411, 412 . I. L. R. 31 Bom. 10

See COMPROMISE—REMEDY ON NON-PERFORMANCE OF COMPROMISE.
Agra F. B. 1

See DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 53 . I. L. R. 12 Bom. 684

See DIVORCE ACT, s. 35.
9 B. L. R. Ap. 6
I. L. R. 25 Calc. 222

See LETTERS PATENT, HIGH COURTS, 1865, CL. 12 . I. L. R. 24 Mad. 293

See MULTIFARIOUSNESS.
I. L. R. 16 All. 279

See PRACTISE—CIVIL CASES—AFFIDAVITS.
3 Bom. O. C. 55

See PRACTICE—CIVIL—CASES—WITHDRAWAL OF SUITS OR APPEALS. Cor. 67
I. L. R. 7 Bom. 287

See RELINQUISHMENT OR OMISSION TO SUE FOR PORTION OF CLAIM.
I. L. R. 1 All. 324
I. L. R. 10 Mad. 160
I. L. R. 17 All. 53

See RES JUDICATA—RELIEF NOT GRANTED
I. L. R. 21 Calc. 265

——— order allowing—

See APPEAL—DECREES.
I. L. R. 8 All. 82
I. L. R. 18 Calc. 322
I. L. R. 15 All. 169
I. L. R. 16 All. 19
I. L. R. 17 All. 97

See APPEAL—ORDERS.
I. L. R. 6 All. 211

See SUPERINTENDENCE OF HIGH COURT—CIVIL PROCEDURE CODE, 1882, s. 622.
I. L. R. 11 Mad. 322
I. L. R. 15 All. 169

——— power to allow—

See SMALL CAUSE COURT, PRESIDENCY TOWNS—PRACTICE AND PROCEDURE—REFERENCE TO HIGH COURT.
I. L. R. 24 Calc. 129

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WITHDRAWAL OF SUIT—*contd.*

[It was formerly *held* in some cases that the power to allow withdrawal of suits given by the Civil Procedure Code (s. 97 of Act VIII of 1859) was not applicable to suits under the Rent Act, 1859.]

DOYAL CHUNDER GHOSE *v.* DWARKANATH MISSER
Mar. 148 : W. R. F. B. 47
1 Ind. Jur. O. S. 41 : 1 Hay 347

MODHOO SOODUN MULICK *v.* PANCH COWREE MULICK . . . . . **7 W. R. 302**

BEER CHUNDER JOBRAJ *v.* TARINEE CHURN ROY
11 W. R. 46

RAMANATH DUTT *v.* JOYKISHEN MOOKERJEE
11 W. R. 3

In other cases rent suits were *held* not to be excluded. RAM CHARAN BYSAK *v.* HARVEY
2 B. L. R. S. N. 11 : 10 W. R. 373

WOOMANATH ROY CHOWDHRY *v.* SREENATH SING . . . . . **15 W. R. 260**

[Since the Bengal Rent Act, 1869, however the procedure in rent suits has been, and is now, the same as in any other suits.]

1. ——— Sanction for fresh suit—*Act VIII of 1859, s. 97.* Civil Courts had no power to sanction the bringing of a fresh suit, except under s. 97, Act VIII of 1859. ARGOON SINGH *v.* HUREE HUR SINGH . . . **14 W. R. 472**

ANUND MOHUN PAUL CHOWDHRY *v.* RAM KISHEN PAUL CHOWDHRY. GOBIND CHUNDER PAUL CHOWDHRY *v.* RAMKISHEN PAUL CHOWDHRY
2 W. R. 297

2. ——— Leave to one of several co-plaintiffs to withdraw—*Consent of co-plaintiff—Civil Procedure Code, 1877, s. 373.* The proviso in the third clause of s. 373 of the Code of Civil Procedure does not deprive the Court of power to permit one of several co-plaintiffs to withdraw unconditionally from a suit, even though his co-plaintiffs do not consent to his withdrawal. MOHAMAYA CHOWHDRAIN *v.* DURGA CHURN SHAHA
9 C. L. R. 332

3. ——— Withdrawal with consent of defendant—*Civil Procedure Code, 1859, s. 97—Right to bring fresh suit.* A plaintiff filed a plaint for an account to be taken. The plaintiff withdrew the plaint, without the permission of the Court to withdraw from the suit, with liberty to bring a fresh suit. This was done for the purpose of a submission to arbitration under a deed mutually executed between the plaintiff and defendant. The deed was not acted upon. *Held*, reversing the decision of MACPHERSON, *J.*, that the plaintiff was not debarred by s. 97 of Act VIII of 1859 from bringing a fresh suit to establish the agreement for reference to arbitration, and also for the account, which was a relief to which he was entitled. The section only applied to cases where the plaintiff withdraws from the suit without the consent of the defendant. JUGGOBUNDO CHATTERJEE *v.* WATSON & Co.
Bourke A. O. C. 162
s. c. in Court below . . **Bourke O. C. 250**

WITHDRAWAL OF SUIT—*contd.*

4. ——— Withdrawal of claim under s. 230, Act VIII of 1859—*Right to bring subsequent suit.* In a suit to recover the possession of land of which the plaintiff had been dispossessed in execution of a decree against the first defendant, it appeared that the plaintiff had applied within one month from the date of his dispossession to the Court from which the process of execution had issued under s. 230 of the Code of Civil Procedure, setting up his title, and it was numbered and registered as a suit under the section. Before the claim came on for hearing the plaintiff was allowed by the Court to withdraw the proceeding, with liberty to bring a fresh suit upon the claim set up. The plaintiff subsequently brought the present suit. *Held*, that the former proceeding was a suit within the meaning of s. 97 of the Code, and liberty having been given on its withdrawal before decree to bring another suit, the present suit was well brought. SUBBARAMIEN *v.* PONNUSAWMY CHETTY . . **5 Mad. 298**

5. ——— Substitution of assignee of plaintiff's rights and allowing him to withdraw—*Power of Court—Civil Procedure Code, 1859, s. 97.* Where the Court allowed the purchaser of the plaintiff's rights to be substituted for him and then permitted him to withdraw the suit :—*Held*, that it was an order not within s. 97, and one which the Court had no power to make. JUDOOPUTTEE CHATTERJEE *v.* CHUNDER KANT BHUTTACHARJEE
9 W. R. 309

6. ——— Withdrawal after issue joined—*Civil Procedure Code, 1859, s. 97—Failure to support claim.* A plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issue has been joined and he has failed to produce evidence to support his claim. MUDDUN RAM DOS *v.* ISRAIL ALI CHOWDHRY
21 W. R. 291

7. ——— *Discretion of Court—Power to interfere with discretion on appeal.* Where, after issue joined, the plaintiff was permitted to withdraw his suit, with liberty to sue again :—*Held*, that to allow withdrawal and fresh suit at that stage was a discretion to be exercised with great caution, but the discretion having been exercised it could not be interfered with on appeal by the Judge. OMESH CHUNDER MUNDUL *v.* THAKOOR DOSS MOOKERJEE . . **23 W. R. 345**

8. ——— Withdrawal before final judgment—*Discretion of Court—Power to interfere with discretion on appeal—Civil Procedure Code, 1859, s. 97.* A lower appellate Court had no power to interfere with the discretion of a first Court under s. 97, Act VIII of 1859, in allowing a plaintiff whether before or after the settlement of issues and before or after the acceptance of evidence upon the issues, at any time before final judgment, to withdraw from the suit with liberty to bring a fresh suit in the same matter. RAM KANYE DUTT *v.* HAROO CHUNDER MOJOOMDAR . . **17 W. R. 229**

9. ——— S. 97 of Act VIII of 1859 applied only to cases where a plaintiff before final judgment is permitted by the Court to with-

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draw from his suit, with liberty to sue again. ANUND MOHUN PAUL CHOWDHRY *v.* RAM KISHEN PAUL CHOWDHRY. GOBIND CHUNDER PAUL CHOWDHRY *v.* RAMKISHEN PAUL CHOWDHRY
2 W. R. 297

10. ——— **Leave to bring fresh suit**—*Civil Procedure Code, 1859, s. 97.* Permission under s. 97 to bring a fresh suit could not be given after final judgment has been pronounced. SHEORAJ NUNDUN SINGH *v.* RAJCOOMAR BABOO DEO NUNDUN SINGH . . . **24 W. R. 23**

11. ——— *Failure to prove case—Dismissal of suit—Procedure.* The power to dismiss a suit, with liberty to bring a fresh one for the same matter, is limited to cases where the suit fails by reason for some point of form: such liberty should not be given where, after issue joined, the plaintiff has failed to make out his case. WATSON *v.* COLLECTOR OF RAJSHYE
3 B. L. R. P. C. 48 : 12 W. R. P. C. 43
13 Moo. I. A. 160

See MONA BIBEE *v.* OOMED ALI **16 W. R. 276**

12. ——— *Civil Procedure Code, 1859, s. 373—Ground for allowing withdrawal. Quære:* Whether, under s. 373 of Act X of 1877, the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with. ZAHURUN-NISSA *v.* KHUDA YAR KHAN
I. L. R. 3 All. 528

13. ——— **Ground for allowing withdrawal**—*Civil Procedure Code, 1859, s. 97—Inability to prove claim.* Where a plaintiff asked for permission to withdraw his plaint saying that it would be out of his power to adduce the evidence, which he pointed out as existing in certain records, within the period fixed by the Court for hearing the case, the Court was competent, under s. 97, Act VIII of 1859, to grant him permission to withdraw the suit. PORESH NARAIN ROY *v.* SURUT SOONDUREE DEBEE . . . **16 W. R. 100**

14. ——— *Insufficiency of evidence.* In a suit by one of several shares of certain mortgaged property for contribution on account of payments made by the plaintiff to prevent foreclosure, the Court on appeal thought the plaintiff might have produced better evidence, but his claim being a good one, it allowed him to withdraw the suit with leave to bring a fresh one. KHATOON KOONWAR *v.* HURDOOT NARAIN SINGH
20 W. R. 163

15. ——— **Compromise of suit on appeal**—*Civil Procedure Code, 1859, s. 97—Subsequent suit on compromise.* A suit founded on a compromise, which was entered into when special appeal was withdrawn, was not barred by s. 97, Act VIII of 1859, as it was not a suit for the same matter within the meaning of that section; but if the compromise was duly made by the parties thereto, and if its terms have been broken, a party to it is entitled to maintain a suit to enforce it. GOLAB SINGH *v.* CHEDA SINGH . **3 Agra 135**

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16. ——— **Private agreement**—*Restoration of suit.* Where a plaintiff filed a petition withdrawing his claim unconditionally, the suit should be at once struck off the file. If the defendant had entered into some private agreement and did not fulfil the same, it might give a new right of action to the plaintiff for enforcing that agreement, but was no reason for setting aside the petition for withdrawal of the suit as null and void. SHUMSHER BAHADOOR *v.* MAHOMED ALI BEG . **2 Agra 158**

17. ——— **Suit for possession**—*Subsequent suit for rent—Civil Procedure Code, 1859, s. 97.* There was nothing in s. 97, Act VIII of 1859, to prevent a suitor from instituting a claim for possession and afterwards bringing one for rent. RAMKESHORE MUNDLE *v.* MOORAD MUNDLE
W. R. 1864, Act X, 67

18. ——— **Suit for possession after release from attachment in execution in another suit**—*Civil Procedure Code, 1877, s. 97.* A claim to attached property made under Act VIII of 1859, s. 246, was dismissed, and the claimant, in the year 1875, instituted a regular suit against the decree-holder under the provisions of that section. The decree-holder then released the property from attachment, and the plaintiff withdrew his suit. The same property was afterwards, in the year 1878, attached again and sold in execution of the same decree. *Held*, that a subsequent suit for possession of the property against the purchaser at the execution sale was not barred under s. 97 of Act VIII of 1859. *Eshen Chunder Singh* v. *Shama Churan Bhutto, 11 Moo. I. A. 7*, cited. MUKHODA SOONDURY DASI *v.* RAM CHURN KARMOKAR
I. L. R. 8 Calc. 871

19. ——— **Suit withdrawn under Regulation law**—*Civil Procedure Code, 1859, s. 97.* A plaintiff without leave of the Court withdrew from a suit in 1853. He filed a fresh suit in the same cause of action in 1866. *Held*, that he was not debarred from doing so, as the provisions of s. 97 of the Code of Civil Procedure did not apply. VINAYAK JOSHI *v.* JANARDAN JOSHI
7 Bom. A. C. 23

20. ——— **Nature of fresh suit**—*Fresh suit filed upon a different title in existence at date of former suit—Civil Procedure Code (XIV of 1882), s. 373—Practice.* The plaintiffs, who were an English joint stock company registered under the English Companies Act of 1862, used the defendant as a passed member of the bank, upon a balance order of the High Court of Justice in England, dated 24th February 1881, to recover the sum of £678-3. In August 1882 the plaintiffs had filed a previous suit against the defendant to recover the said sum of £678-3. That suit was based upon a call order, dated 11th November 1880, which it sought to enforce. By an order made in that suit on 7th April 1883, the plaintiffs were permitted to withdraw it, with liberty to bring a fresh suit for the same cause of action. The

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present suit to enforce a balance order, dated the 24th February 1881, was filed on 11th February 1885. It was contended on behalf of the defendant that the present suit being based upon an order which was in existence at the date of the previous suit, the plaintiffs could not now sue upon it; that the plaintiffs could not abandon the title upon which they claimed in the first suit, and set up a different title in the second. *Held*, that the plaintiffs were not precluded from bringing the second suit upon the balance order, and that the suit was properly framed. LONDON, BOMBAY, AND MEDITERRANEAN BANK *v.* BURJORJI SORABJI LYWALLA . . . **I. L. R. 9 Bom. 346**

21. ——— **Withdrawal of suit by next friend**—*Suit on behalf of a minor—Civil Procedure Code (Act VIII of 1859), s. 97—Fraud.* Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, any withdrawal of the suit by that party would have precisely the same effect as the withdrawal of a suit by a person of full age. But where a person acting for a minor has fraudulently withdrawn the minor's suit under s. 97 of Act VIII of 1859, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it is open to the minor to relieve himself from the consequences of the fraud in one of three ways, *viz.*, (i) by an application to the Court in the suit in which the withdrawal took place; (ii) by a regular suit to set aside the judgment founded upon the withdrawal; or (iii) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar. ESHAN CHUNDRA SAFOOI *v.* NUNDAMONI DASSEE **I. L. R. 10 Calc. 357**

22. ——— **Withdrawal wrongly allowed**—*Arbitration—High Court's powers of revision—Civil Procedure Code, 1882, ss. 2, 373, 588, 622—Practice—Notice to show cause—Amendment of plaint.* An order under s. 373 of the Civil Procedure Code permitting the withdrawal of a suit, with liberty to bring a fresh one, not being made appealable by s. 588, or being a "decree" within the meaning of s. 2, is not appealable. When the plaintiff in a suit applies for permission to withdraw it, with liberty to bring a fresh one, such permission should not be granted without the defendant being served with notice to show cause why such permission should not be granted. *L*, claiming as heir to *H*, a deceased Hindu, sued *K*, his widow, and *G*, a minor represented by his mother and guardian *B*, to have the adoption by *K* of *G* set aside and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favour of the defendants. The plaintiff preferred objections to the award. Before these were disposed of, *K* died. The Court of first instance subsequently allowed the objections and set aside the award. The minor defendant then applied

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to the High Court for revision of the order setting aside the award. This application was rejected, on the ground that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit, with liberty to bring a fresh one, on the ground that, *K* having died, he was entitled to possession of the immoveable property left by *H*. This permission was granted. The minor defendant applied to the High Court for revision. *Held*, that it might have been a very good ground for allowing the plaintiff to withdraw the suit that *K*, the adoptive mother of the minor defendant, had died *pendente lite*, had no arbitration proceedings taken place in the course of the suit; but when the parties had referred their differences to arbitration, and an award had been made in favour of the defendant and had been set aside, and an application for revision of the order setting it aside had been refused, on the ground that the matter could be made the subject of appeal from the final decree in the suit, permission to withdraw the suit and bring a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of *K*, while, on the other hand, a decree in the suit, if in his favour, would decide the litigation, and, if in favour of the plaintiff, would not prevent his bringing a suit for possession on the separate cause of action which had arisen. *Stahlschmidt* v. *Walford*, *L. R. 4 Q. B. D. 217*, referred to. The High Court refused to allow the plaint in the suit to be amended by the addition of a claim for possession of the property left by *H*. KALIAN SINGH *v.* LEKHRAJ SINGH . . . **I. L. R. 6 All. 211**

23. ——— *Specific Relief Act (I of 1877), s. 21—Arbitration—Agreement to refer—Order under s. 506, Civil Procedure Code, to refer matters in dispute in action then pending—Order under s. 373, pending the reference, granting plaintiff permission to withdraw with liberty to bring fresh suit.* The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit, it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877). *Held*, that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by s. 510 of the Code; that consequently the Court's order under s. 373 was *ultra vires* if

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involving such revocation, or, if not involving it, left the order of reference still in force, that in either alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. *Per* TYRRELL, *J.*, that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision. SHEOAMBER *v.* DEODAT . **I. L. R. 9 All. 168**

24. ——— Civil Procedure Code, s. 373—*Withdrawal of suit with liberty to bring fresh suit.* On the 5th September 1874 *R*, a Hindu, and his sons borrowed R5, 000 from *V* and mortgaged to him certain land, items, 1, 2, and 3. On the 7th September 1874, *V* borrowed R5,000 from *R N* and mortgaged his rights in items 1 and 2 and land of his own to *R N*. In 1877 *R N* bought at a sale in execution of a decree against *R* the share of *R* in the said items 1 and 2 subject to the mortgage created by *R* on 5th September 1874, and to another mortgage created by *R* on 11th January 1875. In 1880 *R N* sued *V* and the sons of for arrears of interest due under his mortgage-bond. This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond. In 1885 *R N* sued the sons of *R* and *V* to recover principal and interest due under his mortgage-bond. *Held*, that the claim of *R N* was not barred. VENKATA *v.* RANGA . **I. L. R. 10 Mad. 160**

25. ——— *Withdrawal of suit with permission to bring a fresh suit on the same cause of action—Civil Procedure Code, s. 43.* Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure, the effect is to leave the parties in the same position as that in which they would have been if the suit had never been brought. A plaintiff, therefore, who has obtained an order under s. 373 of the Code, will not be debarred by s. 43 from claiming in a subsequent suit a relief which he might have included, but did not in the suit which he was permitted to withdraw. *Venkata Chetti* v. *Ranga Nayak, I. L. R. 10 Mad. 160*, followed. BEHARI LAL PAL *v.* BARAN MAI DASI **I. L. R. 17 All. 53**

26. ——— *Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject matter—Res judicata.* A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms: "This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of *M L* in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share

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referred to in the order just quoted. *Held*, by the Full Bench, that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect. *Kudrat* v. *Dinu, I. L. R. 9 All. 155*; *Ganesh Rai* v. *Kalka Prasad, I. L. R. 5 All. 595*; *Salig Ram Pathak* v. *Tirbhawan Pathak, All. Weekly Notes, (1885) 171*, and *Muhammad Salim* v. *Nabian Bibi, I. L. R. 8 All. 282*, explained. SUKH LAL *v.* BHIKHI **I. L. R. 11 All. 187**

27. ——— *Jurisdiction—Withdrawal of part of claim—Part of property in suit within and part without the jurisdiction of the Court.* Suit for partition and possession of an undivided share of property sold to plaintiff by an aged gosha lady of the class of Canarese Mahomedans called Navayats. The property sold was the vendor's share as heiress of her father, brother, and sister, who died in 1856, 1866, and 1871, respectively; but it appeared that the property of the family had been in the possession of one managing member since 1856. The plaintiff, during the suit, withdrew his claim against that part of the immoveable property in suit which was within the local limits of the jurisdiction of the Court, having compromised with the defendants, who had it in their possession, and pursued his claim against the other immoveable property and obtained a decree. *Held*, that the withdrawal of the claim with regard to the property situated within the local limits of the jurisdiction of the Court (the compromise not having been shown to be otherwise than *bonâ fide*) did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit. KHATIJA *v.* ISMAIL . . . **I. L. R. 12 Mad. 380**

28. ——— *Summons not served on defendant—Suit for damages—Civil Procedure Code (Act XIV of 1882), ss. 97, 477, 491—Arrest of defendant before judgment under s. 477 of Civil Procedure Code (Act XIV of 1882)—Subsequent application by plaintiff under s. 373 of Civil Procedure Code for leave to withdraw suit—Right of defendant to appear at hearing, although summons not served upon him—Compensation for arrest—Rule of Court No. 64—Practice—Procedure.* The plaintiff sued the defendant in Bombay for damages for breach of contract. The suit was filed on the 13th May 1890. The summons was not served on the defendant, but on the 16th May the plaintiff's agent procured his arrest before judgment. On that day he was brought before a Judge of the High Court and was at once discharged. When the case subsequently came on for hearing, the plaintiff applied, under s. 373 of the Civil Procedure Code, for leave to withdraw the suit, with liberty to file a fresh suit on the same cause of action. The defendant's Counsel objected, and claimed either that the plaintiff should continue his suit to a hearing or that the suit should be dismissed with costs, and that

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compensation for his arrest should be awarded to the defendant under s. 491 of the Civil Procedure Code. The plaintiff contended that, inasmuch as the summons had not been served on him, the defendant was not entitled to appear, and that no compensation could be awarded to him. *Held*, (i) that inasmuch as the plaintiff had by a legal process brought the defendant before the Court, the defendant had the right to appear at the hearing of the case, although no summons had been served upon him, and that he was entitled to object to the suit being dismissed under Rule of Court No. 64; (ii) that under the circumstances the defendant was entitled to compensation for his arrest under s. 491 of the Code of Civil Procedure; (iii) that the plaintiff might withdraw the suit under s. 373 of the Civil Procedure Code with liberty to bring a fresh suit on payment of the costs incurred by the defendant in the present suit. SYED ALI *v.* ADIB
I. L. R. 15 Bom. 160

29. ——— *Institution of fresh suit.* Where *A* instituted a suit to establish his right to cell certain property in satisfaction of a decree against *B*, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted another suit to establish his right to sell the same property in satisfaction of another decree against *B*:—*Held*, that the second suit was not barred by the provisions of s. 373 of the Code of Civil Procedure. KAMINI KANT ROY *v.* RAM NATH CHUCKERBUTTY
I. L. R. 21 Calc. 265

30. ——— *Withdrawal of suit without permission to bring fresh suit—Application of s. 373 of the Civil Procedure Code to suits in Revenue Courts—Act X of 1859.* S. 373 of the Civil Procedure Code does not apply to suits before the Revenue authorities under Act X of 1859, that Act being a complete Code in itself. RADHA MADHUB SANTRA *v.* LUKHI NARAIN ROY CHOWDHRY . . . **I. L. R. 21 Calc. 428**

MOKUNDA BULLAVKAR *v.* BHOGABAN CHUNDER DAS . . . . **I. L. R. 21 Calc. 514**

31. ——— *Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter.* In 1893 the plaintiff sued to eject the defendants, alleging they were in occupation of the land in question under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff there upon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present Zamorin and sued again to eject the defendants. *Held*, that the second suit was not maintainable by reason of Civil Procedure Code, s. 373. ACHUTA MENON *v.* ACHUTA NAYAR
I. L. R. 21 Mad. 35

32. ——— *Fresh cause of action—"Subject-matter of suit," meaning of.* Where a plaintiff brought a suit for partition of joint property from which he withdrew with the consent of the defendants, but without leave from Court to bring a fresh suit, and subsequently, being dispossessed from the same joint property, brought this suit for the recovery of joint possession of the same:—*Held*, that the mere fact of the suits being in respect of the same property would not be sufficient to make the latter suit one for the same subject-matter as the former, when the state of facts leading to the two suits and the reliefs claimed under them are different, and s. 373, Civil Procedure Code, does not apply. *Kamini Kanto Roy* v. *Ram Nath Chuckerbutty, I. L. R. 21 Calc. 265*, followed. *Quære*: Whether the mere fact that a plaintiff withdraws with the consent of the defendant, but without leave of the Court, makes s. 373, Civil Procedure Code, inapplicable. The observation of NORMAN, *J.*, on this point in *Juggobundo Chatterji* v. *Watson & Co., Bourke, A. O. C. 102*, doubted. GOPAL CHANDRA BANERJEE *v.* PURNO CHANDRA BANERJEE
4 C. W. N. 110

See JUGGOBUNDO CHATTERJEE *v.* WATSON & Co.
Bourke A. O. C. 102

33. ——— **Costs**—*Power to award costs—Withdrawal without leave.* The High Court has no power, under the Civil Procedure Code, to award costs to the defendant when the plaintiff withdraws, not having asked leave to do so with liberty to bring another suit for the same matter. BRASS *v.* TIRUVENGADA PILLAI . . . **1 Mad. 247**

34. ——— *Power to award Costs—Civil Procedure Code, 1859, s. 97.* Where the plaintiff applied, under s. 97, Act VIII of 1859, to be allowed to withdraw from the suit, with liberty to bring a fresh suit for the same matter, the Court refused the application. Another application for leave, simply to withdraw from the suit, was granted, the Court dismissing the suit with costs. *Brass* v. *Tiruvengada Pillai, 1 Mad. 247*, dissented from. HOSSAINI BIBI *v.* PERI KHANUM
1 B. L. R. O. C. 45

35. ——— *Form of order—Civil Procedure Code, 1859, s. 97.* A plaintiff who is permitted to withdraw from his suit under s. 97, Act VIII of 1859, must pay the defendant's costs. On such withdrawal, the proper order to be recorded is not one of dismissal, but one simply permitting the plaintiff to withdraw the suit, with liberty to bring a fresh suit for the same matter on payment of costs or otherwise as the Court may direct. DOUCETT *v.* WISE . **1 W. R. 322**

36. ——— *Payment of costs not made condition precedent to fresh suit—Power to stay suit.* *A*, having brought an action against *B*, was allowed to withdraw with leave to bring a fresh suit, and was also ordered to pay the costs. *Held*, that, the payment of the costs not having in terms been made a condition precedent to bringing a fresh suit, the Court had no power to stay proceedings in the fresh suit, on the ground that the costs had not been paid. CHITTO *v.* MUZZUR HOSSAIN
2 Hyde 212.

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37. ——— *Small Cause Court.* A Small Cause Court is not bound to allow a plaintiff to withdraw a suit, on the ground that he has received payment from one of the defendants in the suit, that attempt to withdraw having been made after the plaintiff had succeeded in getting a judgment against two defendants which had been set aside by the Court on various grounds, and a new trial ordered. In such a case the Court may permit the withdrawal of the suit upon the terms of plaintiff paying the first defendant's costs. RAMA CHANDRA SHASTRY *v.* PAPU AIYAN **3 Mad. 27**

38. ——— **Withdrawal of appeal—** *Power of Appellate Court.*—An appellate Court has authority to permit an appeal to be withdrawn. RAM PERSHAD OJHA *v.* BHUROSA KOONWAR **9 W. R. 328**

39. ——— *Permission of Court—Notice of withdrawal.* An appellant has no right to withdraw an appeal, which has been regularly registered, without the permission of the Court. Where the appellant had given notice of the withdrawal of the appeal before the day of the hearing, and notice of withdrawal had been given to the respondent, but not until costs had been incurred:—*Held*, that the appellant was not at liberty to withdraw the appeal, and the Court ordered that the appeal be set down for hearing. KAREEM BEE *v.* BEEGAM BEE . **3 Mad. 368**

40. ——— **Withdrawal of suit on appeal—***Act XXIII of 1861, s. 37—Power of Appellate Court.* Under s. 37, Act XXIII of 1861, the High Court upon appeal from a Judge sitting in the exercise of the ordinary original jurisdiction of the Court, had power, before pronouncing final judgment in appeal, to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit. GREGORY *v.* DOOLEY CHAND **14 W. R. O. C. 17**

41. ——— *Civil Procedure Code, 1859, s. 97—Exercise by Appellate Court of powers under s. 37, Act XXIII of 1861.* Where application was made for leave to withdraw a suit, with leave to bring a fresh one, it being contended that the fact of a notarial protest on inland bills, and of their being in the hands of the holder without signature, was proof of dishonour; and further that, defendant being a Hindu, there was no necessity for notice of dishonor,—the Appellate Court, reversing the decision of the Court below, granted the application under the power given by s. 37, Act XXIII of 1861. BOMBAY CITY BANK *v.* MOONJEE HURRYDOSS . . . **Bourke A. O. C. 99**

42. ——— *Civil Procedure Code, 1859, s. 97.* The plaintiff having sued, and the issues having been laid down as though the suit was for separate possession, the decree of the ower Court for joint possession was set aside, with leave to plaintiff, under Act VIII of 1859, s. 97, to bring a fresh suit for joint possession. JUGGUNNATH DEB NAZIR *v.* MOHEBOOLLAH **17 W. R. 164**

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43. ——— *Appellate Court, powers of—Discretion, exercise of—Civil Procedure Code, 1882, ss. 373, 582.* Where, on appeal from a decree dismissing a suit, the Appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under s. 373 of the Civil Procedure Code, to withdraw the suit with leave to institute a fresh one:—*Held, per* STRAIGHT, *J.*, that with reference to the terms of s. 582 of the Civil Procedure Code, the Appellate Court had power to avail itself of the provisions of s. 373, and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *Gregory* v. *Dooley Chand, 14 W. R., O. C., 17*, and *Khatoon Koonwar* v. *Hurdoot Narain Singh, 20 W.R. 163*, referred to. Also *per* STRAIGHT, *J.*, that it could not be said that the Appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal. *Per* TYRRELL, *J.*, that it might be taken that the Appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that in this view there was ne legal objection to the exercise by the Appellate Court of the discretionary power of Ch. XXII of the Code. GANGA RAM *v.* DATA RAM **I. L. R. 8 All. 82**

44. ——— **Applications for execution of decree—***Civil Procedure Code, s. 374—Withdrawal of application.* The rule laid down in s. 374 of the Civil Procedure Code (Act XIV of 1882)—that where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought—does not apply to applications for execution. *Pirjade* v. *Pirjade, I. L. R. 6 Bom. 681*, dissented from. TARACHAND MEGRAJ *v.* KASHINATH TRIMBAK . . **I. L. R. 10 Bom. 62**

45. ——— *Civil Procedure Code, ss. 373, 374, 467—Application for execution withdrawn by decree-holder—Act XV of 1877, Sch. II, Art. 179 (4).* S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali* v. *Ram Singh, I. L. R. 7 All. 359*, and *Pirjade* v. *Pirjade, I. L. R. 6 Bom. 681*, followed. *Tarachand Megraj* v. *Kashinath Trimbak, I. L. R. 10 Bom.* 62, and *Ramanandan Chetti* v. *Periatambi Chervai, I. L. R. 7 Mad. 250*, dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. *Held*, that, with reference to the second paragraph of s. 373 read with s. 647 of the Code, the decree-holder was precluded from again applying for execution;

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WITHDRAWAL OF SUIT—*contd.*

but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to Art. 179 of the Limitation Act. SARJU PRASAD *v.* SITA RAM **I. L. R. 10 All. 71**

46. ——— **Revocation of withdrawal** —*Civil Procedure Code, 1859, s. 97.* A plaintiff who has withdrawn from his suit is at liberty to rescind the act of withdrawal at any time before final judgment. S. 97 of the Civil Procedure Code was *held* to be inapplicable to a case where the plaintiff rescinded after two days a petition he had presented of withdrawal from his claim. The last clause of that section contemplated cases in which the withdrawal is not revoked. RAMBHUROS LALL *v.* GOPEE BEEBEE . . . **6 N. W. 66**

47. ——— **After award made**—*Civil Procedure Code (Act XIV of 1882), s. 373 and Ch. XXXVII—Withdrawal of suit after an award is made by an arbitrator.* The powers relating to withdrawal of suits, conferred upon the Court by s. 373, Civil Procedure Code, are, when an award of an arbitrator to whom the case is referred for arbitration has once been duly made by the arbitrator, limited by the particular provisions contained in Ch. XXXVII of that Code. So, where, upon an award made by the arbitrator, the plaintiff put in a petition of objection to the award, and subsequently, on his putting in a petition for permission to withdraw the suit with liberty to bring a fresh suit, the Court granted such prayer under s. 373, Civil Procedure Code: *Held*, that the order of the Court was without jurisdiction. DEBI CHURN MANNA *v.* BIPRA PROSAD JANA (1902) . . . **7 C. W. N. 186**

48. ——— **By Small Cause Court, after granting a new trial**—*Presidency Small Cause Courts Act (XV of 1882, as amended by Act I of 1895), s. 38—New trial—Civil Procedure Code (Act XIV of 1882), s. 373—Withdrawal of a suit—Jurisdiction of the Small Cause Court to pass an order under s. 373 of the Civil Procedure Code after granting a new trial.* A suit having been dismissed by a Judge of Small Cause Court at Calcutta, the plaintiff made an application for a new trial, which was granted, the suit being allowed to be withdrawn under s. 373 of the Civil Procedure Code. On a rule obtained by the defendant in the High Court: *Held*, that, although the Judges of the Small Cause Court, when granting the application for a new trial, were exercising their revisional powers, yet, as soon as they had passed the order granting the new trial, their revisional jurisdiction ceased, and then they had jurisdiction to deal with the case as an Original Court, and as such had perfect authority to pass the order under s. 373 of the Civil Procedure Code. JADU MANI BOISTABEE *v.* RAM KUMAR CHAKRAVARTI (1902) . . . **I. L. R. 29 Calc. 239**

WITHDRAWAL OF SUIT—*concld.*

49. ——— **Effect of withdrawal**—*Civil Procedure Code, s. 373—Suit for partition—Withdrawal of suit—Joint petition of parties, praying that the suit might be struck off—Subsequent suit for partition of same property barred.* The plaintiff and the defendants in a suit for partition, having arrived at a compromise, presented to the Court a joint petition asking that the suit might be struck off (*kharij kardiya jawe*). The Court passed orders accordingly, in the terms of the petition, striking off the suit. The terms of the compromise were not, however, inserted in the decree, and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property. *Held*, that it was incumbent on the plaintiff to see that the Court did its duty and recorded a proper order in the suit with reference to s. 375 of the Code of Civil Procedure, and that, as he has not done so, he must be taken to have withdrawn his suit without permission to sue again, and his second suit was barred by s. 373 of the Code. GULKANDI LAL *v.* MANNI LAL (1901) **I. L. R. 23 All. 219**

50. ——— *Limitation Act (XV of 1877), Sch. II, Art. 120—Alienation by widow—Subsequent suit to set it aside—Withdrawal of suit without permission to bring a fresh suit—Confirmation of original alienation—Fresh cause of action to sons of the daughters.* *V*, who was possessed of lands, died in 1868, leaving a widow and three daughters him surviving. In 1874, the widow alienated the land. In 1892, the daughters sued to have that alienation set aside, but withdrew the suit on the ground that the alienation was valid, without obtaining leave to sue again. In 1895 the daughters' sons instituted the present suit, for a declaration that neither the original alienation nor its confirmation by the withdrawal petition in the suit, should be effective as against them. On the plea of limitation being raised: *Held*, that the withdrawal of the suit of 1892 on the ground that the alienation was valid, without permission to bring a fresh suit, was a confirmation of the alienation of 1874, and gave a fresh cause of action, and that the suit was not barred. MULLAPUDI RATNAM *v.* MULLAPUDI RAMAYYA (1902) **I. L. R. 25 Mad. 731**

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WITNESS—CIVIL CASES—*contd.*

1. PERSONS COMPETENT OR NOT TO BE WITNESSES.

1. ——— **Arbitrator**—*Suit after award is set aside.* If an arbitration award is set aside and the matter is tried as a suit before the Court, the arbitrator cannot be examined as a witness as to the grounds of his decision, but only to prove any admission which may have been made before him in the course of the arbitration and which might be material evidence. NILMONEE BOSE *v.* MOHIMA CHUNDER DUTT . **17 W. R. 516**

2. ——— **Attorney**—*Advocate—Competent witness.* An attorney who has acted as advocate for one of the parties, and pleaded his case in Court, can be examined as a witness in the case. RAMFAL SHAW v. BISWANATH MANDAL **5 B. L. R. Ap. 28**

3. ——— **Magistrate**—*Suit for malicious prosecution—Magistrate who held preliminary enquiry into criminal charge.* Magistrates are not incapacitated to give evidence of matters which have come before them in the course of a preliminary enquiry into a criminal charge. *Held*, that in a suit for a malicious prosecution the defendant had a right to the evidence of the Subordinate Magistrate, who held a preliminary enquiry into a charge of forgery preferred by the defendant against the plaintiff. RAMASAMI AYYAN *v.* RAMU MUPAN . . . **3 Mad. 372**

4. ——— *Magistrate giving evidence before himself.* Where a Judge is the sole Judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused. QUEEN-EMPRESS *v.* MANIKAM . **I. L. R. 19 Mad. 263**

5. ——— **Munsif**—*Witness as to facts judicially before him.* A Munsif ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif, and he is entitled to exemption. ANONYMOUS . . **6 Mad. Ap. 42**

6. ——— **Person against whom affiliation order is sought**—*Criminal Procedure Code, 1882, s. 488—Evidence Act (I of 1872), s. 120—Bastardy proceedings—Maintenance, order of Criminal Court as to.* Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf. NUR MAHOMED *v.* BISMULLA JAN . **I. L. R. 16 Calc. 781**

HIRA LAL *v.* SAHEB JAN **I. L. R. 18 All. 107**

7. ——— **Mamlatdar as assessor under land acquisition proceedings.** On a reference to the Collector under the Land Acquisition Act, the Mamlatdar acted as an assessor appointed by the Collector, and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. The District Judge eventually upheld the Collector's award. On an application under s. 622 of the Civil Procedure Code (Act XIV of 1882):—*Held*, that a person who is appointed an assessor under s. 19 of the Land Acquisition Act (X of 1870) performs quasi-judicial functions, and is therefore incompetent to testify as a witness in the same proceedings. SWAMIRAO *v.* COLLECTOR OF DHARWAR . . **I. L. R. 17 Bom. 299**

WITNESS—CIVIL CASES—*contd.*

1. PERSONS COMPETENT OR NOT TO BE WITNESSES—*concld.*

8. ——— **Wife**—*Evidence of wife to prove non-access—Husband and wife—Presumption of legitimacy — Illegitimacy — Presumption of non-access—Evidence Act (I of 1872), ss. 112 and 118.* A wife can be examined as to non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of her children. ROZARIO *v.* INGLES **I. L. R. 18 Bom. 468**

9. ——— **Child witness**—*Evidence Act (I of 1872), s. 118—Witness, competency of—Mode of examination—Competency to be tested before examination as to res gestæ.* Before a child of tender years is asked any question bearing on the *res gestæ*, the Court should test his capacity to understand and give rational answers and his capacity to understand the difference between truth and falsehood. The Judge must form his opinion as to the competency of a witness before his actual examination commences. SHEIKH FAKIR *v.* EMPEROR (1906) . **11 C. W. N. 51**

2. SUMMONING AND ATTENDANCE OF WITNESSES.

1. ——— **Duty of Court**—*Securing attendance of witnesses.* Every Court is bound to render all reasonable assistance to a party to enforce the attendance of his witnesses. NILMONEE BANERJEE *v.* SHURBO MONGOLA DEBEE . **6 W. R. 14**

2. ——— *Civil Procedure Code, 1882, s. 159.* Under s. 159 of the Civil Procedure Code (Act XIV of 1882), a party to a suit is entitled, as of right, to obtain summonses for his witnesses any time before the day fixed for the disposal of the suit. BAI KALI *v.* ALARAKH PIRBHAI . . . **I. L. R. 15 Bom. 86**

3. ——— *Application for summons to cite witnesses.* A party is entitled at any stage of the case before hearing to apply for a summons to cite witnesses without reference to the number of such applications which he may have previously made, and it is the duty of the Court to comply with such application, if any time be left before the hearing of the cause. ANURUP CHANDRA MUKHOPADHYA *v.* HIRAMANI DASI **3 B. L. R. Ap. 38**

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WITNESS—CIVIL CASES—*contd.*

2. SUMMONING AND ATTENDANCE OF WITNESSES—*contd.*

s. c. ONOOROOP CHUNDER MOOKERJEE *v.* HEERA MONEE DOSSEE **11 W. R. 418**

HARI DAS BAISAKH *v.* MOAZAM HOSSEIN **8 B. L. R. Ap. 16 : 15 W. R. 447**

4. ——— Power to summon witnesses —*Settlement of issues.* Act VIII of 1859 conferred no authority upon a Judge to issue summons to witnesses to attend on the settlement of issues. The written statements must be prepared with great care and deliberation, so as to dispense altogether with parol evidence at the settlement of issues. ANUND CHUNDER BANERJEE *v.* WOOMESH CHUNDER ROY **1 Ind. Jur. O. S. 15 : 1 Hyde 147**

[The subsequent Codes, however, expressly provide for the attendance of witnesses at the settlement of issues : *see* s. 159, Civil Procedure Code, 1882.]

5. ——— Discretion of Court to summon witnesses. A Judge's discretion in not compelling the attendance of witnesses named by one of the parties must be exercised on reasonable grounds distinctly stated in the judgment. OZEER MAHOMED v. BYDNATH DOSS CHOWDHRY **5 W. R., Act X, 6**

HARA CHAND PORAMANICK *v.* KRISHTO MONEE GIREE **1 W. R. 298**

MATUNGUNEE DABEA *v.* KALEE DABEA **2 W. R. 4**

See NEEM CHUND DEY *v.* ANUND COOMAR ROY CHOWDHRY **7 W. R. 147**

6. ——— *Selection of witnesses by Court.* It is not right for the lower Court to select five out of twenty witnesses tendered for examination. It is the bounden duty of the Judge to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case, or otherwise to obstruct the ends of justice. RAMDHAN MANDAL *v.* RAJBALLAB PARAMANIK **6 B. L. R. Ap. 10**

7. ——— *Power to refuse to summon witness.* A Court has no power to refuse to summon witnesses when expressly requested by a party to do so unless the witnesses are required to be summoned in such a manner, or in such numbers, as clearly indicates a vexatious desire of obstructing the course of justice. RAM PHUL PANDEY *v.* WAHED ALI KHAN **14 W. R. 66**

8. ——— *Refusal to summon witnesses—Reasons for refusing application to enforce attendance.* It is not incumbent on a Court to give detailed legal reasons for its refusal to comply with an application to enforce the attendance of a party to a suit as a witness. SIDDHESSURREE DEBIA *v.* DENOBUNDHOO KOONDOO **6 W. R. 65**

9. ——— Preliminaries to summoning witness—*Materiality of evidence.* Before the Court makes an order compelling the attendance of a party to the suit, it must be satisfied that his evidence will be material GOPAL CHUNDER HAZRAH *v.* MOHESH CHUNDER BANERJEE **21 W. R. 44**

10. ——— Summoning plaintiff as witness—*Reasons for summons—Duty of Court—Materiality of evidence.* A Court is bound, before summoning a plaintiff to give evidence, to record the reasons of its being satisfied that the evidence of the plaintiff is essential to the defendant's case. Where, however, the Court does not give reasons for being satisfied that the presence of the plaintiff is necessary, it does not follow that the defendants had failed to satisfy the Court that there was sufficient ground for the application. MAKOOND ADIT *v.* SUTTOORGUN ADIT **17 W. R. 507**

11. ——— Application to summon witnesses—*Witnesses declared unnecessary by Court.* Where on a case coming on for hearing before a Court to which it had been remanded, the Judge observed that the evidence of witnesses would be unnecessary, the declaration was *held* to have sufficiently justified the plaintiffs in making no further application for a summons on their witnesses. RAM JEWUN SINGH *v.* RADHA PERSHAD SINGH **16 W. R. 109**

12. ——— *Undertaking to bring witnesses—Practice.* On the 12th October 1879 the plaintiff applied to the Court for subpœnas to his witnesses. The Court refused to grant them, on the ground that the plaintiff had himself originally undertaken to bring his witnesses. (The Court had fixed the 28th October 1879 for the final hearing of the plaintiff's case.) *Held*, that the plaintiff's failure to bring his witnesses was no sufficient reason for depriving him (the plaintiff) of his right to have subpœnas issued, if he found himself unable to bring his witnesess or to detain them till they could be examined, although it might possibly be, under certain circumstances, a reason for not waiting for them, if the plaintiff's case had been in other respects finished before they could be examined. PANDURANG ANPAI *v.* KESHAVJI JADHAVJI **I. L. R. 6 Bom. 742**

13. ——— Time for summoning witnesses—*Duty of Court.* The Civil Procedure Code neither expressly nor impliedly declares that witnesses must be summoned before the day fixed for the first hearing of the suit. So long as the hearing merely stands adjourned, and so long as the party who wishes to summon witnesses has not closed his case, the Court is bound to summon them, unless it appears that the application is made so late that the witnesses cannot be reasonably expected to attend in time to be examined before that party's case closes. INDRO CHUNDER BABOO *v.* DUNLOP **9 W. R. 530**

14. ——— Ground for refusal to summon witnesses—*Obligation of Court to assist*

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WITNESS—CIVIL CASE—*contd.*

2. SUMMONING AND ATTENDANCE OF WITNESSES—*contd.*

party—Delay in giving names of intended witnesses. Where an appellant delayed to give in the names of his witnesses, but would yet have been within reasonable time to secure their attendance on the day of hearing if summonses had been sent through different peons by the railway :—*Held*, that the lower Appellate Court was bound to have directed the issue of the summonses, and to have given every assistance to the party asking for them, all additional expenses being paid by such party. PEAREE MOHUN MOOKERJEE *v.* MADHUB CHUNDER GHOSAL **9 W. R. 489**

15. ———— *Omission of proper steps to obtain attendance of witnesses.* Where some of the witnesses (defendants) in a suit had been examined, and plaintiff petitioned the Court to have the remaining defendants examined as witnesses, he was *held* not to have taken the necessary steps required by law to enforce their attendance, because he did not make any special application to the Court, or show sufficient grounds in support of his petition. RAM TUHUL THAKOOR *v.* OODIT NARAIN SINGH . . . **12 W. R. 36**

16. ———— *Procedure under Dekkhan Agriculturists' Act (XVII of 1879), s. 7—Right of defendant to call witnesses.* The plaintiff sued, under s. 3, cl. (*w*), of Act XVII of 1879 for money due on a bond dated the 8th September, 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court therefore proceeded with it *ex parte*. The defendant, being subsequently summoned and examined as a witness under s. 7 of the Act, admitted the bond sued upon, but pleaded part payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, and that their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court :—*Held*, that it was his duty to summon the witnesses named by the defendant. DULICHAND *v.* DHONDI **I. L. R. 5 Bom. 184**

17. ———— *Civil Procedure Code, 1877, s. 137—Summons to produce documents.* In all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under s. 137 of the Code of Civil Procedure, the Court ought not to refuse such application, merely because in its opinion the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial. KRISHNA CHURN BAISACK *v* PROTAB CHUNDER SURMA **I. L. R. 7 Calc. 560**

18. ———— **Adjournment for attendance of witnesses**—*Civil Procedure Code (Act XIV of 1882), s. 156—Discretion, exercise of—Witnesses, Attendance of—Power of High Court*

WITNESS—CIVIL CASES—*contd.*

2. SUMMONING AND ATTENDANCE OF WITNESSES—*contd.*

on second appeal. On the day fixed for the hearing of a suit, the defendant applied for process against certain of his witnesses who had been summoned, but had who failed to attend, asking for an adjournment to obtain their attendance. This application was refused and the case was proceeded with. The plaintiffs' evidence was recorded and that of one of the defendants ; the defendants being unable to produce further evidence, the Court recorded that the case was closed, and that judgment would be delivered on the following day, the 31st December. On the day following the defendants produced certain witnesses and asked that they might be examined. This application was rejected, and judgment was subsequently delivered in favour of the plaintiffs. *Held per* PETHERAM, *C.J.*, that the omission to examine the defendants' witnesses on the 31st December was a substantial error in procedure, and that the Munsif had therefore exercised his discretion wrongfully. *Per* GHOSE, *J.*—That although there was some doubt whether the Court on second appeal could interfere in a point of discretion, yet this doubt was not strong enough to justify an expression of opinion contrary to that arrived at by the Chief Justice. MONI LAL BANDOPADHYA *v.* KHIRODA DASI **I. L. R. 20 Calc. 740**

See TAYLOR *v.* SARAT CHUNDER ROY CHOWDHRY **I. L. R. 20 Calc. 745 note.**

19. ———— *Civil Procedure Code, 1882, s. 159—Application to summon witnesses—Duty of Court in respect of such application.* Where a person making an application to a Civil Court for witnesses to be summoned has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for the issue, as the Court is not given a discretion under s. 159 of the Code of Civil Procedure enabling it to refuse such an application. *Krishna Churn Baisack* v. *Protab Chunder Surma, I. L. R., 7 Calc., 560*, and *Bai Kali* v. *Alarakh Pirbhai, I. L. R. 15 Bom. 86*, approved. BHAGWAT DAS *v.* DEBI DIN **I. L. R. 16 All. 218**

20. ———— **Ground for adjournment of suit**—*Delay in making application to summon witnesses—Discretion of Court.* If a party applies for summons to witnesses so late that he cannot bring the witnesses on the day of hearing, it still remains in the discretion of the Court to decide whether or no the case should be adjourned. A Munsif is bound under the Procedure Code to issue summonses to witnesses when asked for. ABDOOL KADIR *v.* ABIN MIRDHA **24 W. R. 290**

21. ———— *Civil Procedure Code, 1882, ss. 159 and 167—Summoning witnesses—Delay in serving summonses.* Under s. 159 of the

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WITNESS—CIVIL CASES—*contd.*

2. SUMMONING AND ATTENDANCE OF WITNESSES—*contd.*

Code of Civil Procedure (Act XIV of 1882), parties are entitled to summonses for their witnesses at any time before the final hearing, but if there has been delay and want of diligence in consequence of which witnesses, not having been served in good time, are not present, the Court may properly refuse to adjourn the hearing. KAJI AHMED *v.* KAJI MAHAMAD . . . . I. L. R. 9 Bom. 308

22. ——— Power to dismiss suit—*Dismissal of suit on ground of there not being time after filing of list to summon witnesses—Civil Procedure Code, 1859, s. 149 ; 1877, s. 159.* The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff on the 17th of March, and the defendant on the 19th filed their list of witnesses to be summoned. Both lists were ordered merely to be put up with the record. When the suits came on for hearing, it was dismissed on the ground that, when the plaintiff filed his list, there was not sufficient time left to summon the witnesses. *Held*, that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been absolutely impossible to secure the attendance of the witnesses had the summonses been granted on the 17th instant. S. 149 of Act VIII of 1859, and s. 159 of Act X of 1877, discussed. RAJENDRO NARAIN NEOGI *v.* KUMUD NARAIN BHUP 3 C. L. R. 569

23. ——— Issue of fresh subpœnas to witnesses—*Re-hearing of ex parte case under s. 119, Civil Procedure Code, 1859. Quœre :* Where, either under s. 119, Code of Civil Procedure, or in the exercise of a power of review, a suit is restored to its original position, is the plaintiff bound to obtain and issue fresh subpœnas ? BISHEN PERKASH SINGH *v.* RUTTUN GEER CHELA. 20 W. R. 3

24. ——— Service of subpœnas—*Liability for non-service.* After a list of witnesses has been filed and the tulubana paid, the Court's officers, not the applicant, are responsible for the service and return of notice. MUSSITEE KHANUM *v.* HOOKOOM BIBEE . . . 15 W. R. 88

25. ——— Form of summons—*Omission to state place of attendance.* A summons should state the place of attendance. ANONYMOUS 7 Mad. Ap. 14

ANONYMOUS . . . 7 Mad. Ap. 43

See s. 163, Civil Procedure Code, 1882.

26. ——— Summoning public officer as a witness. In fixing the time for the attendance of a public officer as a witness, or in granting an adjournment for that purpose, the fullest consideration must be given to the exigencies of the public duties of the officer summoned. ANONYMOUS 6 Mad. Ap. 6

27. ——— Issue of warrant on non-attendance of witness—*Warrant of arrest for witnesses not attending—Verbal order to attend.* A verbal order of the Court to witnesses requiring them to attend on a future day would not justify the issuing of a warrant for the apprehension of such witnesses in case they failed to attend in obedience to such verbal order. VENKATAPPAH *v.* PAPAMMAH . . . . . 5 Mad. 132.

ANONYMOUS . . . 6 Mad. Ap. 10

See, however, ANONYMOUS . 5 Mad. Ap. 15

28. ——— Postponement—*Direction of Court—Adjournment for production of witnesses—Irregularity or error affecting merits—Code of Civil Procedure (Act XIV of 1882), s. 578.* The question of the proper exercise of discretion of lower Courts to grant time to parties to produce further evidence, discussed. SURJYAMONI DASI *v.* KALI KANTA DAS (1900) . I. L. R. 28 Calc. 37 s.c. 5 C. W. N. 195

29. ——— *Civil Procedure Code (Act XIV of 1882), s. 162—Summons forms Nos. 125, 126—Summons to witness—Postponement of hearing of case—Necessity for issuing fresh summons—Practice.* When a witness has been summoned to give evidence in a case which is not reached, it is not necessary to issue a fresh summons to the witness. He need only be warned that his attendance will be required on the day to which the hearing of the case may be postponed. SUBBARAYADU *v.* CHENCHURAMAYYA (1900) I. L. R. 24 Mad. 200

3. EXPENSES OF WITNESSES.

1. ——— Right to be paid expenses—*Omission to apply for expenses before giving evidence.* A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has not applied for them before giving his evidence. LONDON, BOMBAY, AND MEDITERRANEAN BANK *v.* MAHOMED IBRAHIM PARKAR . I. L. R. 4 Bom. 619

2. ——— *Suitable expenses—Persons of rank and wealth.* People of rank and wealth, when summoned as witnesses to a distance from their place of residence, are entitled to travelling and other expenses suitable to their circumstances. CHUNDER SEKHUR DEB *v.* JADUB CHUNDER SETT . . . . 19 W. R. 78

3. ——— Payment of expenses into Court—*Civil Procedure Code, 1859, s. 151.* Under s. 151, Act VIII of 1859 (extended to Revenue Courts by s. 67, Act X of 1859), the defendant was not bound to pay into Court the costs of summoning and defraying the expenses of the witnesses, until the Court had fixed what was reasonable. MOHUN MUNDUR *v.* BRIJ BHOOKUN SINGH . 9 W. R. 128

4. ——— Power to order evidence to be taken—*Omission to tender expenses—Evidence of tender of expenses.* Where there was no proof that a defaulting witness's expenses were

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WITNESS—CIVIL CASES—*contd.*

3. EXPENSES OF WITNESSES—*concld.*

tendered to him by the party at whose instance he was summoned, the Court on appeal declined to order that witness's evidence to be taken or to take it itself. ISHEN CHUNDER SEN *v.* ONATH NATH DEB. COWELL *v.* ISHEN CHUNDER SEN . **18 W. R. 16**

5. ——— **Amount of expenses**—*Compensation for loss of time.* Act VIII of 1859 made no provision for compensation to witnesses for loss of time. NAWAB NAZIM OF BENGAL *v.* PROSONO NARAIN DEB . . . . **2 Hyde 236**

6. ——— **Provision for expenses**—*Suit for expenses—Cause of action.* No action for the expenses of a witness will lie. Explanation of the manner of providing for the payment of such expenses. DE SARAN *v.* HURRISH CHUNDER BISWAS **5 W. R. S. C. C. Ref. 6**

7. ——— **Expenses for attendance in Court**—*Application in Chambers—High Court, Rule 195.* A witness, who attends the Court on a subpœna, is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpœna, even though he only gives evidence as a witness for a party to the suit other than the party summoning him. *In re* BULLOCK (1904) . . **I. L. R. 28 Bom. 647**

4. DEFAULTING WITNESSES.

1. ——— **Non-attendance of witnesses on summons**—*Duty of parties—Commission.* When witnesses do not appear after service of summons, it is the duty of the party requiring their evidence, and not of the Court, to move for further measures to be taken to secure their attendance; and when a commission is issued for the examination of witnesses, the Court must be moved to wait for the return. NUND MOHUN CHOWDHRY *v.* GOLUCK NATH NEOGEE . . **11 W. R. 99**

2. ——— *Duty of parties—Issue of attachment—Civil Procedure Code, 1859, s. 168.* Where witnesses do not appear on summons, it is for the parties to move the Court, not for the Court to proceed, *suo motu*, to further the production of the witnesses, though the Court may issue attachment under s. 168, Code of Civil Procedure, if it is shown that the witnesses are absconding or keeping out of the way. BACHMAN *v.* LALL BEHAREE PANDEY **13 W. R. 324**

3. ——— *Civil Procedure Code, 1882, s. 174—Non-attendance of witness in obedience to a summons—Warrant of arrest—Non-payment of expenses in accordance with s. 160, Civil Procedure Code.* There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who, having been summoned, has failed to attend, when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender, by the person at whose instance the summons had been issued, of the necessary expenses

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4. DEFAULTING WITNESSES—*contd.*

of such witness as specified in s. 160 of the Code of Civil Procedure. TODAR MAL *v.* SAID MUHAMMAD **I. L. R. 17 All. 277**

4. ——— **Order for arrest of witness**—*Civil Procedure Code, 1859, s. 168—Proceedings against witnesses absent who have been summoned.* Where a lower Appellate Court, by the terms of its order on a petition for the apprehension of witnesses, under s. 168, Code of Civil Procedure, undertook to see that proper orders should be passed, it was bound to pass such orders as might, in its judicial discretion, be necessary under that section. MOHADEB SHAHA *v.* SHEO SUHOY GEER **9 W. R. 359**

5. ——— *Witness making default in appearing—Civil Procedure Code, 1859, s. 168—Ground for issue of warrant.* S. 168 of the Civil Procedure Code required that there should appear to the Court to be satisfactory ground for believing that the default on the part of witnesses summoned to give evidence was without lawful excuse before issuing a warrant for the arrest of such witnesses. But it was not necessary for this purpose to institute a formal investigation and come to a determination on the evidence adduced. PERIYANNA CHETTY *v.* GOVINDA GOUNDEN **5 Mad. 104**

6. ——— **Issue of proclamation against absent witness**—*Materiality of evidence—Ground for non-attendance.* A Court was *held* to be not bound to issue a proclamation against absent witnesses in a case where it was not satisfied that the witnesses were material, or that they had really absconded to avoid attendance. BHOOBUN MOYEE DOSSEE *v.* KISHOREE DOSSEE **6 W. R. 235**

7. ——— **Application for process against absconding witness**—*Ground for not granting application—Civil Procedure Code, 1859, ss. 159, 168.* On application being made under ss. 159 and 168 of Act VIII of 1859 for issue of process against an absconding witness, the Court, if satisfied (as it was bound to be) that the witness had absconded and that he was a material witness, ought to grant the application unless the applicant had placed himself in such a position by his conduct that it would be inequitable to grant it. RAJOO SINGH *v.* LALLA BALGOBIND LAL **1 W. R. 26**

8. ——— **Notice of proclamation**—*Civil Procedure Code, 1859, ss. 159 and 168—Service of proclamation.* The proclamation issuable under s. 159, Act VIII of 1859, could not be legally affixed to the mal cutchery of a defaulting witness. Before the provisions of that section can come into play, personal service of summons must be attempted. In the absence of process of legal service, the Magistrate's order of imprisonment for contempt, under s. 174 of the Penal Code and s. 168 of the Code of Criminal Procedure, was quashed. QUEEN *v.* HURYNATH CHOWDHRY **7 W. R. Cr. 58**

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WITNESS—CIVIL CASES—*contd.*

4. DEFAULTING WITNESSES—*contd.*

9. ——— **Discretion of Court to issue of proclamation**—*Proclamation against absent witness—Civil Procedure Code, 1859, s. 159.* S. 159, Code of Civil Procedure, gives a Civil Court a discretion as to the issue of proclamation and subsequent orders for attachment; but such Court is bound to exercise a reasonable discretion. PORAN CHUNDER GHOSE *v.* GOPEE NATH SINGH **8 W. R. 505**

10. ——— *Ground for issue of proclamation—Civil Procedure Code, 1859, s. 159.* A Court was not authorised to issue the proclamation and attachment mentioned in s. 159, Code of Civil Procedure, unless it was proved to its satisfaction that the evidence of the witness was material and that he was avoiding the summons; and after these circumstances have been shown, it was a matter of discretion to issue the proclamation and attachment, and after issue to let the case stand over. KALEE DASS CHUCKERBUTTY *v.* ESHAN CHUNDER CHATTERJEE **13 W. R. 416**

11. ——— **Production of document**—*Civil Procedure Code, 1882, s. 174—Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Penal Code (Act XLV of 1860), s. 175—Criminal Procedure Code (Act X of 1882), s. 480.* A witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the document, stating on oath that it was not in his possession. But this statement was disbelieved, and the Court fined him R75 under s. 174 of the Code of Civil Procedure. *Held*, that the fine was illegally levied. The jurisdiction of the Court to punish under s. 174 of the Civil Procedure Code exists only in the case of a witness who, not having attended on summons, has been arrested and brought before the Court. The case of a witness who having a document will not produce it is provided for by s. 175 of the Penal Code and s. 480 of the Code of Criminal Procedure. *In re* PREMCHAND DOWLATRAM **I. L. R. 12 Bom. 63**

12. ——— **Service of subpœna**—*Civil Procedure Code (Act XIV of 1882), ss. 80, 174—Failure to attend—Fine.* S. 174 of the Code of Civil Procedure is a section of a highly penal nature, and its provisions, in order to give validity to anything purporting to be done under them, must be strictly complied with. Where the return of the peon of the service of a summons upon a witness was in these terms: "The remaining witness No. 1 being in Calcutta, the copy of summons in his name has been hung upon the mat wall of the cutchery house of the defendant's residence:—*Held*, that the circumstance that the peon could not find the witness when he says he knew where the witness was, is not sufficient *per se* to warrant the peon in affixing a copy of the summons to the house of the witness, so as to constitute good substituted service under s. 80, Civil Procedure Code. That

WITNESS—CIVIL CASES—*contd.*

4. DEFAULTING WITNESSES—*concld.*

under s. 174, Civil Procedure Code, a witness who has failed to appear on his summons can only be fined after he has been arrested and brought before the Court. Where a witness was served as above and he applied for a time to appear:—*Held*, that the fact of his applying for time would not preclude him from saying that there had been no such service of the summons as could warrant s. 174, Civil Procedure Code, being put into force against him. KALI NARAIN ROY CHOWDHURI *v.* BAJOO **3 C. W. N. 307**

13. ——— **Ground for postponement of case**—*Application for process against absent witness made at late stage of case—Civil Procedure Code, 1859, s. 159.* Where an application was made at a very late stage of a case to enforce the provisions of s. 159 of the Code of the Civil Procedure, without proffer of any proof that the witness was absconding or keeping out of the way for the purpose of avoiding the service of the summons, the lower Appellate Court was *held* to have been justified in not postponing the case to secure the attendance of the witness, although material. AJOODHYA DOSS *v.* MISRUN **15 W. R. 176**

14. ——— **Fine for avoiding service of summons**—*Act XIX of 1853, s. 28—Act X of 1861.* S. 28 of Act XIX of 1853 having been repealed by Act X of 1861, a Judge had no jurisdiction, under Act VIII of 1859, to inflict a fine for the purpose of punishing a witness who absconded, or kept out of the way, to avoid service of summons. *In re* GAJADHAR PRASAD NARAYAN SINGH **1 B. L. R. A. C. 186**

GUJADHUR PERSHAD NARAIN SINGH *v.* JUGDEO NARAIN . . . . **10 W. R. 233**

5. SWEARING OR AFFIRMATION OF WITNESSES.

1. ——— **Objection to take oath**—*Member of Church of England—Stat. 17 & 18 Vict., c. 125.* A member of the Church of England is not exempt by law from taking an oath in a Court of justice in India, although he may entertain sincere objections against taking an oath on the Bible, and is willing to make an affirmation binding upon his conscience. The English Stat. 17 & 18 Vict., c. 125, does not apply to India. VALU MUDALI *v.* SOWERBY . . . **2 Mad. 246**

2. ——— Where a Mahomedan witness stated that he had no objection to oaths in general, but that he was suffering from a disease which disqualified him from taking an oath on the Koran until purification:—*Held*, that the witness must be sworn in the regular way or not at all. ANONYMOUS . **1 Mad. 99 note**

3. ——— **Refusal to examine witnesses**—*Dismissal of suit by first Court without examining defendant's witnesses—Reversal of decree on appeal—Duty of Appellate Court to direct*

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WITNESS—CIVIL CASES—*contd.*

5. SWEARING OR AFFIRMATION OF WITNESSES—*concld.*

examination of witnesses before reversing decree. Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower Appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal :—*Held*, that, before doing so, the lower Appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants. The Court directed the first Court to examine the defendants' witnesses, and, having done so, to return their depositions to the lower Appellate Court, which was to replace the appeal upon its file and dispose of it. KHUDA BUKHSH *v.* IMAM ALI SHAH
I. L. R. 9 All. 339

6. EXAMINATION OF WITNESSES.

(*a*) GENERALLY.

1. _____ Selection of witness—*Duty of parties.* It is not the business of a Court to determine what witnesses shall be examined. The parties must select their own witnesses, and call upon the Court to examine such of them as they may offer for examination, and it is their own fault if they do not take the necessary steps to have the witnesses examined, or to compel them to be present for examination at the proper time. MORNO MOYEE DEBEE *v.* BHEEM KOOMAR CHOWDHRY
6 W. R 231

DEEN DYAL SINGH *v.* DANEE ROY
13 W. R. 185

2. _____ Right to have witnesses examined—*Ground for refusing to hear witness—Opinion of Court as to materiality of evidence.* Every party to a suit is entitled to have all the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given. LOOLOO SINGH *v.* RAJENDUR LAHA
8 W. R. 364

PORAN CHUNDER GHOSE *v.* GOPEENATH SINGH
8 W. R. 505

CHOWDHRY KHOORGO ROY *v.* SHIB TOHUL ROY
17 W. R. 172

3. _____ *Ground of special appeal—Omission of Court to examine witness.* As a general rule, all the witnesses brought forward by a party ought to be examined. But when an objection is made in special appeal that the Judge below has omitted to examine certain witnesses, it ought to be shown that the evidence of

WITNESS—CIVIL CASES—*contd.*

6. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

those witnesses would have been material to the case. NILKANTH SURMAH *v.* SOOSELA DEBIA
6 W. R. 324

4. _____ Want of opportunity to adduce evidence, proof of—*Tender and rejection of witness.* In order to establish such a plea as that he was not allowed an opportunity to adduce evidence, a party must show that he tendered witnesses or other evidence, and that his tender was rejected on the ground alleged. BUKSH ALI SOWDAGUR *v.* JOYANUT KHAN . 11 W. R. 248

CHUNDER NATH SEIN *v.* ANUNDMOYEE DOSSEE
11 W. R. 289

QUEEN *v.* TOTARAM . 11 W. R. Cr. 15

5. _____ Refusal to examine witness—*Ground for refusal—Omission from list of witnesses.* The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced at the proper time. RAKHAL DOSS MUNDUL *v.* PROTAP CHUNDER HAZRAH . . . 12 W. R. 455

6. _____ *Refusal of verbal request of vakil—Ground of special appeal.* Where a lower Appellate Court's refusal to examine witnesses in a suit for damages for assault is made a ground of special appeal, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakil to examine the witnesses was refused by the Judge. RAMESSUR BHUTTACHARJEE *v.* SHIB NARAIN CHUCKERBUTTY . . 14 W. R. 419

7. _____ *Additional witnesses to facts already in evidence—Tender of large number of witnesses—Ground for remand.* In a suit for possession of zamindari and other estates claimed by the plaintiff as son and heir of the deceased zamindar, the defendants denied the title of the plaintiff, alleging that he was a spurious and suppositious child and tendered fifty-eight witnesses to prove that fact. The Zillah Court, having taken the depositions of thirty of these witnesses, refused to permit the remaining twenty-eight to be examined, on the ground that, as they were going to prove the facts deposed to by those already examined, it was unnecessary to take their depositions, and ultimately decided in favour of the plaintiff. The defendants appealed to the Sudder Court, which refused to examine the witnesses rejected by the Zillah Court, and affirmed the decree of that Court. On appeal to Her Majesty in Council, the Judicial Committee remitted the case back to the Sudder Court, being of opinion that the refusal by that Court to permit the examination of the witnesses tendered was irregular, and that no decision could be come to upon the merits under such circumstances. JESWUNT SINGJEE UBBY SINGJEE *v.* JET SINGJEE UBBY SINGJEE . . 2 Moo. I. A. 424

8. _____ *Ground for remand.* A lower Court having allowed some of the

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WITNESS—CIVIL CASES—*contd.*

6. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

witnesses of the plaintiff to depart without taking their evidence, the plaintiff objected to its taking the evidence of more of the defendant's witnesses than of his own. Upon this the Court allowed some of the defendant's witnesses to leave the Court without examining them. The case, on coming up to the High Court, was remanded for examination of all the remaining witnesses and a fresh decision. GOPEE OJHA *v.* HUR GOBIND SINGH . . . . . 12 W. R. 229

9. ———— *Application to re-examine after consent to allow evidence in one suit to be evidence in others.* Five suits having been brought to recover a balance of accounts from defendants, who were alleged to be partners of a trading concern, and as such liable, certain witnesses were examined in four of the cases in which the plaintiff in one of the suits was not a party, and at his request the evidence taken in those cases was allowed to be used as evidence in his case, and then the witnesses were discharged. Two days after this he applied to have the witnesses re-examined, giving no reason for his application, which was refused. *Held*, that the refusal was justified in the absence of any new reason for the re-examination. SREENATH ROY *v.* GOLUCK CHUNDER SEIN . . . 15 W. R. 348

10. ———— Death before delivering legal judgment—*Obligation to hear witnesses again—Consent of parties.* A suit was dismissed by a Deputy Collector, who dies before recording a legal judgment, whereupon it was made over by the lower Appellate Court for trial to the deceased officer's successor, who decided the case in favour of the plaintiff upon the evidence as it stood on the record without any objection by either party. *Held*, that it was not the duty of the second Deputy Collector to remand the witnesses or to take additional evidence unless requested to do so by the parties. GOUR CHUNDER SEN *v.* MANICK RAM 13 W. R. 76

11. ———— Recall of witness—*Witness for plaintiff recalled for defendant—Leave of Court.* When a witness has been examined on behalf of the plaintiff, he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination. MACKINTOSH *v.* NOBINMONEY DOSSEE . 2 Ind. Jur. N. S. 160

12. ———— Examination of witness by Appellate Court. Courts should in all cases exercise the powers with which they have been entrusted by the law in the examination of witnesses, if they see that they are not properly examined through the incompetency of those who have the management of the suits. If the Munsif fails to take proper evidence, the Appellate Court should not decide the case on such evidence as there is, but having the power to call for further evidence under s. 355, Act VIII of 1859, it should

WITNESS—CIVIL CASES—*contd.*

6. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

take proper means for making the evidence complete. RAMGATI *v.* IMITARI BANEE 1 B. L. R. S. N. 20 10 W. R. 280

13. ———— Mode of taking evidence. Observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, and in which it was taken in this case. PHUL KUAR *v.* SURJAN PANDEY I. L. R. 4 All. 249

14. ———— Irregularity in examination of witness—*Witness for plaintiff examined in absence of defendant or his pleaders—Irregularity—Objection not taken in time—Evidence Act, s. 167.* The examination of a material witness of the plaintiff, in the absence of the defendant, his vakil having been removed, and no other vakil then acting for him, is such an irregularity as, if objected to at the proper time, would be fatal to the reception of such evidence. But where no objection was urged during the trial, or until an appeal was interposed, the Judicial Committee *held* that the objection came too late and could not be sustained, as, notwithstanding such irregularity and miscarriage, that fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case. But although the other evidence rendered the evidence improperly admitted immaterial, the Judicial Committee, as there had been an irregularity in the Court below in affirming the judgment, refused to give the costs of the appeal. BOMMARAUZE BAHADUR *v.* RANGASAMY MUDALY . . . 8 Moo. I. A. 232

15. ———— *Evidence given without cross-examination and without opportunity of cross-examination.* Evidence given when a party never had the opportunity either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he consents that it should be so used. GORACHAND SIRCAR *v.* RAM NARAIN CHOWDHRY . . . 9 W. R. 587

16. ———— Evidence to contradict witness—*Contradiction of witness to collateral questions—Right to call evidence to contradict.* The rule limiting the right to call evidence to contradict witnesses on collateral questions excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence. GULAM ALLI BIN KAZI ISMAIL *v.* AGA KHAN . . . . 6 Bom. O. C. 93

17. ———— Evidence of experts—*Proof of signatures.* In a suit for arrears of rent for 1273 at an enhanced rate, plaintiff relied upon an agreement said to have been executed by defendant in

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WITNESS—CIVIL CASES—*contd.*

6. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*concld.*

that year. The Assistant Collector found that the agreement had not been executed by defendant. On appeal, the Judge called an expert who proved that the signatures of the attesting witnesses were not all genuine, and the decision of the Assistant Collector was affirmed. *Held*, that the Judge was wrong in calling for and acting upon the evidence of the expert. BINDESSUREE DUTT SINGH *v.* DOMA SINGH . . . . . 9 W. R. 88

18. ——— **Consent to be bound by particular witness**—*Evidence not legally admissible.* An *a priori* consent to abide by the testimony of a certain witness cannot bind the consenting party to hersay testimony, but only to such evidence as is legally admissible, *i.e.*, evidence as to such facts as the witness can directly speak to. LUCKEEMONEE DOSSEE *v.* SHUNKURREE DOSSEE 2 W. R. 252

MUNNOO SINGH *v.* AMRUT LALL . 5 W. R. 234

19. ——— *Witness sworn in particular manner.* Where the plaintiff rested her claim solely on the deposition of the defendant to be taken by his placing his hand on a particular text of the Koran, and the defendant, not being examined in that way but in the usual way, did not prove the claim:—*Held*, that the Court was not right in allowing the plaintiff to examine further witnesses and to re-open her case. MAHOMED SALEH *v.* MURIAMOONISSA . 10 W. R. 284

20. ——— *Plaintiff agreeing to be bound by defendant's evidence—Statements obviously untrue.* Where the defendant on examination makes statements which amount to nothing and are manifestly untrue, the plaintiff cannot be bound by them, even though he had agreed to be bound by what the defendant said. GOOROODOSS ROY *v.* GREEDHUR SEIN . . 11 W. R. 110

21. ——— *Subsequent refusal—Duty of Court.* Where a defendant, after asking the lower Appellate Court to summon plaintiff as a witness, and consenting to abide by his deposition, had again petitioned the Court that the plaintiff should not be examined. *Held*, that defendant should not have been bound solely and absolutely by the plaintiff's deposition, but that the other evidence on the record should also have been considered. JUGDEO SINGH *v.* MOLAZIM HOSSEIN 13 W. R 108

(*b*) CROSS-EXAMINATION.

22. ——— **Right to cross-examine**—*Witness called by the Court.* A witness called by the Court is liable to be cross-examined by any of the parties to a suit. TARINI CHARAN CHOWDHRY *v.* SARODA SUNDARI DASI 3 B. L. R. A. C. 145 : 11 W. R. 468

23. ——— *Witness called by Court.* A party summoned by the Court to give

WITNESS—CIVIL CASES—*contd.*

6. EXAMINATION OF WITNESSES—*contd.*

(*b*) CROSS-EXAMINATION—*contd.*

evidence is not only required to give answers to the questions put to him by the Court, but the opposite party has a right to cross-examine him. The statement of any person examined is not admissible unless the opposite party has had the opportunity of cross-examining him. GOOROODOSS ROY *v.* GREEDHUR SEIN . . 11 W. R. 110

SHURFURAZ MOLLAH *v.* DHUNOO . 16 W. R. 257

24. ——— *Co-defendant separately represented.* One co-defendant, whose interests are separately represented, may cross-examine another. NARASIMMA *v.* KISTNAMA 1 Mad. 456

25. ——— *Recall of witnesses—Omission to give opportunity for cross-examination.* A Court of first instance decreed a case *ex parte* in favour of the plaintiff, and at a re-hearing did not recall the plaintiff's witnesses, whom, therefore, the defendant had no opportunity to cross-examine, and again gave a decree for the plaintiff. The lower Appellate Court rejected the evidence of plaintiff's witnesses, and reversed the decree. *Held*, that the Court of first instance should have recalled the plaintiff's witnesses, and given the defendant an opportunity of cross-examination. RAM BAKS LALL *v.* KISHORI MOHAN SHAHA 3 B. L. R. A. C. 273 : 12 W. R. 130

26. ——— *Refusal to allow cross-examination—Act VIII of 1859, s. 170.* A defendant failed to appear when ordered to attend under s. 170, Act VIII of 1859. The Judge did not at once pass judgment against him, but called the plaintiff's witnesses, and refused to allow the defendant's vakil, who was present, to cross-examine them. *Held*, that the Judge ought to have allowed the defendant's vakil to cross-examine the plaintiff's witnesses. PAKAKTAR *v.* JAKRIRAM BHAKAT 2 B. L. R. Ap. 12

27. ——— **Refusal of witness to answer questions on cross-examination**—*Civil Procedure Code, 1859, s. 169—"Lawful excuse."* A party to a suit tendering himself as a witness, and declining without lawful excuse to answer questions put on cross-examination, was liable to be dealt with under s. 169 of the Civil Procedure Code. "Without lawful excuse" means such an excuse as would in law justify the refusal to give evidence. LEKH RAJ *v.* PALEE RAM 1 N. W. 162 : Ed. 1873, 241

28. ——— **Cross-examination to credit**—*Opinion formed as to credit of witness by another Judge in another case inadmissible.* Evidence of the particular estimate formed by a Judge in another case of the credit to be attached to the testimony of a witness who is cross-examined in a subsequent trial is inadmissible. *In the matter of* PASUMARTY JUGGAPPA . 4 C. W. N. 684

29. ——— **Witness proving hostile**—*Refusal by Court of permission to cross-*

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WITNESS—CIVIL CASES—*contd.*

6. EXAMINATION OF WITNESSES—*concld.*

(*b*) CROSS-EXAMINATION—*concld.*

examine, effect of. Where one's own witness unexpectedly makes statements adverse to his interest, it is common fairness that the Judge should permit such statements to be tested by cross-examination, if the evidence is to be relied upon ; and if cross-examination be disallowed the evidence is of no value. KALAGURLA SURYANARAYANA *v.* YARLAGADDA NAIDOO (P.C., 1902) . **6 C. W. N. 513**

7. CONSIDERATION AND WEIGHT OF EVIDENCE.

1. ——— **Credibility of witnesses**—*Power to set aside decision on evidence.* The credibility of witnesses is a matter altogether for the Court of first instance and the Court which hears a regular appeal ; and if these Courts are satisfied that the witnesses are not to be believed, their decision cannot be set aside by the High Court on special appeal, even though upon a general view of the case it should think that, if it had tried the case originally, it might have come to a different conclusion. GOUREE PERSHAD KOONDOO *v.* PRANNATH SURMAH . . . **10 W. R. 365**

2. ——— *Mode of testing credibility—Several witnesses to same facts.* In examining evidence with a view to test whether several witnesses who bear testimony to the same facts are worthy of credit, it is important to see whether they give their evidence in the same words, or whether they subtantially agree, not, indeed, concurring in all the minute particulars of what passed, but with that agreement in substance, and that variation in unimportant details, which are usually found in witnesses intending to speak the truth, and not tutored to tell a particular story. NANA NARAIN RAO *v.* HARREE PUNTH BHAO **Marsh. 436 : 9 Moo. I. A. 96**

3. ——— *Witnesses called to support case giving evidence contrary to it.* A party who calls a witness to give evidence on his behalf is not necessarily bound by his evidence ; but if the evidence is at variance with the truth of his case (*e.g.*, if a witness called to prove execution of a document swears that it was not executed and has the means of knowing the fact), it throws a suspicion on the case which renders the clearest testimony necessary to establish its truth. FUZEELUN BEEBEE *v.* OMDAH BEEBEE **10 W. R. 469**

4. ——— *Credit on other matters of witnesses supporting a false case.* Although it does not necessarily follow that where a witness gives evidence on a particular fact in a case and that fact is found against his evidence, he is to be entirely disbelieved on the other parts of the case he has spoken to, yet where witnesses who were not merely giving an opinion upon an isolated fact in the case, but came into Court to prove the whole case made by the plaintiffs, and that a very

WITNESS—CIVIL CASES—*contd.*

7. CONSIDERATION AND WEIGHT OF EVIDENCE—*contd.*

special case and it is shown to be a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the case. HABEEBOOLLAH *v.* GOUHUR ALLY KHAN . . . . **18 W. R. P. C. 523**

5. ——— **Ground for refusal to consider evidence**—*Non-production of best evidence.* The principle that a plaintiff is bound to produce the best evidence in his power was *held* not to justify a Judge in omitting to consider the weight and legal effect of the remaining witnesses, when plaintiff had failed to produce the most important witness. LATORE MISTREE *v.* AGAMUDDEE NUSHYO **14 W. R. 482**

6. ——— **Mode of weighing evidence**—*Considerations of motives for bringing a suit.* Where the evidence in support of a case is doubtful, the Court, in weighing that evidence, may properly take into consideration the motives imputed to the plaintiff as having induced him to sue. BIRCH *v.* FURZIND ALI . **3 N. W. 303**

7. ——— **Estimating value of evidence**—*Witness swearing affirmatively to fact.* In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not. CHOWDHRY DEBY PERSAD *v.* CHOWDHRY DOWLUT SINGH **6 W. R. P. C. 55 : 3 Moo. I. A. 347**

8. ——— *Credit of witness, a servant or dependent of plaintiff.* The circumstance of a witness being a servant or a dependent of the plaintiff does not of itself disentitle him to credit. SHOOBUL CHUNDER KULLEAH *v.* KOYLASH CHUNDER MAL . . . . **14 W. R. 23**

9. ——— *Rejection of evidence unnecessarily and unjustifiably. Held,* by NORMAN, *J.*, that the Judge was not at liberty to reject, as matters which he could wholly leave out of consideration, any of the evidence before him in a case where the witnesses were unimpeached in their general character and uncontradicted by any testimony on the other side, and where there was no improbability in the facts which they related, and that the probative force arising from concurrent testimony was the compound ratio of the probabilities of the testimonies taken singly. RADHA KANT DEB *v.* KHEMA DOSSEE **7 W. R. 105**

10. ——— *Evidence of witnesses found unreliable in criminal case.* A Judge was *held* to have done wrong in throwing out the evidence of witnesses tendered by the defendant in a civil action, merely because they have been found untrustworthy when examined with reference to a charge of breach of trust against the same defendant in a criminal case. LALL CHAND ROY *v.* BRINDABUN CHUNDER ROY . **13 W. R. 226**

11. ——— *Evidence, weight of—Witness, evidence of, part of which is*

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WITNESS—CIVIL CASES—*contd.*

7. CONSIDERATION AND WEIGHT OF EVIDENCE—*contd.*

disbelieved, value of. If a part of the evidence of a witness is disbelieved, other evidence coming from the same quarter must be viewed warily, but that does not exonerate the Court from weighing whatever evidence has actually been tendered and the mode in which it has been met. RAMESWAR KOER *v.* BHARAT PERSHAD SAHI . **4 C. W. N. 18**

12. ——— *Evidence of person who has been convicted of perjury or other offence.* The evidence of a person who has been punished for perjury or of a person who has been convicted of a criminal offence can hardly be entitled to the credit that would be given to the testimony of a person against whom no such imputation can be brought. DOONGUN RAI v. DOORGA RAI. **2 N. W. 97**

13. ——— *Evidence of truth of witness.* The observation that the evidence of a witness proves too much is not rebutted by the suggestion that it cannot be supposed that the witness was suborned, for, if he was possessed of common shrewdness, he would not have overdone the thing and then have given rise to such an objection. SOORIAH ROW *v.* COTAGHERY BOOCHIAH **5 W. R. P. C. 127 : 2 Moo. I. A. 113**

14. ——— *Credibility of witnesses—Professional witness—Witnesses in former cases.* The Privy Council, referring to the generality of the Principal Sudder Ameen's observations as to certain witnesses having given evidence in other cases, observed that, though it was a legitimate objection to a man's credit that he was a professional witness, yet to state broadly and generally that a witness has given evidence in other cases, and therefore became unworthy of credit, could only tend to increase the indisposition of respectable persons to come into Court as witnesses, which was one of the social evils of India. LALL BEHAREE LALL *v.* GOPEE BEEBEE **18 W. R. P. C. 285**

15. ——— *Discrepancies in statements of witnesses.* Discrepancies in an account of what took place in a conversation are not a sufficient ground for disbelieving statements made by different witnesses. BHAJU SING *v.* KAIFNATH TEWARI . . . **3 B. L. R. A. C. 332**

16. ——— *Ground for discrediting witness.* A bare allegation by a defendant in his written statement, without any proof in support of it, that a certain person is his inveterate enemy, is not sufficient to discredit that person's testimony. KASHINATH SHAHA *v.* DWARKANATH SIRKAR . . **9 B. L. R. 215 : 17 W. R. 550**

17. ——— *Findings of fact by first Court, upset by Appellate Court—Credibility of witnesses—Witness proving hostile ; refusal by Court of permission to cross-examine, effect of—Documentary evidence, direct and indirect, in respect of business transactions, relative value.* A case in which the Appellate Courts questioned the credibility of witnesses relied upon the Court of first instance, and upset the findings of fact of such Court upon the evidence on record. When one's own witness unexpectedly makes statements adverse to his interest, it is common fairness that the Judge should permit such statements to be tested by cross-examination, if the evidence is to be relied upon ; and if cross-examination be disallowed the evidence is of the value. *J*, a trader in Calcutta of no solvency, had obtained goods from *Y*, a trader in Madras, and dishonoured all his *hundies* except one, and transferred the goods to one *K*. *Y*, unable to obtain payment from *J*, sent down his *gomasta B* to realize the amount, and the latter, alleging non-payment on the part of *J* and fraudulent, transfer of goods to *K*, took insolvency proceedings against *J*, at which, in spite of *J's* plea of payment to *B* and evidence by him and *K* to that effect, *J* was declared an insolvent. Later on, *B* on behalf of *Y* presented a further petition for a declaration that the transfer of goods to *K* was fraudulent and void as against the Official Assignee, and praying that *K* be ordered to return the goods to him or pay the proceeds. *K*, who had hitherto not been a party, set up the *bonâ fides* of the transfer and the alleged payment by *J* to *B* in full settlement of *Y's* claim. Further evidence was given in support of the plea, and amongst other evidence documentary evidence, such as receipts, account-books and promissory notes was produced to show the transfer, receipt and endorsement and cashing of certain currency notes of large value to prove the alleged payment by *J* and settlement with *B*. *Held*, on evidence, that *K's* plea failed, and, further, as it appeared that as between *J* and other persons transactions apparently were carried on in a business-like manner, but none with *B*, although he had taken insolvency proceedings against *J*, and, as no settlement of claim in writing, no receipts of alleged payments to *B* or endorsement by him on the currency notes alleged to have been changed by him was forthcoming, the story of *K* was all the more incredible. KALAGURLA SURYANARAYANA *v.* YARLAGADDA NAIDOO 1902) . . . . . **6 C. W. N. 513**

8. PRIVILEGES OF WITNESSES.

1. ——— **Exemption from appearance in Court**—*Natives of rank, prejudices of, to appear in Court.* The prejudices of natives of rank to appear as witnesses in a Court of justice will not be allowed to relax the rule that the best evidence must be produced of which the case is susceptible. RAM MOHUN MOOKERJEE *v.* NURSING DEB. **1 Ind. Jur. O. S. 63 : W. R. F. B. 54**

NURSING DEB *v.* RAM MOHUN MOOKERJEE. **Marsh. 176 ; 1 Hay 379**

See MANICKRAM *v.* RAMYAD RAM. **2 W. R. 63**

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WITNESS—CIVIL CASES—*contd.*

8. PRIVILEGES OF WITNESSES—*contd.*

RADHA KISTO SINGH DEO *v.* GUDADHUR BANERJEE . . . . . 8 W. R. 453

KALEE CHUNDER CHOWDHRY *v.* SURUT SOONDUREE DEBIA . . . 18 W. R. 45

2. ——— **Exemption from suit in respect of evidence**—*Action for damages—False evidence.* Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury. GUNESH DUTT SINGH *v.* MUGNEERAM CHOWDHRY. 11 B. L. R. P. C., 321 : 17 W. R. 283

3. ——— **Right of suit**— *Slander—Slander uttered by witness whilst under examination in a judicial proceeding.* A witness in a Court of justice is absolutely privileged as to anything he may say as a witness having reference to the enquiry on which he is called as a witness. The plaintiff sued to recover damages for slander, the statement complained of being alleged in the plaint to have been made by the defendant while being examined as a witness during the hearing of a case before a Magistrate. It was found that the statement was made in answer to questions put to the defendant as a witness and allowed by the Court as relevant to the case. The plaintiff alleged that the statement was made maliciously, that the defendant bore him a grudge, and that it was to give vent to that grudge and to injure his reputation that the statement was made. *Held*, that the plaint disclosed no cause of action, and that the suit has been properly dismissed. BHIKUMBER SINGH *v.* BECHARAM SIRCAR. BHIKUMBER SINGH *v.* GOTI KRISTO DAS . I. L. R. 15 Calc. 264

See CHIDAMBARA *v.* THIRUMANI. I. L. R. 10 Mad. 87

4. ——— **Defamation**—*Penal Code, s. 500—Statement by witness.* *M S* was convicted under s. 500 of the Penal Code of defaming *S S* by making a certain statement when under cross-examination as a witness before a Court of Criminal jurisdiction. *Held*, that the conviction was bad. The statements of witnesses are pirvileged ; if false, the remedy is by indictment for perjury, and not for defamation. MANJAYA *v.* SESHA SHETTI. I. L. R. 11 Md. 477

5. ——— *Cause of action—Verbal abuse—Special damage.* The plaintiff was cited as a witness by one *S* in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant. The defendant was examined by the Court, and stated that there was enmity between him and the plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate. *Held*, by BRODHURST, *J.* that under the circumstances the statement complained of was made by defendant while deposing in the witness-box, and therefore absolutely

WITNESS—CIVIL CASES—*concld.*

8. PRIVILEGES OF WITNESSES—*concld.*

privileged. *Per* MAHMOOD, *J.* (*contra*), that the question whether or not the statement complained of was made by defendant in course of his deposition, or after it was finished, and when he was no longer in the witness-box, had not been tried, and the order remanding the case for trial on the merits was right. Further, that the English law of slander as forming part of the law of defamation, and as such drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India ; that whilst the English law of defamation recognizes no distinction between defamation as such and personal insult in civil liability, the law of British India recognizes personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage ; that such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury, apart from defamation, and that malice is an element of liability for abusive and insulting language, and that such malice will be presumed or inferred, unless the contrary is shown ; that when the defendant is absolutely privileged and protected by reason of the office or occasion on which he employed such language, he renders himself subject to a civil liability for damage, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of ; that the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness ; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase ; and that, even where such statements have no reference to the inquiry, the defendant may prove the absence of malice, and that they were made in good faith for the public good. DAWAN SINGH *v.* MAHIP SINGH I. L. R. 10 All. 425

6. ——— *Prosecution of witness—Defamation.* A prosecution for defamation under s. 499 of the Indian Penal Code will not lie against a witness in respect of any statement made by him in the course of giving evidence even if such statement may be not relevant to the matter under inquiry. *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry, 11 B. L. R. 321,* followed. *Dawkins* v. *Lord Rokeby, L. R. 7 H. L. 744 ; Abdul Hakim* v. *Tej Chunder Mukerji, I. L. R. 3 All. 815 :* and *Isuri Prasad Snigh* v. *Umrao Singh, I. L. R. 22 All. 234,* referred to. EMPEROR *v.* GANGA PRASAD (1907) I. L. R. 29 All. 685

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1. PERSONS COMPETENT OR NOT TO BE WITNESSES.

1. ——— Judge—*Competent witness.* A Judge is a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint, acting as a public officer, provided that he has no personal or pecuniary interest in the subject of the charge and he is not precluded thereby from dealing judicially with the evidence of which his own forms a part. QUEEN *v.* MUKTA SING
4 B. L. R. A. Cr. 15 : 13 W. R. Cr. 60

See ROUSSEAU *v.* PINTO 7 W. R. 190

2. ——— Magistrate— *Evidence Act, s. 121—Power of Sessions Judge to compel Magistrate to give evidence—Privilege of witness.* A Sessions Judge finding, in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been fully complied with, summoned the committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the district objected to this proceeding of the Sessions Judge, contending that it was "contrary to law." The Sessions Judge referred the question, whether or not his proceeding was contrary to law, to the High Court. *Per* STUART, *C. J.*, PEARSON, *J.*, OLDFIELD, *J.*, and STRAIGHT, *J.* That the privilege given by s. 121 of Act I of 1872 is the privilege of the witness, *i.e.*, of the Judge or Magistrate of whom the question is asked: if he waives such privilege, or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not having been taken by the Subordinate Magistrate, but the Magistrate of the District, should be answered accordingly.

WITNESS—CRIMINAL CASES—*contd.*

1. PERSONS COMPETENT OR NOT TO BE WITNESSES—*contd.*

Per SPANKIE, *J.*—That a Sessions Judge, while trying a case, cannot compel a committing Magistrate to answer questions as to his own conduct in Court as such Magistrate. EMPRESS OF INDIA *v.* CHIDDA KHAN . . . I. L. R. 3 All. 573

3. ——— *Judge trying case—Magistrate witness of facts.* In a case in which a Deputy Magistrate took an active part in the capture of parties charged with having been members of an unlawful assembly,—parties whom he himself tried on that charge,—it was *held* that he was bound to state to the accused, so far as he could, what were the facts he himself observed, and to which he himself could bear testimony, and the prisoner in such situation had a right, if he thought it desirable, to cross-examine the Judge, whose evidence should be recorded, and form part of the record in the case. The proper course, however, for the Deputy Magistrate to have taken in this case would have been to decline to try the case, and to ask that it should be undertaken by some other Judge. *In the matter of the petition of* HURRO CHUNDER PAUL
20 W. R. Cr. 76

4 ——— *Conviction, illegality of.* A Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. *Per* MARKBY *J.*—Where in such a case he has given his evidence and convicted the accused his having so acted makes the conviction bad. *Per* PRINSEP, *J.*—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed to support the conviction. EMPRESS *v.* DONNELLY . I. L. R. 2 Calc. 405

5. ——— *Magistrate sitting on Bench in Appellate Court—Liability to be examined as witness.* It is undesirable that Magistrates, whose decisions are under appeal, or who have been engaged in promoting the prosecution as police officers concerned in a case, should sit on the Bench beside or converse privately in Court with the Judge who is engaged in trying the prisoner's appeal. If the Appellate Court wishes to ascertain any facts relating to the case from the Magistrate who convicted the accused, he should examine the Magistrate on oath or solemn affirmation in the same manner as an ordinary witness. REG. *v.* KASHINATH DINKAR . . 8 Bom. Cr. 126

6. ——— *Examination of Magistrate trying case.* Case in which the High Court permitted a Deputy Magistrate to be examined on behalf of a petitioner whose case was investigated by the Deputy Magistrate. QUEEN *v.* MUDHOOSOODUN ROY . . 16 W. R. Cr. 49

See S. 121 OF THE EVIDENCE ACT, 1872.

7. ——— Prisoner—*Tendering pardon to prisoner.* Procedure as to tendering a pardon to a

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1. PERSONS COMPETENT OR NOT TO BE WITNESSES—*contd.*

prisoner before examining him as a witness, discussed. QUEEN *v.* GAGALU.
6 B. L. R. Ap. 50 : 12 W. R. Cr. 80

8. ——— *Co-defendants, Examination of, as witnesses.* Where there is no community of interest, any one of a number of prisoners jointly indicted may be called as a witness either for or against his co-defendants. QUEEN *v.* ASHRUFF SHEIK . . . **6 W. R. Cr. 91**

9. ——— *Prisoners tried together jointly—Examination of one as witness against another.* Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other. *In the matter of* DAVID . **5 C. L. R. 574**

10. ——— **Person brought up with accused and not discharged.** A person apprehended by the Police and brought before the Magistrate with the accused is, though not discharged by the Magistrate a competent witness against the accused, provided he be not charged along with the accused. REG. *v.* NARAYAN SUNDAR.
5 Bom. Cr. 1

11. ——— **Evidence of woman on charge of adultery.** A person may call the woman with whom he is accused of having had sexual intercourse as a witness on his behalf. *In re* BECHOO . . . . **6 W. R. Cr. 92**

12. ——— **Person against whom affiliation order is sought**—*Criminal Procedure Code, 1882, s. 488—Order for maintenance.* A person against whom an order for maintenance under s. 488 of the Code of Criminal Procedure is sought is a competent witness on his own behalf in such proceedings. HIRA LAL *v.* SAHEB JAN.
I. L. R. 18 All. 107

See NUR MAHOMED *v.* BISMULLA JAN.
I. L. R. 16 Calc. 781

13. ——— **Competency of persons of tender years**—*Evidence Act s. 118.* The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into enquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established. QUEEN-EMPRESS *v.* LAL SAHAI.
I. L. R. 11 All. 183

WITNESS—CRIMINAL CASES—*contd.*

1. PERSONS COMPETENT OR NOT TO BE WITNESSES—*contd.*

14. ——— **Evidence of a witness illegally pardoned by the police**—*Evidence Act (I of 1872), s. 118—Meaning of "accused" in s. 342 of the Code of Criminal Procedure (Act X of 1882).* During the course of a police investigation into a case of house-breaking and theft, several persons were arrested, one of whom, named *H*, made certain disclosures to the police, and pointed out several houses which had been broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted. *Held*, that the evidence of *H* was admissible under s. 118 of the Evidence Act, though he had been illegally discharged by the police. *Held*, also, that by the word "accused" in s. 342 of the Code of Criminal Procedure (Act X of 1882) is meant a person over whom the Magistrate or other Court is exercising jurisdiction. QUEEN-EMPRESS *v.* MONA PUNA . **I. L. R. 16 Bom. 661**

15. ——— **Accused persons, under trial separately for a substantive offence and for abetment of that offence, competent witnesses on each other's behalf**—*Criminal Procedure Code, 1882, s. 342.* Prisoner *A* was tried for an offence under s. 403 of the Indian Penal Code and was convicted, but was sent to a Magistrate of higher powers than the convicting Magistrate to be sentenced. Whilst his case was pending before the second Magistrate, prisoner *B*, being on his trial separately for abetment of the offence for which *A* had been tried, applied for *A* to be summoned as a witness on his behalf. *B's* application was refused. *Held*, that s. 342 of the Code of Criminal Procedure was no bar under the circumstances to *A's* giving evidence for *B*, and that *B's* application ought to have been granted. QUEEN-EMPRESS *v.* TIRBENI SAHAI . . **I. L. R. 20 All. 420**

16. ——— **Accused persons who have been discharged**—*Criminal Procedure Code (Act V 1898), ss. 337 and 494—Withdrawal of prosecution—Discharge—Acquittal—Evidence—Discharged persons called as witnesses—Competent witness—Practice.* Where the Public Prosecutor, with the consent of the Court, withdrew from the prosecution of two out of several accused persons tried jointly for an offence under s. 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under s. 494 of the Criminal Procedure Code (Act V of 1898), and then examined as witnesses for the prosecution :—*Held* (WHITWORTH, J., dissenting), that the persons so discharged were competent witnesses. QUEEN EMPRESS *v.* HUSSEIN HAJI (1900).
I. L.R. 25 Bom. 422

17. ——— **Child**—*Evidence Act (I of 1872), s. 118—Evidence—Competency of witness of tender years.* In this case a Sessions Judge purposely, refrained from examining a small

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WITNESS—CRIMINAL CASES—*contd.*

1. PERSONS COMPETENT OR NOT TO BE WITNESSES—*concld.*

boy, who must, under the circumstances, have been an eye-witness to a murder. On appeal the High Court observed :—"In our opinion the learned Judge, especially considering the importance of the witness, ought not to have refrained from examining him, unless, under the words of s. 118 of the Indian Evidence Act, he considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions, by reason of tender years." QUEEN-EMPRESS *v.* RAM SEWAK (1900). **I. L. R. 23 All. 90**

18. ———— *Child witness Evidence Act (I of 1872), s. 118—Witness—Competency of—Child witness—Mode of examination—Competency to be tested before examination as to res gestæ.* Before a child of tender years is asked any question bearing on the *res gestæ*, the Court should test his capacity to understand and give rational answers and his capacity to understand the difference between truth and falsehood. The Judge must form his opinion as to the competency of a witness before his actual examination commences. SHEIKH FAKIR *v.* EMPEROR (1906) **11 C. W.N. 15.**

2. SUMMONING WITNESSES.

1. ———— **Dispensing with personal attendance of witnesses**—*Deposition—Trial before Sessions Court.* It is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with, and the evidence given by him before the committing Magistrate referred to. EMPRESS *v.* MULU . . **I. L. R. 2 All. 646**

2. ———— **Application to enforce attendance of witnesses**—*Witnesses for defence—Examination of accused.* In a case under Ch. XV, Code of Criminal Procedure, 1861, it was incumbent on the accused either to produce their witnesses or to apply beforehand for a summons to enforce the attendance of any witness who was not likely to appear without a summons ; it was not necessary in such cases to record the examination of the accused with the same formalities as in cases under Chs. XII and XIV. QUEEN *v.* CHEDEE KOONJRA . . . **14 W. R. Cr. 76**

3. ———— **Discharge of witness from attendance**—It is incumbent upon a Court when it discharges a witness from a duty of attendance before the trial is ended to ascertain from the accused whether he has, or is likely to have, any need of the witness's testimony, and if he has such need, then to take such steps for insuring the presence of the witness at the required time as may be necessary. KHURRUCKDHAREE SINGH *v.* PERSHADEE MUNDUL . . **22 W. R. Cr. 44**

4. ———— **Discretion of Court as to summoning witnesses**—*Criminal Procedure Code, 1872, s. 192—Discretion of Magistrate as to examining witnesses.* It is entirely within the discretion of a Magistrate conducting a trial in a warrant case to admit evidence on behalf of either side at any stage of the trial, s. 192, Act X of 1872, applying to such a case ; but the Magistrate, in exercising the discretion conferred on him by this section, ought to have good reason for allowing witnesses on the part of the prosecution to be interposed in the midst of the case of the accused. QUEEN *s.* KASSY SINGH. QUEEN *v.* HULKOREE SINGH . . . . **21 W. R. Cr. 61**

5. ———— **Duty of Court as to summoning witnesses**—*Criminal Procedure Code, 1872, s. 359—Adjournment for appearance of witnesses for defence.* Certain persons were charged before the Magistrate with rioting, and being called upon for their defence, named several witnesses, and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused. *Held per* JACKSON, *J.*, that this being a warrant case, it was the duty of the Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case. *Held*, further, *per* JACKSON, *J.*, that the meaning of s. 359 of the Criminal Procedure Code is, that if among the persons named by the accused as witnesses, the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material ; but that the section is not intended to enable the Magistrate to enquire into what the defence of the accused person is to be and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused ; and further, that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence. EMPRESS *v.* RAJCOOMAR SINGH. **I. L. R. 3 Calc. 573**

s. c. *In the matter of the petition of* RAJCOOMAR SINGH . . . . **2 C. L. R. 62**

6. ———— *Obligation to summon witnesses—Criminal Procedure Code, 1861, Ch. XIV.* In a case tried under the provisions of Ch. XIV of the Code of Criminal Procedure, the accused were entitled to have their witnesses summoned, and a Magistrate had no power to refuse to summon them. QUEEN *v.* DURGAGUTTY. **11 W. R. Cr. 55**

7. ———— *Discretion of Magistrate—Criminal Procedure Code, 1861, s. 262. Held*, by BAYLEY, *J.* (MARKBY, *J.*, *dubitante*), that a Magistrate had a discretion, under s. 262 of the Code of Criminal Procedure, to summon a

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WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

witness when he was likely to give material evidence on behalf of the accused. *In the matter of the petition of* AMEER CHAND NOHATTA. QUEEN *v.* AMEER CHAND NOHATTA . **13 W. R. Cr. 63**

8. ——— *Forcibly rescuing cattle—Act III of 1857, s. 13—Criminal Procedure Code, 1861, s. 262—Summoning witnesses.* In a case of forcibly rescuing cattle under s. 13, Act III of 1857, in which the accused did not summon any witness, it was *held* that, even if the accused wanted them summoned, the Magistrate, under s. 262 of the Code of Criminal Procedure, need not have summoned them, unless persuaded that they were likely to give material evidence, and that they would not attend voluntarily. AKBAR TAGUDGEER *v.* PUNCHOO BISWAS. **10 W. R. Cr. 42**

9. ——— *Duty of parties—Criminal Procedure Code, 1861, ss. 261, 262—Attendance of witnesses.* In a case under Ch. XV of the Code of Criminal Procedure it was expected that parties would bring their own witnesses with them. If they required the attendance of any witness, they should apply to the Magistrate to cause his attendance ; and where they did not so apply, it was sufficient if the Magistrate recorded in his judgment the substance of the defendant's answer. BAGDEE MANJEE *v.* MOHINDRO NARAIN **10 W. R. Cr. 16**

10. ——— *Criminal Procedure Code, 1861, s. 186.* In the case of a charge of an offence triable by the Court of Session alone, the Magistrate was bound, under s. 186 of the Criminal Procedure Code, to summon the complainant's witnesses. QUEEN *v.* ZAKIR ALLY. **8 W. R. Cr. 4**

11. ——— *Criminal Procedure Code, 1861, s. 375—Accused person, right of.* An accused person is entitled to have examined as a witness any person named in his list of witnesses delivered to the Magistrate ; and the Magistrate should take measures to enforce the attendance of such person. QUEEN *v.* ISHAN DUTT . **6 B. L. R. Ap. 88 : 15 W. R. Cr. 34**

12. ——— *Right of accused to have witness summoned in his defence when he has refused to give in a list in the Magistrate's Court—Criminal Procedure Code, 1882, s. 211.* If an accused person on being called upon under s. 211 of the Code of Criminal Procedure to give orally or in writing a list of the persons whom he wishes to be summoned to give evidence on his trial, declines to give in such list, he cannot compel the Magistrate after committal to issue any summonses for witnesses on his behalf. Neither under such circumstances will the Sessions Judge be obliged to issue summnoses for the attendance of such witnesses unless he is satisfied that their evidence may be material. *Queen-*

WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

Empress v. *Hargobind Singh, I. L. R. 14 All. 242*, referred to. QUEEN-EMPRESS *v.* SHAKIR ALI **I. L. R. 19 All. 502**

13. ——— *Criminal Procedure Code (Act XXV of 1861), ss. 188, 207, 227 and 228—Arrest and detention of witnesses.* S. 207 of the Criminal Procedure Code gave no power to the Magistrate to call up and examine witnesses for the defence whose names have been given in a list, under s. 227, when the prisoners reserve their defence for the Court of Session ; but under s. 228 he was bound to summon them to give evidence before the Court of Session. *In the matter of* MAHESH CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SARKAR . **4 B. L. R. Ap. 1 : 13 W. R. Cr. 1**

14. ——— *Credibility of witnesses.* It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence. *In the matter of the petition of* MAHIMA CHANDRA SHAH. **4 B. L. R. Ap. 78 : 15 W. R. Cr. 15**

15. ——— *Criminal Procedure Code, 1861, ss. 186, 262.* S. 186 of the Code of Criminal Procedure referred to cases under Ch. XII, which were triable by the Court of Session and not to cases under Ch. XV, which were triable by a Magistrate. To the latter cases s. 262 applied. BOIDDONATH BANIA *v.* BHEEDOO DOSS. **9 W. R. Cr. 3**

16. ——— *Right of accused to have witnesses summoned—Criminal Procedure Code, 1872, s. 363.* Under s. 363, Code of Criminal Procedure, a prisoner was entitled, as a matter of right, to have any witnesses named in the list which he delivered to the Magistrate, summoned and examined. QUEEN *v.* PROSUNNO COOMAR MOITRO . . . **23 W. R. Cr. 56**

17. ——— *Criminal Procedure Code, 1861, s. 253.* Under s. 253 of the Criminal Procedure Code, 1861, it was imperative on the Magistrate to summon the witnesses named by the prisoner. QUEEN *v.* MUDSOODDEEN. **2 N. W. 148**

18. ——— *Summoning witnesses for accused—Criminal Procedure Code (Act XXV of 1861), s. 253. Per* AINSLIE, *J.*—In a trial under Ch. XIV of the Criminal Procedure Code, the Magistrate was not bound, under s. 253, to summon any witness whom the accused might require. It was only discretionary with him to do so, and in the circumstances of the present case he exercised his discretion rightly in refusing to summon the witnesses asked for. *Per* PAUL, *J.* (differing).—The right of an accused to have witnesses for his defence summoned during the pendency of the trial is an ordinary and natural right, and this right was not taken away, but affirmed, by s. 253 ; the Magistrate was bound to

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WITNESS—CRIMINAL CASES—*contd.*

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summon the witnesses, though it was discretionary with him to adjourn the trial. In the present case, treating it as a matter of discretion only, the Magistrate was wrong in refusing to summon the witnesses required. QUEEN *v.* BHOLANATH MOOKERJEE **7 B. L. R. 564 : 16 W. R. Cr. 28**

19. ——— *Discretion of Magistrate—Criminal Procedure Code, 1861, ss. 253, 262, 263.* S. 253 of the Criminal Procedure Code did not apply to cases triable under Ch. XV of that Code, and ss. 262 and 263 were applicable when the offence was not punishable with more than six months' imprisonment; and it was in the discretion of the Magistrate to summon the witnesses for the defence, if he considered their evidence essential to the just decision of the case, and incumbent on him to summon them only if it appeared to him that they were likely to give material evidence on behalf of either party, and that they would not voluntarily appear for the purpose of being examined at the time and place appointed for the hearing of the complaint. QUEEN *v.* MOHUREE . . **2. N. W. 393**

20. ——— *Discretion of Magistrate—Criminal Procedure Code, 1861, ss. 227, 228.* Where a prisoner, under s. 227, Code of Criminal Procedure, gave in a list of the witnesses he wished to summon, after his case had been committed, the Magistrate was bound to exercise his discretion upon the point, and to state whether he would summon the witnesses or not, and he ought to state his reasons for not doing so. If he thought the witnesses were included in the list for the purpose of delay, he should proceed under s. 228 of the Code. QUEEN *v.* RAJCOOMAR MOOKERJEE . . . . . **16 W. R. Cr. 14**

21. ——— *Discretion of Magistrate—Criminal Procedure Code, 1872, ss. 215, 362.* It was not incumbent on a Magistrate to summon every person named as a witness by the complaint. S. 215, expl. 3 of the Criminal Procedure Code, 1872, must be read with s. 362 which vested a discretionary power in the Magistrate. JELDHARI SINGH *v.* SHUNKUR DOYAL. **23 W. R. Cr. 9**

See, however, EMPRESS *v.* HEMATULLA. **I. L. R. 3 Calc. 389**

EMPRESS OF INDIA *v.* KASHI **I. L. R. 2 All. 447**

QUEEN *v.* PURASURAMA NAIKAR. **I. L. R. 4 Mad. 329**

ANONYMOUS . . . **8 Mad. Ap. 5**

22. ——— *Criminal Procedure Code, 1861, Ch. XIV.* In a case of an offence (such as hurt, under s. 323, Penal Code) punishable with imprisonment exceeding six months and therefore falling under Ch. XIV of the Code of Criminal Procedure, a Magistrate was bound to summon all the witnesses required by the accused. QUEEN *v.* BOOLAKEE **14 W. R. Cr. 81**

WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

23. ——— *Criminal Procedure Code, 1869, s. 131—Claims to stolen property.* Petitioner was charged with the theft of certain money found in his house and acquitted. Proclamation having been made for claimants to come in and claim the property, no one appeared, whereupon petitioner preferred his claim, and asked the Assistant Magistrate to summon certain witnesses, but the Assistant Magistrate refused to do so, and disallowed his claim, the Magistrate on appeal declining to interfere. On reference by the Judge, the High Court *held* that the Assistant Magistrate was bound to summon the witnesses named by the petitioner, set aside that officer's order, and directed him to dispose of the case after taking due steps for securing the attendance of the witnesses in question. SOOKHAN SAHOO *v.* GOVERNMENT . . . . . **18 W. R. Cr. 5**

24. ——— *Issue of summons—Criminal Procedure Code (Act XXV of 1861), s. 318.* Although there was no mention in Ch. XXII of Act XXV of 1861 of any particular provisions under which witnesses might be summoned, yet it was the duty of the Court, if parties could not procure the attendance of their witness, to issue summonses for their attendance. *In the matter of the petition of* SHAMASANKAR MAZUMDAR. **9 B. L. R. Ap. 45**

SHAMASUNKUR MOZOOMDAR *v.* ANUNDMOYEE DASSYA . . . . **18 W. R. Cr. 64**

25. ——— *Ground for postponement of case.* A Magistrate was *held* to be right, under the circumstances, in not postponing the case for the purpose of summoning witnesses for one of the parties. *In the matter of the petition of* GOVINDA CHANDRA GHOSE **9 B. L. R. Ap. 39**

26. ——— *Non-attendance of witnesses—Criminal Procedure Code, 1861, s. 269—Ground for adjournment of trial.* In a trial held under Ch. XV of the Criminal Procedure Code it was not an irregularity to adjourn the trial, under s. 269, for the purpose of allowing the accused to secure the attendance of his witnesses. As a general rule, a prisoner should have his witnesses present on the day of trial. QUEEN *v.* DINOO ROY . . . . . **16 W. R. Cr. 21**

27. ——— *Refusal of a Magistrate to summon prisoner's witnesses—Criminal Procedure Code (Act X of 1872), s. 359.* A Magistrate was not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal Procedure Code; and if he did refuse, he was bound to proceed under that section. The fact that the accused declined to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed. *In the matter of the petition of* DEELA MAHTON *v.* SHEO DAYAL KOERI . **I. L. R. 6 Calc. 714**

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WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

s.c. *In the matter of* DEELA MAHTON.
8 C. L. R. 70

28. ——— *Criminal Procedure Code, 1872, s. 359—Witness for the defence—Failure to attend—Refusal to re-summon.* On the 30th March 1881 an accused person on his trial before a Magistrate asked that a certain witness might be summoned on his behalf. The Magistrate ordered a summons to be issued for the attendance of such witness on the 18th April, to which day the further hearing of the case was adjourned. There was some delay in the service of the summons, and such witness did not attend on that day. The Magistrate refused an application by the accused for the issue of a second summons to such witness, with reference to s. 359 of Act X of 1872, on the ground that such application was not made in "good faith." *Held*, that the provisions of s. 359 of Act X of 1872 were clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was bound to make a further attempt—the first attempt seemed to have been nominal merely—to secure the attendance of the absent witness. EMPRESS *v.* RUKN-UD-DIN . . . **I. L. R. 4 All. 5**

29. ——— *Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, 1882, s. 216—Witness summoned by Sessions Court—Criminal Procedure Code, 1882, ss. 291, 540.* Under the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoner, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it. *Held*, that when a

WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd*

Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not, under the circumstances, be desirable to interfere with his order in revision. *Per* STRAIGHT, *J.*, that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. *In the matter of the petition of the* RAJAH OF KANTIT.
I. L. R. 8 All. 668

30. ——— *Refusal to summon witnesses not declared material unless expenses are paid.* A prisoner who was about to be committed to the Sessions Court presented to the Magistrate a list of witnesses whom he desired to have summoned to give evidence on his behalf, at the trial, and on being asked by the Magistrate why he desired to summon the witnesses, the prisoner declined to state his reason. *Held*, that the Magistrate was at liberty to decline to summon the persons named in the list on the prisoner declining to satisfy him that they were material witnesses; but the Magistrate ought to have fixed the amount which he considered necessary to defray the cost of the attendance of the persons named, and intimated to the prisoner his readiness to issue summonses on that amount being deposited. The High Court called for the record for the purpose of seeing whether any of the persons named in the list were likely to be able to give material evidence. SUBHARAYA MUDALI *v.* QUEEN . **4 Mad. 81**

31. ——— *Omission to take steps to summon witnesses.* A complainant in a case who mentioned the names of several witnesses on his behalf was requested to produce them on a certain date. Instead of doing that, he produced only two witnesses, who were examined. *Held*, that, as the complainant did not apply to the Magistrate to issue summonses on the other witnesses, or ask him to proceed under s. 262, Code of Criminal Procedure, 1861, the Magistrate was not wrong in law in deciding the case on the evidence which was before him. QUEEN *v.* NOTOBUR BERA.
15 W. R. Cr. 87

32. ——— ——— *Refusal to summon witness for accused—Participation in charge—Illegal conviction.* A refusal to summon

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WITNESS—CRIMINAL CASES—*contd.*

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witnesses cited by an accused, on the ground of their being implicated in the charge, vitiates the trial and conviction. RAM SHAHAI CHOWDHRY *v.* SANKER BAHADUR.
6 B. L. R. Ap. 65 : 15 W. R. Cr. 7

33. ——— *Refusal to summon witnesses named for the defence.* Where the Subordinate Magistrate convicted certain persons without allowing them a proper opportunity for the summoning and attendance of witnesses named for the defence, the High Court quashed the conviction and directed the Subordinate Magistrate to re-hear the case. ANONYMOUS. **5 Mad. Ap. 27**

34. ——— *Criminal Procedure Code, 1872, s. 362—Warrant case—Refusal of Magistrate to summon witness named by accused—Error or defect in proceedings.* Where the Magistrate trying an offence rejected an application by the accused person that a certain person might be examined on his behalf either in Court or by Commission, without recording his reasons for refusing to summon such person, as required by s. 362 of the Criminal Procedure Code :—*Held*, that the conviction of the accused person must be set aside, and the case be re-opened by such Magistrate, and the application by the accused for the examination of such person be disposed of according to law. *In the matter of the petition of* SAT NARAIN SINGH . **I. L. R. 3 All. 392**

35. ——— *Criminal Procedure Code, 1882, ss. 256, 257—Right of accused to call witness upon charge being framed in a warrant case.* The accused was charged with having committed an offence under s. 420 of the Indian Penal Code. On the last day that the case was taken up, certain witnesses for the prosecution, who had been examined-in-chief, were cross-examined by the accused, and upon the conclusion of such cross-examination a charge was framed. The accused then stated that he could produce witnesses if the case were postponed, but the Magistrate refused postponement on the ground that at the outset the accused had stated that he had no witnesses. The accused moved the High Court and stated in his affidavit that what he had meant was that he had no witnesses present in Court. *Held*, that under s. 256 and 257 of the Criminal Procedure Code, the accused was, as of right, entitled to an adjournment for the purpose of adducing evidence in defence. EMTAZ ALI *v.* JAGAT CHANDRA BANERJEE . **1 C. W. N. 313**

36. ——— *Right of accused to have witnesses re-summoned and re-heard—Criminal Procedure Code (Act X of 1882), s. 350 (a) s. 537—Commencement of proceedings—Interlocutory orders—Trial, meaning of—Right to have witnesses summoned and re-heard—Irregularity—Refusal to recall witnesses.* An accused person does not lose the right of having the witnesses re-summoned and re-heard under prov. (*a*), s. 350, of the Criminal Procedure Code, because an interlocutory

WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

application for enforcing the attendance of certain witnesses has been made and granted not at the trial, but before the trial and with a view to the trial. The proper time for making such application is when the trial commences before the Magistrate. The expression "trial" means the proceedings which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecutions and for the defence, if the accused be defended present in Court, for the hearing of the case. S. 537 of the Criminal Procedure Code cannot cure the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses in contravention of prov. (*a*), s. 350. GOMER-SIRDA *v.* QUEEN-EMPRESS.
I. L. R. 25 Calc. 863
2 C. W. N. 465

37. ——— *Right of accused—Compelling attendance of witnesses—Evidence—Criminal Procedure Code (Act X of 1882), s. 257.* Certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing, or to issue fresh processes for the attendance of the defendant's witnesses, on the ground that they were all friends of the accused who would come to Court if the accused desired it. The prisoners were convicted. *Held*, that the conviction must be set aside : the Magistrate having once granted processes, he was bound to assist the accused in enforcing the attendance of his witnesses. QUEEN-EMPRESS *v.* DHANANJOI CHOWDHRY.
I. L. R. 10 Calc. 931

38. ——— *Non-attendance of witness, enquiry into reasons for—Criminal Procedure Code, 1861, s. 221.* It was *held* that an enquiry should be made into the excuse given by a person for his non-attendance as a witness before enforcing a fine for such non-attendance, in order that the Sessions Judge, or other authority, might fairly exercise the discretion given him by s. 221 of the Criminal Procedure Code. QUEEN *v.* AMEER KHAN. *In re* BHUGWAN DOSS.
2 N. W. 113

39. ——— *Mode of summoning witnesses—Recognizances to appear.* A Subordinate Magistrate cannot bind over witnesses by recognizances to appear before himself. The proper course to enforce attendance is by summons and, if that fails, by warrant. ANONYMOUS.
4 Mad. Ap. 6

See ANONYMOUS . . **4 Mad. Ap. 17**
VENKATAPPAH *v.* PAPAMMAH . **5 Mad. 132**

40. ——— *Criminal Procedure Code, 1861, s. 191—Warrant to enforce attendance of witnesses.* A Magistrate was not bound, under s. 191 of the Code of Criminal Procedure, to enforce the attendance of witnesses by warrant except upon proof of due service of summons. *In the matter of the petition of* ABDOOR RUHMAN . . . . **7 W. R. Cr. 37**

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WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

QUEEN *v.* SUTHERLAND· QUEEN *v.* NARAIN SINGH . . . . . 14 W. R. Cr. 20

41. ——— *Criminal Procedure Code, ss. 76, 81, and 160—Investigation by police—Power of Magistrate to issue warrant for arrest and production of witness—Penal Code, s. 174.* Where a District Magistrate issued a warrant for the arrest and production of a witness for the purpose of giving evidence at an investigation held by the police, and in attempting to execute such warrant the police arrested the wrong person and were assaulted in the attempt:—*Held*, that, apart from the fact that the attempt to arrest was made on the wrong person, a District Magistrate has no authority to issue a warrant for the production of a witness at an investigation by a police officer, but only before his own Court under ss. 76 and 81 of the Code of Criminal Procedure. *Held*, also, that, as the investigation was held by a police officer under Ch. XIV of the Criminal Procedure Code, the proper course was for the Sub-Inspector of Police to require the attendance of the witness under s. 160 of the Code of Criminal Procedure, and, on failure by her to comply with such order, prosecute her under s. 174 of the Penal Code. QUEEN-EMPRESS *v.* JOGENDRA NATH MOOKERJEE I. L. R. 24 Calc. 320 1 C. W. N. 154

42. ——— *Issuing summons to witnesses out of jurisdiction.* Magistrates may, under the Criminal Procedure Code, issue summonses for service upon witnesses beyond the limits of their districts. (COLLET, *J.*, dissenting). ANONYMOUS . . 3 Mad. Ap. 5

43. ——— *Service of summons—Affixing summons to door of house.* Service of summons on a witness by affixing it to the door of his house was *held* to be no evidence of his having received it, in a charge brought against him of disobeying the summons. ANONYMOUS . . . . . 6 Mad. Ap. 29

44. ——— *Service of summons.* The mere showing to a witness of a summons issued under s. 186 of the Criminal Procedure Code, 1861, is not sufficient service. Either the original should be left with the witness, or it should be exhibited to him, and a copy of it delivered or tendered. REG. *v.* KARSANLAL DANATRAM. 5 Bom. Cr. 20

45. ——— Obligation to summon—*Duty of Court as to summoning witnesses.* In this case a rule was obtained by the petitioners Madhab Chandra Tanti and others, calling upon the District Magistrate of Burdwan to show cause why the order under s. 145 of the Criminal Procedure Code should not be set aside on the ground that the Magistrate should have allowed summons to issue on the witnesses cited by the petitioners on the 7th October, 1901, notwithstanding the reasons given by him for refusing to do so. MADHAB CHANDRA TANTI *v.* MARTIN (1901) . . . . I. L. R. 30 Calc. 508

WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

46. ——— Under s. 540 of the Code of Criminal Procedure, a Court is bound to summon and examine any witness whose evidence may seem to be essential to a proper and just decision of the case. RAM SARUP RAI *v.* Emperor (1901) . . . 6 C. W. N. 98

47. ——— *Process to compel attendance of witness, issue of—Refusal to compel attendance of such witness—Magistrate, discretionary power of—Summons case—Criminal Procedure Code (Act V of 1898), s. 244.* There is no discretionary power given in summons cases to a Magistrate by s. 244 of the Criminal Procedure Code to refuse to compel the attendance of a witness upon whom the Court has already issued process. DAULAT SINGH *v.* BRINDA BELDER (1902) . I. L. R. 30 Calc. 121

48. ——— *Duty of Court as to summoning witnesses—Jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 145, 355, 356—Witness, attendance of—Process, refusal to issue—Magistrate, discretion of—High Court, power of interference by—Charter Act (24 & 25 Vict. c. 104), s. 15—Proceedings under Ch. XII of the Criminal Procedure Code.* Where the refusal by a Magistrate to assist one of the parties to a proceeding under Ch. XII of the Criminal Procedure Code, in procuring the attendance of his witnesses, deprived that party of a hearing on the only question for the determination of the Court, and so amounted to a denial of justice:—*Held*, that the Magistrate in refusing process acted without jurisdiction. *Madhab Chandra Tanti* v. *Martin, I. L. R. 30 Calc. 508*, referred to. The High Court, in the exercise of general powers of supervision vested under 24 & 25 Vict., c. 104, s. 15, has power to interfere in a case like this, even if it cannot, in strictness, be said that the Magistrate acted without jurisdiction. A mere refusal, however, to summon or examine a particular witness or witnesses cited by a party, in proceedings under Ch. XII of the Criminal Procedure Code, is not necessarily a ground for interference by the High Court. It cannot be laid down as a rule of law that proceedings under Ch. XII of the Criminal Procedure Code should be regarded, as to procedure, as summons cases. *Hurendro Narain Singh Chowdhry v. Bhobani Prea Baruani, I L. R. 11 Calc. 762*, and *Ram Chandra Das* v. *Monohar Roy, I. L. R. 21 Calc. 29*, explained. SURJYA KANTA ACHARJEE *v.* HEM CHUNDER CHOWDHRY (1902) . I. L. R. 30 Calc. 508 s.c. 7 C. W. N. 404

49. ——— *Party's right to compel attendance of a defaulting witness—Order, Magistrate's, upon application—Irregularity—Criminal Procedure Code (Act V of 1898), ss. 133, 137.* In every petition made before him a Magistrate should make an order either granting or refusing it. An order merely to "file" it is improper. A party has a right to call upon the Court to compel the attendance of witnesses who

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WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

had been summoned and had neglected to attend. So, when, in a proceeding under s. 133 of Code of Criminal Procedure, on defendant applying for the summoning of a witness who did not appear, the Magistrate disposed of the application by simply ordering it to be "filed," and then, without taking the necessary steps to secure the attendance of such witness, passed an order under s. 137 of that Code, the order so passed was set aside as bad, and the case was remanded for re-trial after taking the evidence of such witness. BHOMAR MUNSHI *v.* DIGAMBAR DAS (1902).

6 C. W. N. 548

50. ——— *Witness for defence, attendance, Judge's duty to enforce.* It is not for the Judge, but for the accused himself, to decide what amount of evidence it would be proper to place before the jury in order to establish the case for the defence; and a Sessions Judge should not refuse to enforce the attendance of witnesses whom the accused has cited to prove that a witness for the prosecution was his enemy, on the ground that there was already in the opinion of the Judge, ample evidence on the record about the matter. BROJENDRA LALL SIRKAR *v* KING-EMPEROR (1902) . . **7 C. W. N. 188**

51. ——— *Criminal Procedure Code (Act V of 1898), ss. 257, 177, 110—Security for good behaviour—Magistrate—Summons—Refusal to summons—Procedure.* S. 257 of the Criminal Procedure Code (Act V of 1898) is imperative in its terms. It leaves to a Magistrate no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice: such ground, however, must be recorded by him in writing. The discretionary power of refusing to summon any particular witness is vested in the Magistrate, but the order of refusal must be such as to show in writing the ground of refusal as applied to each individual. EMPEROR *v.* PURSHOTTAM KARA (1902) . . . **I. L. R. 26 Bom. 418**

52. ——— **Plea that applicant wishes to summon the trying Magistrate as a witness**—*Transfer.* In an application for the transfer to another Court of a Criminal case pending against them the applicants alleged that the evidence of the trying Magistrate would be required by the accused touching certain matters connected with the case. It was *held*, that, inasmuch as the Magistrate was bound under s. 257 of the Code of Criminal Procedure to issue a summons unless he considered that the application for a summons was made for the purpose of vexation or delay, or for defeating the ends of justice, and it was not proper to leave the decision of such a question to the Magistrate, whose evidence was required, the application for transfer ought to be granted. EMPEROR *v.* ABDUL LATIF (1904) . **I. L. R. 26 All. 536**

WITNESS—CRIMINAL CASES—*contd.*

2. SUMMONING WITNESSES—*contd.*

53. ——— **Procedure**—*Witnesses—Duty of Magistrate inquiring into a case triable by the Court of Session to summon and examine witnesses asked for by the accused.* The accused, against whom an inquiry with regard to an alleged offence under s. 330 of the Penal Code was being held by a Magistrate of the first class, asked the Magistrate to summon certain witnesses for the defence; but the Magistrate without summoning such witnesses passed an order committing the accused to the Court of Session. *Held*, that the Magistrate was bound to take all such evidence as the accused was prepared to produce before him, and that the order of commitment was bad in law. *Queen-Empress* v. *Ahmadi*, *I. L. R. 20 All. 264*, followed. EMPEROR *v.* MUHAMMAD HADI (1904) **I. L. R. 26 All. 177**

54. ——— *Process—Magistrate—Extraordinary jurisdiction of the High Court—Prejudice—Criminal Procedure Code (Act V of 1898), s. 145—Charter Act (24 and 25 Vict. c. 104), s. 15.* It is not obligatory on a Magistrate to assist parties to a proceeding under s. 145 of the Criminal Procedure Code in producing their witnesses, and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence. *Harendra Narain Singh* v. *Bhobani Prea Baruani*, *I. L. R. 11 Calc. 762*; *Ram Chandra Das* v. *Monohar Roy*, *I. L. R. 21 Calc. 29*, *Madhab Chandra Tanti* v. *Martin*, *I. L. R. 30 Calc. 508 note*; *Surja Kanta Acharjee* v. *Hem Chandra Chowdhry*, *I. L. R. 30 Calc. 508*, and *Radha Nath Singh* v. *Mangal Gareri*, *2 C. L. J. 286 note*, dissented from. *Manmatha Nath Mitter* v. *Barada Prasad Roy*, *I. L. R. 31 Calc. 685*, referred to. The powers of superintendence under s. 15 of the Charter Act should, in cases under s. 145 of the Criminal Procedure Code, be exercised with caution; and the Court ought not to interfere unless satisfied that the party has been prejudiced by the proceedings in the Court below. *Sukh Lal Sekh* v. *Tara Chand Ta*, *9 C. W. N. 1046*, followed. Where a party had obtained summonses upon his witnesses, and on the failure of some of them to appear, applied for fresh summonses against them, which the Magistrate refused, and where it was further alleged that he had refused to allow a witness to prove certain documents:—*Held*, that there was nothing to show that the absent witnesses could not have been made to attend without the assistance of the Court, nor whether they were material witnesses, nor that any questions were put to the witness, which were improperly disallowed, and that the party was not therefore shown to have been prejudiced. TARA PADA BISWAS *v.* NURUL HUQ (1905).

I. L. R. 32 Calc. 1093

55. ——— *Magistrate—Duty of Magistrate to enforce attendance of witnesses after summonses have once been issued against them—Power of second or third class Magistrate to pass sentence and then to refer the case to a superior Court*

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2. SUMMONING WITNESSES—*concld.*

to bind down the accused—Criminal Procedure Code (Act V of 1898), ss. 257, 349. Where a Magistrate has once issued summonses for the attendance of witnesses, he is bound to have the process enforced before disposing of the case. A Magistrate of the second or third class, if of opinion that the accused should be bound down under s. 106 of the Criminal Procedure Code, must refer the whole case to a superior Magistrate without passing any part of the sentence himself. ROHIMUDDI HOWLADAR *v.* EMPEROR (1908).

I. L. R. 35 Calc. 1093

3. AVOIDING SERVICE.

———— **Warrant for apprehension of witness**—*Committal of witness in default of appearance—Criminal Procedure Code, 1861, s. 188.* S. 188 only empowers a Magistrate to issue a warrant for the apprehension of a witness when he has reason to believe that the witness will not attend to give evidence without being compelled to do so, and it does not empower a Magistrate to commit a witness. *In the matter of* MAHESH CHANDRA BANERJEE. QUEEN *v.* PURNA CHANDRA BANERJEE. QUEEN *v.* KALI SIRKAR.

4 B. L. R. Ap. 1. 13 W. R. Cr. 1

4. SWEARING OR AFFIRMATION OF WITNESSES.

———— **Oath or affirmation**—*Criminal Procedure Code, 1861, s. 199—Memorandum of deposition.* A witness may be examined either on oath or on solemn affirmation, but he cannot both be sworn and put on solemn affirmation at the same time. The memorandum required by s. 199 of the Code of Criminal Procedure should always be appended to the depositions. QUEEN *v.* HOSSEIN SIRDAR **13 W. R. Cr. 17**

5. EXAMINATION OF WITNESSES.

(*a*) GENERALLY.

1. ———— **Power of Court to dispense with examination of witnesses**—*Criminal Procedure Code, 1872, s. 362.* S. 362 of the Code of Criminal Procedure did not give a Magistrate discretion to dispense with the examination of witnesses summoned by the prosecution. QUEEN *v.* PARASURAMA NAIKAR **I. L. R. 4 Mad. 329**

2. ———— *Commitment without examining witnesses.* Where a Magistrate committed a person charged with perjury in a trial before himself to the Sessions Judge without examining the witnesses for the prosecution :—*Held*, that the commitment was illegal. QUEEN *v.* CHINNA VEDAGIRI CHETTI **I. L. R. 4 Mad. 227**

QUEEN *v.* SREENATH MOOKHOPADHYA.

7 W. R. Cr. 45

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

DINONATH GOPE *v.* SARODA MOOKHOPADHYA.

7 W. R. Cr. 47

3. ———— *Power of interference of High Court—Criminal Procedure Code, 1861, s. 363.* Where it was not shown that there were any witnesses forthcoming for examination other than those whom the Sessions Judge did examine, the Court refused, with reference to s. 363, Code of Criminal Procedure, to interfere with the Sessions Judge's proceedings. QUEEN *v.* JUMDEM SINGH . . **12 W. R. Cr. 73**

4. ———— **Duty of defence as to calling witnesses**—*Inference from failure to call witnesses.* A prisoner or his counsel is at liberty to offer evidence or not as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another. HURRY CHURN CHUCKERBUTTY *v.* EMPRESS.

I. L. R. 10 Calc. 140 : 13 C. L. R. 358

5. ———— **Duty of prosecution as to calling witnesses**—*Inferences to be drawn on failure to call witnesses—Misdirection.* It is *primâ facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. No such corresponding inference can be drawn against an accused. *In the matter of the petition of* DHUNNO KAZI. EMPRESS *v.* DHUNNO KAZI.

I. L. R. 8 Calc. 121

s. c. DHUNNO KAZI *v.* EMPRESS.

10 C. L. R. 151

6. ———— *Obligation to call witnesses examined before Magistrate.* Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution that they had been examined by the committing Magistrate against the express wish of the police officer in charge of the prosecution :—*Held*, that that was not a valid ground for the non-production of the witnesses in the Sessions Court. In conducting a case for the prosecution, all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined. QUEEN-EMPRESS *v.* RAM SAHAI LALL

I. L. R. 10 Calc. 1070

7. ———— *Trial in Sessions Court—Non-production of material witnesses for Crown—Duty of public prosecutor.* It is the duty of the public prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

prosecution, and the Judge is bound to hear all the evidence upon the charge. The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling those witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses. QUEEN-EMPRESS *v.* TULLA . . . **I. L. R. 7 All. 904**

8. ——— *Discretion of Public Prosecutor as to calling witnesses whose names are returned in the Calendar—Practice.* In a trial before a Court of Session or a High Court, it is entirely in the discretion of the Public Prosecutor conducting the case for the Crown to call or not to call any witness or witnesses whose names appear in the calendar as witnesses for the Crown. QUEEN-EMPRESS *v.* DURGA.
I. L. R. 16 All. 84

9. ——— *Witness for Crown tendered at Sessions trial who had not been examined by committing Magistrate.* At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment, or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice. QUEEN-EMPRESS *v.* HAYFIELD.
I. L. R. 14 All. 212

10. ——— *Witness for Crown "not called" at Sessions trial, though examined before the committing Magistrate—Duty of the prosecution with regard to the production of such witness.* At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness" testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the committing Magistrate present as the trial so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. *In the matter of the petition of Dhunno Kazi, I. L. R. 8 Calc. 121,* and *Empress of India* v. *Kali Prosonno Doss, I. L. R. 14 Calc. 245,* approved. *Empress* v. *Girish Chunder Talukhdar, I. L. R. 5 Calc. 614,* and *Queen* v. *Ishan Dutt, 6 B. L. R. Ap. 88; 15 W. R., Cr. 34,* dissented from. QUEEN-EMPRESS *v.* STANTON.
I. L. R. 14 All. 521

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd*

(*a*) GENERALLY—*contd.*

11. ——— *Obligation of Court of Session to examine all witnesses sent up by the committing Magistrate.* It is the duty of a Sessions Court to examine all the witnesses sent up by the committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up unless it had good reason to believe that such witness came into the Court-house with a predetermined intention of giving false evidence. QUEEN-EMPRESS *v.* BANKHANDI.
I. L. R. 15 All. 6

12. ——— *Revival of prosecution—Presidency Magistrates Act (IV of 1877), s. 87, expl. 12.* A "revival of a prosecution" as mentioned in expl. 2 of s. 87 of Act IV of 1877, is not a continuation of the original prosecution from which the accused has been discharged. On the revival of the prosecution, all the witnesses on whose evidence the prosecution intend to rely must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo.* EMPRESS *v.* CHUNDER NATH DUTT.
I. L. R. 5 Calc. 121 . 4 C. L. R. 305

13. ——— **Witnesses for prosecution** —*Witness examined by prosecution after defence.* It is irregular to allow a witness to be examined on behalf of the prosecution after the prisoner has made his defence, when the witness is not one to contradict any new case set up by the prisoner. QUEEN *v.* CHOTEY LAL . **3 N. W. 271**

Where, however, the prisoner had full notice of the evidence which was to be given by such witness, and made his defence, in allusion to the evidence of the witness, the High Court refused to set aside the conviction, having regard to s. 439 of the Code of Criminal Procedure. QUEEN *v.* SHAM KISHORE HOLDAR . **13 W. R. Cr. 36**

14. ——— *Criminal Procedure Code, 1861, s. 372—Recalling witness for prosecution.* Under s. 372 of the Code of Criminal Procedure, an accused should be called upon to enter upon his defence and to produce his evidence when the case for the prosecution has been brought to a close. Where, therefore, one witness for the prosecution was recalled after the prisoner has made his defence, and the prisoner had no opportunity of calling evidence with reference to the evidence of that witness, the High Court quashed the conviction and ordered a new trial. QUEEN *v.* ASSANOOLLAH . . **13 W. R. Cr. 15**

15. ——— **Witnesses for defence**— *Criminal Procedure Code, 1861, s. 372—Duty of Court as to witnesses for defence.* Under s. 372 of the Code of Criminal Procedure, the accused should be asked, at the end of the case for the prosecution, to produce his evidence, and it is at that point the duty of the Court of Session to ascertain who the

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

witnesses are whom the prisoner desires to examine in his defence. QUEEN *v.* MOOKUN.
12 W. R. Cr. 22

16. ——— *Omission to examine witnesses for accused.* The Court quashed the sentence which was passed upon a prisoner who had not been asked if he had any witness to call, although he was tried at the same time with others who had been so asked. BHUGWAN *v.* DOYAL GOPE . . **10 W. R. Cr. 7**

17. ——— *Criminal Procedure Code (Act XXV of 1861), s. 266—Witnesses attending voluntarily.* In cases coming under Ch. XXV of Act XXV of 1861, to which s. 266 applied, and not s. 252, the Magistrate was not obliged to call on the accused to produce his witnesses, but he was bound to hear them if they attended voluntarily, as by s. 266 read with s. 262, they were supposed to do. *In re* BHIKA ROY.
7 B.L. R. 568 note

S. C. BHIKA ROY *v.* DHOTUN ROY.
10 W. R. Cr. 36

18. ——— *Obligation of Magistrate to hear witnesses—Criminal Procedure Code, 1861, s. 266.* S. 266 of the Code of Criminal Procedure only required the Magistrate to hear such witnesses as the accused shall produce in his defence. ANONYMOUS . . . **4 Mad. Ap. 29**

QUEEN *v.* AMEER CHAND NOHATTA.
13 W. R. Cr. 63

19. ——— *Refusal of Court to allow witness for defence to be examined—Illegal conviction—Criminal Procedure Code (Act XXV of 1861), s. 266.* Conviction set aside on the ground of the Magistrate's irregularity in refusing, in a trial before him under Ch. XV of the Criminal Procedure Code, to allow the examination of a witness who had been tendered on behalf of the accused. QUEEN *v.* MAHIMA CHANDRA CHUCKERBUTTY . **4 B. L. R. Ap. 77: 12 W. R. Cr. 77**

20. ——— *Criminal Procedure Code, 1882, ss. 210 and 212—Sessions case—Defence reserved—Power of Magistrate to examine witnesses named for the defence.* The fact that an accused person committed to a Court of Session by a Magistrate has reserved his defence, does not preclude the Magistrate from acting under s. 212 of the Code of Criminal Procedure, and examining any witnesses named by the accused as witnesses whom he intended to call in the Sessions Court. *In the matter of the petition of* RUDRA SINGH.
I. L. R. 18 All. 380

21. ——— *Criminal Procedure Code, 1882, ss. 202 and 540—Summons case.* Where a Magistrate before whom a complaint was made held an inquiry under s. 202 of the Criminal Procedure Code for the purpose of ascertaining the truth or falsehood of the complaint

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

before issuing process, and, after holding such inquiry, summoned the accused, examined witnesses on both sides, and, after a short adjournment, examined a witness called by himself, and found the accused guilty under s. 341 of the Penal Code:—*Held*, that the Magistrate was strictly within his rights under s. 540 of the Criminal Procedure Code in receiving fresh evidence after evidence on both sides had been taken, and the case adjourned for judgment, inasmuch as the case was still a pending case when such evidence was taken. *In the matter of* ANANDA CHUNDER SINGH *v.* BASU MUDH . . **I. L. R. 24 Calc. 167**

22. ——— *Witnesses under examination—Threatening of witnesses by Court.* It is illegal on the part of a Court to threaten witnesses with the penalties of the law unless they are evidently giving wilfully false evidence or persistently refusing to give evidence of facts which must be within their knowledge. QUEEN-EMPRESS *v.* HARGOBIND SINGH.
I. L. R. 14 All. 242

23. ——— Recording evidence of witness—*Obligation to record evidence of witnesses.* If a person is before the Court as a witness, his evidence must be recorded as the law directs; if he is not a witness, and is not examined as such, the Judge has no right to allude to his having made any statement. QUEEN *v.* PHOOLCHAND *alias* PHOLEEL AHIR . . **8 W. R. Cr. 11**

24 ——— *Note of deposition—Criminal Procedure Code, 1861, s. 195.* A separate note of each witness's deposition was required to be taken by s. 195 of the Code of Criminal Procedure, 1861, which was not satisfied by a statement that a witness "deposes as ast witness." REG. *v.* BYHA VALAD SURJIM **1 Bom. 91**

25. ——— Mode of examination—*Examination in absence of accused.* It is illegal to examine the witnesses for the defence and to pass sentence in the absence of the accused. BHOORAM *v.* ALLAHO KOLITA . . **1 B. L. R. S. N. 8**

QUEEN *v.* RAMNATH . . **7 W. R. Cr. 45**

26. ——— *Examination in absence of accused.* Where witnesses are not examined in the presence of the accused, the conviction will be quashed. QUEEN *v.* LALLA CHOWBY
2 N. W. 49

QUEEN *v.* RAMNATH . . **7 W. R. Cr. 45**

ANONYMOUS . . . **3 Mad. Ap. 34**

QUEEN *v.* RAJCOOMAR SINGH **8 W. R. Cr. 17**

QUEEN *v.* RAMDHUN SINGH **11 W. R. Cr. 22**

QUEEN *v.* RAM DASS BOISTUB.
11 W. R. Cr. 35

QUEEN *v.* RUSSICK DOSS **24 W. R. Cr. 76**

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

ALI MEAH *v.* MAGISTRATE OF CHITTAGONG. **25 W. R. Cr. 14**

27. ——— *Evidence not taken in presence of accused—Criminal Procedure Code, 1861, s. 194.* When the accused has been arrested, the evidence of a witness for the prosecution ought, under s. 194 of the Code of Criminal Procedure, to be taken in the presence of the accused. QUEEN *v.* HOSSAIN ALI CHOWDHRY. **8 W. R. Cr. 74**

28. ——— *Criminal Procedure Code, 1872, s. 327—Evidence taken in absence of accused.* Under s. 327, Criminal Procedure Code, 1872, the witnesses for the prosecution should be examined in the presence of the accused when practicable, notwithstanding that their statements have been previously recorded in his absence. QUEEN *v.* BOCHA CHOWKEEDAR. **22 W. R Cr. 33**

29. ——— *Evidence taken in absence of accused—Warrant cases.* It is not irregular in a warrant case for a Deputy Magistrate to take the evidence of the complainant and certain witnesses on behalf of the prosecution in the absence of the accused. All that the accused has a right to expect after the charge had been framed is that the complainant and witnesses who had been examined in his presence before the charge was framed should be recalled for the purposes of cross-examination. QUEEN *v.* KASSY SINGH. QUEEN *v.* HULKOREE SINGH . **21 W. R. Cr. 61**

30. ——— *Depositions taken in absence of accused—Criminal Procedure Code, 1872, s. 327.* S. 327 of the Criminal Procedure Code, 1872, which permitted the depositions of a witness to be taken in the absence of an accused person who had absconded, did not apply to a deposition taken before that Code was passed. Where s. 327 did apply, it was necessary to show that when the former deposition was taken the accused had absconded, and after due pursuit could not be arrested. QUEEN *v.* ETWAREE DHAREE. **21 W. R. Cr. 12**

31. ——— *Duty of committing Magistrate—Examination on oath in absence of accused—Statements of witnesses.* The Magistrate to whom a complaint was made examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any and what case against the prisoners ; and he did not take down in writing the statements of the persons so examined. *Held*, that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused or for the purpose of finding out whether there was a case ; but that, having done so, he was not bound to take down their statements in writing. *In the matter of the petition of* ASGUR HOSSEIN. EMPRESS *v.* ASGUR HOSSEIN **I. L. R. 6 Calc. 774**

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

S. C. *In re* ASGUR HOSSEIN **8 C. L. R. 124**

32. ——— *Examination of, in absence of accused—Criminal Procedure Code, 1872, s. 327—Power to quash commitment.* An accused who was charged with murder not being found, the witnesses were examined under s. 327 of Act X of 1872 in his absence. The accused was subsequently arrested and committed on the strength of the evidence taken in his absence. Before the Sessions Court he pleaded not guilty. *Held*, that the prisoner having been put upon his trial and having pleaded, the commitment could not be quashed. *Held*, further, that if, in the course of a trial, the Sessions Judge should be of opinion that the prosecution has not laid a proper basis for the reception of evidence in the absence of the accused, his proper course is to adjourn the trial under s. 264 of the Criminal Procedure Code, and then under s. 251 summon such witnesses as he may deem material. *Semble :* The mere absence of questions in the record of a prisoner's statement does not render it inadmissible. EMPRESS *v.* SAGAMBUR. **12 C. L. R. 120**

33. ——— *Reading deposition of witness.* In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new and the witnesses had not been examined before. To read to a witness his deposition on a former trial is not an examination of the witness in the presence of the accused. QUEEN *v.* KYAMUT **W. R. 1864, Cr. 1**

QUEEN *v.* AFFAZUDDEEN **W. R. 1864, Cr. 13**

QUEEN *v.* KANYE SHEIKH **W. R. 1864, Cr. 38**

QUEEN *v.* KALUNDAR DOSS **2 N. W. 100**

See also QUEEN *v.* MOHUN BANFOR. **22 W. R. Cr. 38**

34. ——— *Reading depositions instead of examining witnesses de novo.* The High Court refused to interfere when the evidence of witnesses given on a previous trial was read over and used in a subsequent trial at the express request of the prisoners, instead of the witnesses being examined *de novo*. PURMESSUR SINGH *v.* SOROOP AUDHIKAREE . . **13 W. R. Cr. 40**

35. ——— *Criminal Procedure Code, 1882, s. 288—Trial before Court of Session—Evidence given before committing Magistrate used at trial to contradict witnesses.* S. 288 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself. *Queen* v. *Amanulla, 12 B. L. R. Ap. 15*, referred to. A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate the whole or such portions of the deposition as he

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth. In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, *J.*, quashed the conviction. QUEEN-EMPRESS *v.* DAN SAHAI . . **I. L. R. 7 All. 862**

36. ——— **Witness offering hearsay evidence**—*Duty of Court.* The moment a witness commences giving evidence which is inadmissible,—*e.g.*, hearsay evidence,—he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence, and to decide on the legal evidence alone. QUEEN *v.* PITTAMBUR SIRDAR . . **7 W. R. Cr. 25**

QUEEN *v.* KALI CHURN GANGOOLY. **7 W. R. Cr. 2**

37. ——— **Refreshing memory of witness**—*Ground for inspecting document to refresh memory of witness—Right to inspect documents. Per* FIELD, *J.*—The grounds upon which the opposite party is permitted to inspect a writing, and to refresh the memory of a witness, are three-fold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents,(iii) to compare his oral testimony with his written statement. *Per* FIELD, *J.*—The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness. *In the matter of the petition of* JHUBBOO MAHTON. EMPRESS *v.* JHUBBOO MAHTON . . . **I. L. R. 8 Calc. 739**

S. C. JHUBBOO MAHTON *v.* EMPRESS. **12 C. L. R. 233**

38. ——— *Memorandum made by police officer—Criminal Procedure Code, 1872, s. 119.* In giving evidence a police officer may refresh his memory by referring to documents in which he has, under s. 119 of Act X of 1872, reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses. ROGHUNI SINGH *v.* EMPRESS. **I. L. R. 9 Calc. 455 : 11 C. L. R. 569**

39. ——— *Memorandum made by police officer—Criminal Procedure Code (Act X of 1872), ss. 119 and 126.* A prisoner on his trial is not entitled to insist that a memorandm made by a police officer under the provisions of s. 119 of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory.

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*contd.*

Reg. v. *Uttamchand Kapurchand. 11 Bom. 123*, distinguished. *In the matter of the petition of* KALI CHURN CHUNARI. EMPRESS *v.* KALI CHURN CHUNARI . . **I. L. R. 8 Calc. 154**

S. C. *In the matter of* KALI CHURN CHUNARI. **10 C. L. R. 51**

40. ——— **Medical witness, evidence of**—*Experts—Examination of medical witness examined before Magistrate—Criminal Procedure Code, 1872, s. 323.* The evidence of a medical man who has seen, and has made a *post mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible, *first*, to prove the nature of injuries which he observed, and, *secondly*, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's opinion on those facts. S. 323 of Act X of 1872 did not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who had been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge. A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom. ROGHUNI SINGH *v.* EMPRESS. **I. L. R. 9 Calc. 455 : 11 C. L. R. 569**

41. ——— **Treatment by Court of witnesses for defence.** When a prisoner makes a distinct defence, and calls witnesses to prove it, instead of dismissing the witnesses at once on their saying they know nothing in the prisoner's favour a Judge should put a few questions to them in detail to see if there is any truth in the prisoner's statement or any part of it. QUEEN *v.* BHUGNER PUTWA . . . **11 W. R. Cr. 9**

42. ——— *Witnesses for the defence, omission to file list of; effect of, when witnesses actually in attendance—Adjournment asked for examining witnesses, grounds for refusing—Sitting of Court till late hours.* The Magistrate, who was holding a morning sitting, called upon the accused for their defence at midday, when the Court ought to have closed. Upon that, counsel for the accused asked for an adjournment, so as to examine certain witnesses who were in attendance, but whose attendance had not been certified. The Magistrate, who wanted to finish the case before rising, refused to grant an adjournment, holding that the witnesses were not in attendance; and gave judgment the same day, convicting the accused: *Held*, that the

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*a*) GENERALLY—*concld.*

grounds on which the Magistrate refused to grant an adjournment were wrong, and that the accused should be re-tried, and given an opportunity to examine such witnesses as they might wish to produce on their behalf. EMPEROR *v.* KESO SINGH (1903) . . **7 C. W. N. 714**

(*b*) EXAMINATION BY COURT.

43. ——— **Examination of witness by Judge**—*Evidence Act, s. 138—Duty of Court in examining witnesses.* At a trial before a Sessions Court, the Judge on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed. *Held*, that such a course of procedure was irregular and opposed to the provisions of s. 138 of the Evidence Act. It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act. NOOR BUX KAZI *v.* EMPRESS.
I. L. R. 6 Calc. 279 : 7 C. L. R. 385

44. ——— *Witness examined by Court—Opportunity to accused to cross-examine—Dishonestly receiving stolen property—Criminal Procedure Code (Act V of 1898), ss. 233 and 540.* During the trial of a case, the accused obtained a process for the attendance of a witness. Before the witness appeared, the accused asked the Court to countermand the order for his attendance, but the Court refused to do so. When the witness attended, the accused declined to examine him. He was thereupon examined by the Court; and, upon the accused claiming the right to cross-examine the witness, the Court refused to allow him to do so. *Held*, that, under the circumstances, the witness could not be regarded as a witness for the defence, and that the accused should have been given an opportunity to cross-examine him. MOHENDRO NATH DAS GUPTA *v.* EMPEROR, (1902).
I. L. R. 29 Calc. 387
s.c. 6 C. W. N. 550

(*c*) CROSS-EXAMINATION.

45. ——— **Duty of Court as to allowing cross-examination**—*Cross-examination of witnesses by accused.* The Judge ought, if requested, to allow the accused an opportunity of cross-examining all witnesses whose depositions have been taken for the prosecution by the committing Magistrate, but whose evidene is dispensed with by the prosecutor at the trial. His refusal to do so is, however, not an error in law. REG. *v.* FATECHAND VASTACHAND . **5 Bom. Cr. 85**

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*c*) CROSS-EXAMINATION—*contd.*

46. ——— *Right of accused to cross-examine witnesses, for the prosecution before commitment—Criminal Procedure Code, 1861, s. 194; (Act X of 1872) s. 191; (Act X of 1882) ss. 210, 256, 257 and 288.* An accused person has the right to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The fact that the Criminal Procedure Code of 1872 contained an express provision to that effect, which was omitted in the Code of 1882, together with the provision of ss. 210 and 256 of the latter Code, must not be taken to show an intention on the part of the Legislature to deprive an accused of that right. The express provision in the Code of 1872 was probably thought by the Legislature, when framing the Code of 1882, as being redundant, seeing that the Evidence Act of 1872, which was passed at the same time as the Criminal Procedure Code of 1872, made sufficient provision on the subject. S. 256, moreover, does not prohibit cross-examination before a charge is framed; it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time, subject to a discretion given to the Magistrate by s. 257. Where depositions of witnesses for the prosecution before the Magistrate previous to commitment were taken without any cross-examination by the accused being allowed, it was *held* that such depositions were improperly treated as evidence in the Sessions Court, as they had not been "duly taken" in the presence of the accused withn the meaning of s. 288 of the Code. QUEEN-EMPRESS *v.* SAGAL SAMBA SAJAO.
I. L. R. 21 Calc. 642

47. ——— *Further cross-examination by accused—Criminal Procedure Code, 1882, ss. 256, 257.* *D* was put upon his trial for having caused grievous hurt to *M*. The Magistrate, after hearing the evidence for the prosecution framed a charge under s. 325 of the Penal Code, and on the 6th June 1896 refused an application by the accused to re-summon the prosecution witnesses for further cross-examination. On 19th June, on the application of the accused citing some of those witnesses as his own witnesses, the Magistrate summoned them, but on the 29th, when the witnesses so summoned appeared, he refused to allow the accused to cross-examine them, and, upon the accused declining to examine them as his witnesses, convicted him on the evidence on the record. *Held*, that the Court was wrong in refusing permission to the accused to cross-examine the witnesses present in Court on 29th June. *Held*, further, that the accused was not deprived of the right which he had by law of cross-examining the witnesses for the prosecution under s. 257 of the Criminal Procedure Code, although they were summoned as his witnesses. *Held*, also, that the

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(c) CROSS-EXAMINATION—*contd.*

application of the 6th June being under s. 257, and not under s. 256 the order of the Deputy Magistrate of that date was wrong. MOWLA BUX BISWAS *v.* DERASUTULLA SARKAR . **1 C. W. N. 19**

48. ——— **Right to cross-examine**—*Right of accused to cross-examine witnesses.* The right of an accused party to cross-examine witnesses is limited to a right to cross-examine the witnesses for the prosecution called against him. If he wishes to avail himself of evidence which has been given, or which can be given by a witness called for another of the parties accused, he must call him as his own witness. QUEEN *v.* SURROOPCHUNDER PAUL . . . **12 W. R. Cr. 75**

49. ——— *Evidence Act, s. 165—Witness called by the Court.* Witnesses summoned on behalf of the prosecution, and not called, ought to be placed in the box for cross-examination, in order that the defence may have the opportunity of exercising this right, and *a fortiori*, if such a witness is called and examined by the Court under s. 165 of the Evidence Act, the prisoner should be allowed to cross-examine. EMPRESS *v.* GRISH CHUNDER TALUKHDAR. **I. L. R. 5 Calc. 614 : 5 C. L. R. 364**

50. ——— *Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X of 1882), s. 540.* In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate. The Court should not call a witness on whose evidence it could not put implicit reliance. QUEEN-EMPRESS *v.* KALIPROSONNO DOSS **I. L. R. 14 Calc. 245**

51. ——— *Cross-examination of witness called by the Court—Evidence Act (I of 1872), s. 165—Criminal Procedure Code, 1882, s. 540.* Where in the course of a criminal proceeding a Magistrate himself summoned a witness and examined her under s. 165 of the Evidence Act, but refused to allow the attorney who appeared for the complainant to cross-examine the witness: —*Held*, that, the Magistrate was wrong in not allowing the complainant's attorney to cross-examine the witness when she was summoned. *Held*, also, that there is nothing in s. 165 debarring or disqualifying a party to a proceeding from cross-examining any witness summoned by the Court. GOPAL LALL SEAL *v.* MANICK LAL SEAL. **I. L. R. 24 Calc. 288**

52. ——— *Hostile witness—Evidence Act, s. 154.* The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(c) CROSS-EXAMINATION—*contd.*

the witness is one who ought not to be believed unless supported by other satisfactory evidence. KALACHAND SIRKAR *v.* QUEEN-EMPRESS. **I. L. R. 13 Calc. 53**

53. ——— *Medical witness.* As to cross-examination by accused of medical witness called in a professional capacity, *see* QUEEN *v.* ISHUN DUTT. **6 B. L. R. Ap. 88 : 15 W. R. Cr. 34**

54. ——— *Evidence Act (II of 1855), s. 34—Cross-examination on previous statements reduced to writing.* The complainant's pleader was *held* to be at liberty before the Deputy Magistrate to cross-examine the witnesses for the defence on points respecting which they had made statements before the Joint Magistrate, and he might do so as regards previous statements which were reduced to writing, without showing the writing. S. 34, Act II of 1855, explained. TUKHEYA RAI *v.* TUPSEE KOER **15 W. R. Cr. 23**

55. ——— *Evidence Act 1855, s. 23—Cross-examination on previous statements reduced to writing.* A witness, when under examination-in-chief before the Court of Session, should not have his attention directed to his deposition before the Magistrate. He might, under s. 23, Act II of 1855, be cross-examined as to previous statements made by him in writing, when his attention might be drawn to the parts of the former writing which were to be used for the purpose of contradicting him. QUEEN *v.* RAMCHUNDER SIRCAR. **13 W. R. Cr. 18**

56. ——— *Prosecution witness examined before the Magistrate but not called in the Court of Session—Witness called by the defence—Cross-examination by defending counsel.* Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness was thereupon placed in the witness-box by counsel for the defence, it was *held* that counsel for the defence, was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination, with the permission of the Court, if the witness proved himself a hostile witness. QUEEN-EMPRESS *v.* ZAWAR HUSEN. **I. L. R. 20 All. 155**

57. ——— **Right of witness on cross-examination**—*Right to qualify statements.* A witness ought to be allowed on cross-examination to qualify or correct any statement which he has made in his examination-in-chief. QUEEN *v.* TULSI DOSADH . . . **18 W. R. Cr. 57**

58. ——— **Right to recall witnesses for cross-examination**—*Cross-examination of,*

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(c) CROSS-EXAMINATION—*contd.*

by accused—Witnesses for defence—Record of evidence. The charge having been read to the accused person, he stated his defence to the same upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence. *Held, per* SPANKIE, *J.*, that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused on the date fixed for the examination of the witnesses for the defence. *Held*, also, *per* SPANKIE, *J.*, that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined. EMPRESS OF INDIA *v.* BALDEO SAHAI **I. L. R. 2 All. 253**

59. ——— Cross-examination after reading depositions—*Irregularity in examination—Criminal Procedure Code, ss. 286, 288.* At a trial before a Sessions Court, the attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented. *Held*, that the procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted. SUBBA *v.* QUEEN-EMPRESS. **I. L. R. 9 Mad. 83**

60. ——— Cross-examination of witness after his examination by the Court—*Evidence Act (I of 1872), s. 155.* The principle that parties cannot, without the leave of the Court cross-examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction, s. 155 of Act I of 1872. REG. *v.* SAKHARAM MUKUNDJI . . . **11 Bom. 166**

61. ——— Recalling witnesses for cross-examination—*Refusal to recall witness.* When the charge had been framed and the defendant put on his defence, he had a right, under s. 218 of the Criminal Procedure Code, 1872, to have the prosecutor's witnesses recalled for the purpose of cross-examination. The claim to recall the witnesses for the prosecution was very different from the request made by the accused person to summon a witness under s. 362, Act X of 1872.

WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(c) CROSS-EXAMINATION—*contd.*

In the matter of the petition of BELILIOS. BELILIOS *v.* QUEEN . . . . **19 W. R. Cr. 53**

62. ——— *Criminal Proceduce Code, 1861, s. 252.* A Magistrate could not refuse to allow witnesses whom he allowed to be cross-examined by the accused previous to the preparation of a charge to be recalled and cross-examined after the accused had been put upon his defence, under s. 252 of the Code of Criminal Procedure, treating them as witnesses for the prosecution. *In the matter of* THAKOOR DYAL SEN **17 W. R. Cr. 51**

In the matter of the petition of NOBIN CHAND BANERJEE . . . . **25 W. R. Cr. 32**

63. ——— *Warrant cases—Criminal Procedure Code, 1872, Ch. XVII.* In the trial of warrant cases the accused may, after the charge is drawn up and the witnesses for the defence have been examined, recall and cross-examine the witnesses for the prosecution. TALLURI VENKAYYA *v.* QUEEN . **I. L. R. 4 Mad. 130**

64. ——— *Right of accused to cross-examine witness—Criminal Procedure Code, 1872, s. 218.* An accused person had, under s. 218 of Act X of 1872, the right to recall and cross-examine the witnesses for the prosecution at any time while he was engaged on his defence and before his trial was concluded. He is not precluded from asserting and exercising the right, by reason of his having cross-examined them before he was put on his defence, or by reason of his not having *suo motu*, expressed his wish to do so, at the time he was called upon to enter on his defence, and when the witnesses were in attendance in the Court and did not require to be re-summoned. QUEEN *v.* LALL SINGH . . . . **6 N. W. 270,**

65. ——— *Criminal Procedure Code, 1872, s. 218—Recall of witnesses for prosecution.* Under s. 218 of the Code of Criminal Procedure, a Magistrate is not competent to refuse to recall the witnesses for the prosecution to be cross-examined by the accused, and it is not necessary for the accused to show that he has reasonable grounds for his application. QUEEN *v.* AMIRUDDIN FAKEER . **21 W. R. Cr. 29**

66. ——— *Cross-examination—Recalling witnesses for further cross-examination after charge—Criminal Procedure Code (Act X of 1882), s. 257.* There is, under s. 257 of the Criminal Procedure Code, no absolute right of cross-examination which would enable the accused to recall and cross-examine the witnesses for the prosecution, no matter how completely and fully they have already been cross-examined. Where the witnesses for the prosecution were fully cross-examined and a charge framed against the accused, and after an adjournment for ten days the witnesses for the defence were examined and cross-examined, and on the day on which the jugdment

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*contd.*

(*c*) CROSS-EXAMINATION—*contd.*

was to be delivered and application under s. 257 of the Code of Criminal Procedure was made on behalf of the accused, asking that process should issue for the witnesses for the prosecution to be recalled and further cross-examined :—*Held*, that, if the Magistrate was of opinion that the application was made with the intention and for the purpose of vexation or delay or for defeating the ends of justice, he was right in refusing the application. It lies upon the party who thinks himself aggrieved to show that the ends of justice have been in some way frustrated in consequence of the refusal to recall the witnesses. It is necessary to be very careful that persons on their trial should not be prejudiced ; but it is also necessary, on the other hand, to see that proceedings in the Criminal Courts are not hampered in a needlessly carping and litigious spirit, losing sight of the main purpose of those proceedings and giving over-attention to matter of mere form. NILKANTA SINGH *v.* QUEEN-EMPRESS.
I. L. R. 20 Calc. 469

67. _____ *Cross-examination—Right of co-accused to cros examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.* One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first. RAM CHAND CHATTERJEE *v.* HANIF SHEIKH.
I. L. R. 21 Calc. 401

68. _____ *Cross-examination of prosecution-witnesses before charge.—Right of accused to have prosecution witnesses recalled after charge drawn up for purposes of cross-examination—Discretion of Magistrate—Criminal Procedure Code (Act V of 1898), ss. 254, 256, and 257—Penal Code (Act XLV of 1860), s. 342.* After a charge has been drawn up, the accused is entitled to have the witnesses for the prosecution recalled for the purposes of cross-examination. S. 256 of the Code of Criminal Procedure gives the Magistrate no discretion in the matter. After a charge has been drawn up, it is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and, if so, which of the witnesses for the prosecution whose evidence has been taken. The fact that there has been already some cross-examination beofre the charge has been drawn up does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application, on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. ZAMUNIA *v.* RAM TAHAL **I. L. R. 27 Calc. 370**
4 C. W. N. 469

68. _____ *Summoning witnesses for prosecution for further cross-examination—Refusal of such application for inadequate reason—Criminal Procedure Code, 1898, s. 257.* The mere fact that the witnesses for the prosecution had already been cross-examined is not a sufficient reason for refusing to re-summon them, unless the Magistrate expressly records his opinion that the application for the second cross-examination is within the terms of s. 257 of the Criminal Procedure Code for the purpose of vexation or delay or for defeating the ends of justice. An order refusing to re-summon witnesses without assigning any such reasons is not a proper order. When an application to re-summon witnesses for the prosecution was made, not on the day the accused were called on to make their defence, but on the following day :—*Held*, that the delay of one day was in itself no sufficient reason for refusing the application. SREENATH BARAI *v.* EMPRESS.
4 C. W. N. 241

70. _____ *Criminal Procedure Code (Act V of 1898), ss. 256, 257—Cross-examination of witness for prosecution, right of.* When after the charge was drawn the accused claimed the right to have the medical officer re-summoned for the purpose of cross-examination, and the Magistrate refused to allow process except on payment of fees for his attendance, and the Magistrate in his explanation to the High Court said that the accused had the opportunity to cross-examine the witness immediately after his examination-in-chief was concluded, but that he had declined to do so :—*Held*, that under the terms of s. 256, Criminal Procedure Code, the accused was entitled to claim this as a matter of right, and that s. 257, Criminal Procedure Code, did not apply to the present case. ISWAR CHUNDER RAUT *v.* KALI KUMAR DASS . . . **4 C. W. N. 351**

71. _____ *Cross-examination previous to framing of charge—Criminal Procedure Code, 1872, s. 218.* An accused person was *held* to be not deprived of the right given him by s. 218, Act X of 1872, to recall and cross-examine the witnesses for the prosecution after the charge had been drawn up against him by reason of the witnesses having been cross-examined before the charge was framed. A Magistrate should not of his own motion discharge the witnesses for the prosecution until the accused person has exercised or waive the right of cross-examination given him by the section. When it becomes necessary to adjourn the hearing, the Magistrate should in all cases enquire of the accused if he desires tc exercise his right of recalling the witnesses for the prosecution, or consents to the discharge of all or any of them. If the accused consents to their discharge, and they are discharged accordingly, he is not entitled to have them re-summoned as a matter of right. Where it became necessary to adjourn the hearing and the Magistrate did not call upon the accused to exercise his right under the section, and there was no sufficient proof that the accused

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consented to the discharge of the witnesses for the prosecution, it was *held* that the accused was entitled to have the witnesses, whom he desired to cross-examine at the further hearing re-summoned. *Quære :* If the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time, whether the Magistrate would thereupon be at liberty to discharge the witnesses. QUEEN *v.* LALL MAHOMED . . . **6 N. W. 284**

72. ——— *Right of accused to cross-examine witnesses—Examination of accused—Discretion of Magistrate.* An accused should be allowed at preliminary inquiries before a Magistrate to cross-examine the witnesses ; but whether the accused himself shall be examined upon the matter of the charge by the Magistrate is left entirely to the discretion of the Magistrate, and such discretion should not be exercised when the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner. QUEEN *v.* SHAMA SUNKUR BISWAS . . . **10 W. R. Cr. 25**

73. ——— *Right of accused to recall witnesses for prosecution—Criminal Procedure Code (Act X of 1872), ss. 217, 218.* Reading ss. 217 and 218 of the Criminal Procedure Code together, it appears that, if an accused person desires to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him and he is called upon to make his defence ; and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled. FAIZ ALI *v.* KOROMDI. **I. L. R. 7 Calc. 28**

s. c. *In the matter of* FAIZ ALI . **8 C. L. R. 325**

74 ——— *Cross-examination of witnesses for the prosecution.* As a rule, the proper and convenient time for the purpose of cross-examination of the witnesses for the prosecution is at the commencement of the accused person's defence ; but it is in the discretion of the Criminal Court to allow the accused to recall and cross-examine the witnesses for the prosecution at any period of the defence when the Court may think such a step right and proper. KHURRUCKDHAREE SINGH *v.* PERSHADEE MUNDUL. **22 W. R. Cr. 44**

75. ——— *Refusal to allow accused to recall witnesses for prosecution—Waiver of right by accused.* Where certain accused persons, who were convicted of using criminal force, had not been allowed to recall and cross-examine the witnesses for the prosecution, because the trying officer believed that such witnesses

could only be recalled immdiately after the framing of the charge :—*Held,* that accused persons always had a right to recall prosecution witnesses, which ceased only when they themselves waived it ; that Magistrates could waive all inconvenience to witnesses by asking accused persons, on the drawing up of charges, whether they required the further attendance of the witnesses ; and that the conviction must be set aside because the accused had not enjoyed the protection provided by the law. QUEEN *v.* RAM KISHAN HALWAI. **25 W. R. Cr. 48**

76. ——— *Accused—Defence—Evidence Act (I of 1872), s. 154—Code of Criminal Procedure (Act V of 1898), s. 257—Prosecution.* Certain witnesses for the prosecution were examined. The accused applied to the Court for an adjournment, to enable them to cross-examine the witnesses by Counsel. The application was refused, and the accused, being called upon to cross-examine, were not in a position to do so. The accused then applied that the witnesses should be summoned as witnesses for the defence. The witnesses were summoned, and, when Counsel for the accused proceeded to cross-examine them, he was not allowed to do so. *Held,* that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character. *Held,* also, that, although the accused were compelled to obtain their attendance as witnesses for the defence, they were really summoned under s. 257 of the Code of Criminal Procedure "for the purpose of cross-examination," and the Magistrate was wrong in refusing to allow their cross-examination. SHEOPRAKASH SINGH *v.* RAWLINS (1901) **I. L. R. 28 Calc. 594**

77. ——— *Criminal Procedure Code (Act V of 1898)—Cross-examination of prosecution witnesses—Expenses of recalling witnesses.* Where the witnesses for the prosecution were cross-examined before the framing of the charge, on the understanding that the accused would not require the witnesses to be recalled for further cross-examination after the charge :—*Held,* that it was not open to the Magistrate to refuse the application of the accused that the witnesses might be recalled after the charge had been framed. *Held,* also, that, in the circumstances, it was proper that the accused should pay the expenses of recalling witnesses, which they had offered to pay. KOKIL GHOSE *v.* KASIMUDDI MALITA (1902). **6 C. W. N. 424**

78. ——— *Accused, right of, to cross-examine prosecution witness before charge—Warrant case.* In a case under s. 380 of the Penal Code :—*Held,* that opportunity should be given to an accused, if he so desires, to cross-examine the prosecution witnesses, even

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WITNESS—CRIMINAL CASES—*contd.*

5. EXAMINATION OF WITNESSES—*concld.*

(c) CROSS-EXAMINATION—*concld.*

though a charge may not be framed. ASHIR BAD MUCHI *v.* MAJEE MUCHINI (1904) **8 C. W. N. 838**

6. CONSIDERATION AND WEIGHT OF EVIDENCE.

1. ——— **Weight of evidence**— *Single witness—Evidence of fact.* The evidence of one witness, if reliable, is sufficient to prove a fact. ZALEM MISSER *v.* KUNDUN KOOER **11 W. R. 194**

BALINDUR NARAIN *v.* KALLA MESSOO KOOS **18 W. R. 341**

PROSONNO NARAIN DEB *v.* ROMONEE DOSSEE. **10 W. R. 236**

2. ——— **Discrepancies in evidence of witnesses**—*Effect of discrepancies.* Discrepancies in the evidence of witnesses are not the less destructive of their testimony because a greater sagacity on the part of the witnesses would have avoided them. REG. *v.* KALU PATIL **11 Bom. Cr. 146**

3. ——— **Consideration of evidence**—*Assumption of bad character of prisoner.* A Judge cannot properly weigh evidence which starts with an assumption of the general bad character of the prisoners. QUEEN *v.* KALU MAL **7 W. R. Cr. 103**

4. ——— **Value of evidence**—*Value of evidence of medical witness.* In trying a prisoner charged with giving false evidence, a Sessions Judge rejected facts which were proved by the evidence of certain witnesses, because a medical officer gave it as his opinion that what the witnesses deposed to could not be true. *Held*, that it was not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved. QUEEN *v.* AHMED ALLY **11 W. R. Cr. 25**

5. ——— **Evidence disbelieved in some parts and accepted in others.** Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereon. JASPATH SINGH *v.* QUEEN-EMPRESS . **I. L. R. 14 Calc. 164**

7. STATEMENTS OF WITNESSES.

1. ——— ——— *Witnesses, statements of—Police investigation—Power of Magistrate to record statements not voluntarily made—Duty of police when fear of witnesses being gained over—Magistrates, Bench of; power of member to act independently—Murder—Suspicion—Criminal Procedure Code (Act V of 1898), ss. 15, 12, 162, 164, and 307—Penal Code (Act XLV of 1860), s. 302.*

WITNESS—CRIMINAL CASES—*contd.*

7. STATEMENTS OF WITNESSES—*concld.*

The accused was suspected of having killed his wife. The police officer investigating the case sent him to the Sub-divisional Magistrate, who, considering the case as one of suspicion only, released the accused on bail. After the *post mortem*, the investigation was renewed, and three days after the release of the accused the police officer sent a number of witnesses to an Honorary Magistrate, not having jurisdiction to try the case, to have their statements recorded under s. 164 of the Criminal Procedure Code, on the ground that there was every chance of their being gained over. Their statements as also that of the accused, were recorded by that Magistrate. *Held*, that the police officer had no authority to place the witnesses before the Honorary Magistrate, as they did not appear voluntarily. *Held*, also, that the Honorary Magistrate, being a member of an independent Bench exercising third-class powers, could not, unless he was specially authorised, act independently, that is to say, when not sitting on the Bench. *Held*, further, that the object of s. 162 of the Criminal Procedure Code would be defeated if, while a police-officer cannot himself record any statement made to him by a person under examination, he can do so by causing the persons to appear before a local Magistrate not competent to deal with the case, and get their statements recorded by him. If the police officer had reason to believe that the witnesses were likely to be gained over by the accused or his party, the police officer should have sent in the accused and the witnesses to the Magistrate having jurisdiction, without delay EMPEROR *v.* NURI SHEIKH (1902). **I. L. R. 29 Calc. 483**
6 C. W. N. 596

2. ——— *Statement of witness taken by the police during investigation and recorded in the special diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898), ss. 161 and 162—Practice.* Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the police during their investigation in the special diary and then returned them to the police without recording an order that he did not think it expedient in the interests of justice to furnish the accused with a copy and also disallowed an application to summon a defence witness:—*Held*, that the Sessions Judge should re-hear the appeal and examine this witness, and send for the statements recorded by the police and, if he found anything in them of advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements. SALT *v.* EMPEROR (1909) . **I. L. R. 36 Calc. 560**

8. PROSECUTION OF WITNESS.

——— *Prosecution of witness—Defamation.* A prosecution for defamation

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WITNESS—CRIMINAL CASES—*concld.*

8. PROSECUTION OF WITNESS—*concld.*

tion under s. 499 of the Indian Penal Code will not lie against a witness in respect of any statement made by him in the course of giving evidence, even if such statement may be not relevant to the matter under inquiry. *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry, 11 B. L. R. 321*, followed. *Dawkins* v. *Lord Rokeby, L. R. 7 H. L. 744, Abdul Hakim* v. *Tej Chunder Mukerji, I. L. R. 3 All. 815;* and *Isuri Prasad Singh* v. *Umrao singh, I. L. R. 22 All. 234*, referred to. EMPEROR *v.* GANGA PRASAD (1907) . **I. L. R. 29 All. 685**

WOMAN.

See DAUGHTER.

See DAUGHTER-IN-LAW.

See MARRIED WOMAN.

See PARDANASHIN WOMAN.

See WIDOW.

See WIFE.

WORDS AND PHRASES.

See CONSTRUCTION.
I. L. R. 32 Bom. 386

See WILL . **I. L. R. 31 Mad. 283**

——— "abatement of rent," in Act XII of 1881, Ch. II—

BENI PRASAD KUARI *v.* DUKHI RAI
I. L. R. 23 All. 270

——— "absence"—

See post, **"in the absence of a contract to the contrary."**

See post, **"in the event . . of his absence, etc."**

——— "abstain from a certain act," in Act V of 1898, s. 144—

QUEEN-EMPRESS *v.* ABDULLA SAHEB
I. L. R. 24 Mad. 262

RAMANANDHAN CHETTI *v.* MURUGAPPA CHETTI
I. L. R. 24 Mad. 45

——— "abwab"—

See post, **"all impositions upon tenants under the denomination of abwab."**

——— "accepting"—

See STAMP ACT, 1879, s. 61
I. L. R. 7 Mad. 71

——— "access"—

See post, **"place to which the public have access."**

——— "accordance"—

See post, **"in accordance with law."**

WORDS AND PHRASES—*contd.*

——— "accused person," in Act V of 1898, s. 437—

IMAN MANDAL *v.* EMPRESS
6 C. W. N. 163

——— "act"—

See ante, **"abstain from a certain act."**

——— "actionable claim," in Act IV of 1882, s. 135—

MATHURA DAS *v.* MURLIDHAR
I. L. R. 24 All. 517

——— "actual possession"—

BATUL BEGAM *v.* MANSUR ALI KHAN
I. L. R. 24 All. 17
s.c. L. R. 28 I. A. 248
5 C. W. N. 888

——— "add"—

See post, **"shall add to any existing embankment."**

——— "adjusted"—

See post, **"if a suit be adjusted."**

——— "adjacent"—

See ENHANCEMENT OF RENT.
1 Agra Rev. 64; 21 W. R. 157

——— "adjustment of suit"—

See CIVIL PROCEDURE CODE, 1882, s. 375 . . **I. L. R. 33 Bom. 69**

——— "administration"—

See post, **"whenever the direction of the Court is deemed necessary for the administration of such trust."**

——— "adult"—

See PUBLIC DEMANDS RECOVERY ACT (BENG. 1 of 1895), ss. 10, 31.
I. L. R. 34 Calc. 787

——— "adultery"—

See MAINTENANCE ORDER OF CRIMINAL COURT **I. L. R. 17 Mad. 260**

——— "affecting the decision of the case," in Act XIV of 1882, s. 591—

GULAB KUNWAR *v.* THAKUR DAS
I. L. R. 24 All. 464

TASADDUQ HUSAIN *v.* HAYAT-UN-NISSA
I. L. R. 25 All. 280

——— "agricultural purposes"—

See post, **"solely for agricultural purposes."**

——— "agriculturist"—

See DEKKHAN AGRICULTURISTS' RELIEF ACT . . **I. L. R. 33 Bom. 376**

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WORDS AND PHRASES—*contd.*

———— "aggrieved"—

See post, "person aggrieved."

———— "alienate"—

See post, "no power to alienate."

———— "all impositions upon tenants under the denomination of abwab," in Act VIII of 1885, s. 74—

JOTINDRA MOHAN TAGORE *v.* CHANDRA NATH SAPUI . . 6 C. W. N. 360

———— "all proceedings under this Act between party and party," in Act IV of 1869, s. 45—

RAMSAY *v.* BOYL . I. L. R. 30 Calc. 489

———— "all stipulations and reservations for the payment of such," in Act VIII of 1885, s. 74—

JOTINDRA MOHAN TAGORE *v.* CHANDRA NATH SAPUI . . . . . 6 C. W. N. 360

———— "all the parties to a suit," in Act XIV of 1882, s. 506—

PITAM MAL *v.* SADIQ ALI (1898) I. L. R. 24 All. 229

———— "alter"—

See post, "materially alter the structure of any house."

———— "always and for ever"—

AZIZ-UN-NISSA *v.* TASSADUQ HUSAIN (1901) I. L. R. 23 All. 324 s.c. 5 C. W. N. 569 L. R. 28 I. A. 65

———— "and it shall be also lawful for the Court, on those or any other occasions," in 11 & 12 Vict., c. 21, s. 36—

In the matter of CHUNI LAL OSWAL I. L. R. 29 Calc. 503

———— "annual value"—

See CESS, ASSESSMENT OF. I. L. R. 35 Calc. 82; 11 C. W. N. 1053

———— "any dispute shall arise respecting the right of succession," in Act XX of 1863, s. 5—

GOPALA AYYAR *v.* ARUNACHALLAM CHETTY I. L. R. 26 Mad. 85

———— "any interest"—

See post, "devolution of any interest."

———— "any other animal"—

See PENAL CODE, s. 429. I. L. R. 22 Calc. 457

WORDS AND PHRASES—*contd.*

———— "any other reasonable cause," in Act XVIII of 1879, s. 13 (*f*)—

In the matter of JOGENDRA NARAYAN BOSE 5 C. W. N. 48

LEMESURIER *v.* WAJID HOSSAIN I. L. R. 29 Calc. 890 s.c. 6 C. W. N. 556

———— "any person having any interest in, or charge upon, the property," in Act IV of 1882, s. 91 (*a*)—

GIRISH CHUNDER DEY *v.* JURAMONI DE 5 C. W. N. 83

———— "any person whose immoveable property has been sold," in Act XIV of 1882, s. 310A—

KEDAR NATH SEN *v.* UMA CHURN 6 C. W. N. 57

———— "any such offence," in Act XLV of 1860, s. 224—

DEO SAHAY LAL *v.* QUEEN-EMPRESS I. L. R. 28 Calc. 253 s.c. 5 C. W. N. 289

———— "any sufficient cause"—

See post, "prevented by any sufficient cause."

———— "anything which the landlord is, under this Act, required or authorised to do," in Act VIII of 1885, s. 188—

SHER BAHADUR SAHU *v.* MACKENZIE 7 C. W. N. 400

———— "appeal"—

See post, "Court to which appeals ordinarily lie."

See post, "order made on appeal."

————, in Act XV of 1877, s. 5—

SARAT CHANDRA DEY *v.* BROJESHWARI DASSI I. L. R. 30 Calc. 790

———— "appear"—

See BOMBAY MUNICIPAL ACT, 1888, s. 354 I. L. R. 33 Bom. 334

———— "application"—

See post, "person entitled to institute suit or make an application."

———— "apprehension"—

See post, "assisting a person in any way to evade apprehension."

———— "area"—

See post, "the area for which rent has been previously paid."

———— "armed"—

See post, "goes armed."

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WORDS AND PHRASES—*contd.*

———— "arms"—

See SWORD-STICK.
I. L. R. 34 Calc. 749

———— "article"—

See post, "medicated article."

———— "articles"—

See RAILWAYS ACT, 1890, s. 75.
I. L. R. 33 Bom. 703

———— "artificer, workman or labourer"

See WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859), s. 1
I. L. R. 36 Calc. 917

———— "artizan"—

See EMIGRATION ACT, s. 107.
I. L. R. 32 Bom. 10

———— "as determinable"—

See SUITS VALUATION ACT, 1887, ss. 8, 11.
I. L. R. 31 Bom. 73

———— "assessment"—

See post, "settlement of the assessment."

———— "assistance," in Act XLV of 1860, s. 187—

In the matter of RAMAYA NAIKA
I. L. R. 26 Mad. 419

———— "assisting a person in any way to evade apprehension," in Act XLV of 1860, s. 216B—

EMPEROR *v.* HUSAIN BAKSH
I. L. R. 25 All. 261

———— "attendant circumstances"—

See WILL I. L. R. 32 Mad. 443

———— "attestation"—

DINAMOYEE DEBI *v.* BON BEHARI KAPUR
7 C. W. N. 160

———— "attested," in Act IV of 1882, s. 59—

RAMJI HARIBHAI *v.* BAI PARVATI
I. L. R. 27 Bom. 91

———— "authorised"—

See ante, "anything which the landlord is, under this Act, required or authorised to do."

———— authority competent in this behalf"—

See CIVIL PROCEDURE CODE, 1882, s. 440.
I. L. R. 31 Bom. 413

———— "avoid"—

See LIMITATION ACT, 1877, Sch. II, ARTS. 119, 120 . I. L. R. 4 Calc. 86

WORDS AND PHRASES—*contd.*

———— "award," in Act I of 1894—

EZRA *v.* SECRETARY OF STATE
I. L. R. 30 Calc. 36
s.c. 7 C. W. N. 249

———— "become useless and inoperative," in Act V of 1881, s. 50 (*4*)—

BAL GANGADHAR TILAK *v.* SAKWARBAI
I. L. R. 26 Bom. 792

———— "benefit"—

See post, "for the benefit of the inmates of the hospital."

———— "bhog"—

RAM KRISHNA MAHAPATRA *v.* MOHUNT PADMA CHARAN DEB GOSWAMI . 6 C. W. N. 663

———— "bind down"—

SUKRU DOSADH *v.* RAM PERGASH SINGH
L. R. 30 Calc. 443
s.c. 7 C. W. N. 174

———— "bound by law to pay," in Act IX of 1872, s. 69—

BIPIN BEHARI SARNOKAR *v.* KALIDAS CHATTERJEE
6 C. W. N. 336

———— "breach of promise of marriage," in Act XV of 1882, s. 19 (*g*)—

MUHAMMAD ASHRUFF HUSSAIN SAHEB *v.* MUHAMMAD ALI . . . I. L. R. 24 Mad. 652

———— "breach of the peace"—

See post, "offences involving a breach of the peace."

———— "bull" and "cow"—

See PENAL CODE, s. 429.
I. L. R. 22 Calc. 457

———— "but of a lower class," in Manu, Ch. IX, verse 122—

JAGDISH BAHADUR *v.* SHEO PERTAB SINGH
I. L. R. 23 All. 369
s.c. 5 C. W. N. 602
L. R. 28 I. A. 100

———— "by a ship"—

THE "TELENA"
I. L. R. 29 Calc. 402
s.c. 6 C. W. N. 773

———— "by way of wager," in Act IX of 1872, s. 30—

KONG YU LONE & CO. *v.* LOWJEE NANJEE
I. L. R. 29 Calc. 461
s.c. 5 C. W. N. 714
L. R. 28 I. A. 239

———— "candidate for a degree"—

See BOMBAY UNIVERSITY ACT, 1857, s. 12
I. L. R. 23 Bom. 465

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WORDS AND PHRASES—*contd.*

———— "capital"—

See MADRAS MUNICIPAL ACT, 1904, SCH. V. . I. L. R. 31 Mad. 408

———— "carriers"—

See post, "common carriers."

———— "case"—

See ante, "affecting the decision of the case."

See post, "criminal case."

See post, "in the case."

See TRANSFER OF CRIMINAL CASES. I. L. R. 28 Calc. 709

LOLIT MOHAN MOITRA *v.* SURJA KANT ACHARJEE I. L. R. 28 Calc. 709 s.c. 5 C. W. N. 749

———— in Act II of 1899, s. 57—

REFERENCE UNDER STAMP ACT, S. 57 I. L. R. 25 Mad 751

———— "cash on delivery"—

See CONTRACT—CONSTRUCTION OF CONTRACTS . . I. L. R. 16 Calc. 417

———— "caste"—

See post, "shall be of any of the lower castes," etc.

———— "cause"—

See ante, "any other reasonable cause."

See post, "costs in the cause."

See post, "good cause."

See post, "other reasonable cause."

See post, "prevented by any sufficient cause."

See post, "reasonable and probable cause."

See post, "sufficient cause."

———— "cause of action"—

See LETTERS PATENT I. L. R. 30 Bom. 167

———— "cause of action"—

———— in Act XIV of 1882, s. 17—

BANKE BEHARI LAL *v.* POKHE RAM I. L. R. 25 All. 48

———— in Act XIV of 1882, s. 424—

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* PERUMAL PILLAI . I. L. R. 24 Mad. 279

———— "certificate"—

See post, "order granting] a certificate."

WORDS AND PHRASES—*contd.*

———— "certified purchaser"—

See CIVIL PROCEDURE CODE (ACT XIV of 1882), S. 317 . I. L. R. 31 Bom. 61

See EXECUTION OF DECREE. I. L. R. 31 Bom. 61

———— "charge"—

See ante, "any person having any interest in or charge upon the property."

See post, "false charge."

———— in Act XLV of 1860, s. 211—

RAYAN KUTTI *v.* EMPEROR I. L. R. 26 Mad. 640

———— "chattels"—

See post, "goods and chattels."

———— "chowdhuri"—

See HINDU LAW I. L. R. 36 Calc. 590

———— "City of Bombay," limits of.

See BOMBAY MUNICIPAL ACT. I. L. R. 30 Bom. 126

———— "claim"—

See ante, "actionable claim."

———— "class"—

See ante, "but of a lower class."

———— "clearing," in Mad. Act IV of 1882, s. 21 (*a*)—

EMPEROR *v.* VENKANNA PRABHU I. L. R. 26 Mad. 470

———— "cocaine"—

EMPEROR *v.* JAMSETJI CAWASJI CAMA I. L. R. 27 Bom. 551

———— "coin"—

See PENAL CODE, S. 230. I. L. R. 29 All. 141

———— "comes," in Act II of 1899, s. 33 (*l*)—

KING-EMPEROR *v.* BALU KUPPAYYAN I. L. R. 25 Mad. 525

———— "commission of an offence"—

See CRIMINAL PROCEDURE CODE, 1898, S. 565 (*4*) I. L. R. 31 Mad. 548

———— "commit"—

See post, "may commit."

See post, "order him to be committed for trial."

See post, "sufficient ground for committing."

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WORDS AND PHRASES—*contd.*

———— "common carriers"—

EAST INDIAN RAILWAY COMPANY *v.* KALIDA MUKERJI . . I. L. R. 28 Calc. 401
s.c. 5 C. W. N. 449
L. R. 28 I. A. 144

———— "community"—

See post, "member of the village community"

See post, "village community."

———— "compartment"—

See RAILWAYS ACT, 1890, s. 110.
I. L. R. 24 Bom. 293

———— "compass map"—

"Compass map" generally means the revenue survey's map. BETTS *v.* MAHOMED ISMAIL CHOWDHRY 25 W. R. 521

———— "competent jurisdiction"—

See post, "court of competent jurisdiction."

———— "complaint"—

———— in Act V of 1898, s. 4 (*h*)—

LALJI GOPE *v.* GIRIDHARI CHAUDHURI
5 C. W. N. 106

———— in Act V of 1898, s. 199—

TARA PROSAD LAHA *v.* EMPEROR
I. L. R. 30 Calc. 910

———— "completion"—

See BOMBAY MUNICIPAL ACT (III OF 1888) s. 353. I. L. R. 19 Bom. 372

———— "continuing wrong," in Act XV of 1877, s. 23—

RAJAH OF VANKATAGIRI *v.* ISAKAPALLI SUBBIAH
I. L. R. 26 Mad. 410

———— "contract"—

See post, "in the absence of a contract to the contrary."

———— "contract in writing, registered," in Act XV of 1877, Sch II, Art. 116—

KOTAPPA *v.* VALLUR ZAMINDAR
I. L. R. 25 Mad. 50

SESHACHALA NAICKAR *v.* VARADA CHARIAR (1901)
I. L. R. 25 Mad. 55

———— "contrary"

See post, "in the absence of a contract to the contrary."

———— "convenient and fitting," in Mad. Act I. of 1884, s. 392—

MUHAMMAD MOHIDIN SAIT *v.* MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS
I. L. R. 25 Mad. 118

WORDS AND PHRASES—*contd.*

———— "corpus delicti"—

See THEFT . . 7 Mad. Ap. 19

———— "costs in the cause"—

TEMPLETON *v.* LAURIE I. L. R. 25 Bom. 230

———— "Court"—

HARI PANDURANG *v.* SECRETARY OF STATE FOR INDIA . . I. L. R. 27 Bom. 424

See, also, *post*, "whenever the direction of the Court, etc."

———— in Act I of 1894—

EZRA *v.* SECRETARY OF STATE
I. L. R. 30 Calc. 36
s.c. 7 C. W. N. 249

———— "Court"—

See COMMISSIONER FOR EXAMINING WITNESS . . . 11 C. W. N. 909

See CONFESSION . I. L. R. 4 Calc. 483

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 476.
I. L. R. 34 Calc. 551

———— "Court," interpretation of.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 476. I. L. R. 32 Bom. 184

———— "Court of competent jurisdiction," in Act V of 1898, s. 537—

KING-EMPEROR *v.* TIRUMAL REDDI
I. L. R. 24 Mad. 523

———— "Court to which appeals ordinarily lie," in Act V of 1898, s. 195 (7)—

EROMA VARIAR *v.* EMPEROR
I. L. R. 26 Mad. 656

SADHU LALL *v.* RAM CHURN PASI
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———— "Court which passed the decree."

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———— "cow"—

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———— "creditor"—

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———— in Letters Patent, High Courts, 1865, cl. 29—

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———— "criminal force," in Act V of 1898, s. 522—

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———— "crops or other produce of land," in Act V of 1898, s. 145 (*2*)—

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———— "danger"—

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———— "debtor"—

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———— in Act XIV of 1882, s. 2—

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———— "defaulter"—

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See post, "stamp of improper description."

———— "desertion"

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———— "dispute"—

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See post, "subject of dispute."

See post, "subjects in dispute."

———— "distant kindred"—

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———— "distinct matters"—

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———— "district"—

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———— "domestic purposes."

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———— "done or intended to be done."

See EPIDEMIC DISEASES ACT, S. 4.
I. L. R. 31 Calc. 829

———— "drug"—

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———— "due care and attention"—

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———— "due diligence"—

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———— "ekjaddi"—

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———— "engaged"—

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———— "enticing away," in Act XLV of 1860, s. 498—

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———— "entire estate," in Madras Regulation XXVI of 1802, s. 3—

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———— "entitled"—

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———— "equitable"—

See post, "fair and equitable."

———— "estate"—

See ante, "entire estates."
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———— "Europeans."

See CRIMINAL PROCEDURE CODE, s. 451.
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———— "execution"—

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5 C. W. N. 781

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———— "failure of justice"—

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———— "final"—

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———— "final decree passed on appeal."

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———— "forbearance"—

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———— "force"—

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——— "fraudulently," in Act XLV of 1860—

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——— "gaming"—

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——— "Gaontia."

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——— "goes armed," in Act XI of 1878, s. 19—

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——— "good cause"—

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——— "ground"—

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See post, "some special ground."
See post, "sufficient grounds for committing."

——— "guarantee"—

See post, "sum he has rightly paid under the guarantee."

——— "guardian"—

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——— "heir as such"—

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——— "Hindu"—

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——— "hissadaran shikmi," in wajib-ul-arz—

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——— "homestead"—

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——— "honoured"—

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——— "hospital"—

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——— "house"—

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——— "houses," in Act VII of 1870—

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——— "immoveable property"—

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See ante, "any person whose immovable property has been sold."

See post, "movable and immovable property of a defaulter."

See post, "person whose immovable property has been sold."

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——— in Act I of 1877, s. 9—

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——— "import"—

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——— "imposition"—

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——— "imprisonment"—

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——— "in accordance with law," in Act XV of 1877, Sch. II, Art. 179—

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——— "incapacitated"—

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——— "inoperative"—

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——— "inquiry," in Act I of 1894—

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I. L. R. 30 Calc. 36
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——— "in respect of the same matter"—

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——— "instrument"—

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——— "instrument comprising or relating to several distinct matters" in Act I of 1879, s. 7—

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——— "instrument of mischief"—

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———— "instruments of gaming," in Ben. Act II of 1867, s. 1—

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———— "interest"—

See ante, "any person having any interest in, or charge upon, the property."

See ante, "devolution of any interest."

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See post, "right, title and interest of the debtors."

See post, "some interest in."

———— "interested"—

See post, "person interested."

———— "interest in the state of the deceased," in Act V of 1881, s. 69—

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———— "interruption"—

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———— "in the event of the death, resignation or removal of a Subordinate Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held," in Act XII of 1887, s. 11 (*1*)—

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———— "in the exercise of his official functions"—

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———— "in the presence of"—

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———— "intoxicating drug," in Bom. Act V of 1878, s. 3 (9)—

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———— "involve some substantial question of law," in Act XIV of 1882, s. 596—

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———— "irregularity," in Act V of 1898, s. 537—

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———— "issue"—

See ante, "in issue."

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———— "issue of notice"—

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———— "istemrari mokurari"—

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———— "joint ancestral family property"—

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———— "joint-creditors," in Act XV of 1887, s. 8—

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———— "joint family property"—

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See LIMITATION ACT, 1877, SCH. II, ART. 127 . . I. L. R. 15 Mad. 57
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———— "joint property"—

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WORDS AND PHRASES—*contd.*

——— "judgment"—

See LETTERS PATENT, 1865, CL. 15
I. L. R. 30 Mad. 311

——— "judgment"—

in Act XIV of 1882, s. 206—

RAMESHWAR PROSAD NARAIN SINGH *v.* CHANDRESHWAR PROSAD NARAIN SINGH
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——— in Letters Patent, High Courts, 1865, cl. 15—

APPASAMI PILLAI *v.* SOMASUNDRA MUDALIAR . I. L. R. 26 Mad. 437

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DURGA PRASADA NAYAUDU *v.* MALLIKARJUNA PRASADA NAYADU
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NARAYANASAMI REDDI *v.* OSURU REDDI
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SABAPATHI CHETTI *v.* NARAYANASAMI CHETTI . I. L. R. 25 Mad. 555

SESHAGIRI ROW *v.* ASKUR JUNG AFTAB DOWLA . I. L. R. 26 Mad. 502

VYASACHARY *v.* KESHAVACHARYA
I. L. R. 25 Mad. 654

——— in Mad. Act VIII of 1885, s. 69—

VENKATA PAPAYYA RAO *v.* VENKATA SUBBAYYA . I. L. R. 25 Mad. 453

——— "judgment-debtor"—

See post, "same judgment-debtor."

——— judicial determination"—

SAHIRAM AGARWALLA *v.* JIBUN KAMAR
5 C. W. N. 254

——— "judicial officer"—

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——— "judicial proceedings," in Act V of 1898, s. 476—

SANGILIA PILLAI *v.* DISTRICT MAGISTRATE OF TRICHINOPOLY
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——— "jurisdiction"—

See ante, "Court of competent jurisdiction."

See ante, "exercised a jurisdiction not vested in it by law."

——— in Act XIV of 1882, s. 578—

MOHESH CHANDRA DAS *v.* JAMIRUDDIN MOLLAH . I. L. R. 28 Calc. 324
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——— "jury"—

See post, "where the trial was by jury."

——— "justice"—

See post, "occasioned a failure of justice."

——— "kaimi"—

FAZEL SHEIKH *v.* KERAMUDDI SHEIKH
6 C. W. N. 916

——— "kindred"—

See ante, "distant kindred."

——— "knowledge of the nature of the Act"—

See INSANITY I. L. R. 34 Calc. 686

——— "labham."

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I. L. R. 29 Mad. 155

——— "land"—

See ante, "crops or other produce of land."

See post, "suits for land or other immovable property."

——— in Act X of 1859, s. 23 (4)—

ROOKE *v.* BENGAL COAL COMPANY, LTD.
I. L. R. 28 Calc. 485
s.c. 5 C. W. N. 840

——— in Act VII of 1870—

DURGA SINGH *v.* BISHESHAR DAYAL
I. L. R. 24 All. 218

——— in Ben. Act IX of 1879, s. 10—

MUKUND KOERI *v.* DEPUTY COMMISSIONER OF CHOTA NAGPUR
I. L. R. 29 Calc. 638
s.c. 7 C. W. N. 20

——— "landlord"—

See ante, "anything which the landlord is, under this Act, required or authorised to do."

——— "last resided together"—

See DIVORCE I. L. R. 36 Calc. 964

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WORDS AND PHRASES—*contd.*

———— "law"—

See ante, "bound by law to pay."

See ante, "exercised a jurisdiction not vested in it by law."

See ante, " in accordance with law."

See ante, "involve some substantial question of law."

———— "lawful"—

See ante, "and it shall be also lawful."

———— "lawful guardian," in Act XLV of 1860, s. 361, Expln.—

JAGANNADHA RAO *v.* KAMARAJU
I. L. R. 24 Mad. 284

———— "lawfully engaged," in Act XLV of 1860, s. 296—

VIJIARAGHAVA CHARIAR *v.* EMPEROR
I. L. R. 26 Mad. 554

———— "lease"—

See post, "Mulgeni lease."

See post, "the sub-lease shall not be valid."

———— "legally recoverable"—

See CIVIL PROCEDURE CODE, 1882, s. 111.
I. L. R. 30 Bom. 173

———— "license"—

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———— "like"—

See post, "open square or the like."

See post, "or the like."

———— "living in adultery"—

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———— "lower class"—

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———— "mafee birt tenure"—

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———— "Magistrate"—

See ante, "information given to a Magistrate."

———— "Magistrate of the first class"—

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I. L. R. 31 Bom. 611

———— "malice"—

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———— "malik"—

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———— "malikana"—

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I. L. R. 9 All. 591

———— "mark"—

See post, "Trade Mark."

———— "marriage"—

See ante, "breach of promise of marriage."

———— "material defects"—

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I. L. R. 20 Bom. 522

———— "materially alter the structure of any house," in Ben. Act II of 1888, s. 236—

KESHUB CHANDRA SEN *v.* CALCUTTA MUNICIPAL CORPORATION
7 C. W. N. 374

———— "materials," in Mad. Act I of 1886, s. 55 (*g*)—

QUEEN-EMPRESS *v.* GANGAYYA
I. L. R. 24 Mad. 417

———— "may," "must," meaning of.

See RAILWAYS ACT (IX OF 1890), s. 140
I. L. R. 35 Calc. 194

———— "may commit," in Act V of 1898, s. 477—

REILY *v.* KING-EMPEROR
I. L. R. 28 Calc. 434
s.c. 5 C. W. N. 609

———— "means of subsistence"—

See post, "ostensible means of subsistence."

———— "medicated article," in Bom. Act V of 1878, s. 62—

EMPEROR *v.* JAMSETJI COWASJI CAMA
I. L. R. 27 Bom. 551

———— "member"—

See ante, "dependent member."

———— "member of the village community," in Act XVIII of 1876, s. 9, cl. 3rd—

DRIG BIJAI SINGH *v.* DEPUTY COMMISSIONER OF GONDA
I. L. R. 24 All. 420

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WORDS AND PHRASES—*contd.*

———— "mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him," in Act IX of 1872, s. 137—

RANJIT SINGH *v.* NAUBAT
I. L. R. 24 All. 504

———— "mere right to sue"—

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———— "mesne profits"—

NARPAT SINGH *v.* HAR GAYAN
I. L. R. 25 All. 275

———— "mischief"—

See ante, "instrument of mischief."

———— "misconduct," in Act XIV of 1882, s. 521—

KALI CHARAN SIRDAR *v.* SARAT CHUNDER CHOWDHURY
I. L. R. 30 Calc. 397
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———— "mistake"—

See ante, "fraud, surprise or mistake."

———— "mokurari"—

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———— "mokurari istemrari"—

AGIN BINDH UPADHYA *v.* MOHAN BIKRAM SHAH
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I. L. R. 30 Calc. 883

———— "money"—

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I. L. R. 30 All. 455

———— "money likely to become due"—

See TODA GIRAS ALLOWANCE ACT, s. 5.
I. L. R. 33 Bom. 258

———— "month"—

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———— "month lunar or calendar"—

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13 C. W. N. 425

———— "mortgage"—

See ante, "English mortgage."

See post, "specifically mortgaged."

———— "motive or reward"—

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WORDS AND PHRASES—*contd.*

———— "movable and immovable property of a defaulter," in Mad. Act II of 1864, s. 5—

NARAYANA RAJA *v.* RAMCHANDRA RAJA
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———— "movable property"—

in Act XV of 1877, Sch. II, Art. 89—

ASGHAR ALI KHAN *v.* KHURSHED ALI KHAN
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in Act XIV of 1882, s. 268—

TARVADI BHOLANATH HARISHANKER *v.* BAI KASHI
I. L. R. 26 Bom. 305

———— "mulgeni lease"—

NARAYAN MANJAYA *v.* RAMCHANDRA DEVASTHAN
I. L. R. 27 Bom. 373

———— "nadarad"—

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I. L. R. 25 All. 90

———— "naslan bád naslan"—

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I. L. R. 14 Calc. 296

———— "necessity"—

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I. L. R. 32 Bom. 577

———— "no power to alienate," in Act I of 1894, s. 32—

MAHAMMAD ALI RAJA AVERGAL *v.* AHAMMED ALI RAJA AVERGAL
I. L. R. 26 Mad. 287

———— "notice"—

See LAND ACQUISITION ACT, 1894, s. 18.
I. L. R. 30 Bom. 275

See post, "the date of issuing a notice."

———— "now on her passage"—

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8 B. L. R. 544

———— "occasioned a failure of justice," in Act V of 1898, s. 537—

KING-EMPEROR *v.* TIRUMAL REDDI
I. L. R. 24 Mad. 523

———— "occasions"—

See ante, "and it shall be also lawful for the Court, on those or any other occasions."

———— "occupants"—

CHOUDHRI MAKBUL HUSAIN *v.* LALTA PERSHAD
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WORDS AND PHRASES—*contd.*

———— "offence"—

See ante, "any such offence."

———— in Act V of 1898, s. 4 (*o*)—

ADAMS *v.* EMPEROR
I. L. R. 26 Mad. 607

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I. L. R. 11 All. 480

See RAILWAYS ACT, s. 113, cl. (*4*).
I. L. R. 20 All. 95

———— "offence," trial of—

See CATTLE TRESPASS ACT (I OF 1871), s. 20, SCH. II
I. L. R. 34 Calc. 926

———— "offences," in Act XXV of 1879, s. 6—

ADAMS *v.* EMPEROR
I. L. R. 26 Mad. 607

———— "offences involving a breach of the peace," in Act V of 1898, s. 110 (*e*)—

ARUN SAMANTA *v.* EMPEROR
I. L. R. 30 Calc. 366

———— "offer for sale"—

See post, "sells or offers for sale."

———— "officer in charge of a police-station," in Act V of 1898, s. 4 (*l*) (*p*)—

SOLICITOR TO THE GOVERNMENT OF INDIA *v.* MADHO DHOBI 7 C. W. N. 661

———— "omission," in Act V of 1898, s. 537—

RAMAKRISHNA REDDI *v.* EMPEROR
I. L. R. 26 Mad. 598

———— "only"—

See ante, "having only an imperfect title."

———— "open place"—

See POLICE ACT, 1861, s. 34.
I. L. R. 27 Calc. 655

———— "open square or the like," in Ben. Act III of 1899, Sch. XVII, rule 24—

NONI LAL SETT *v.* CORPORATION OF CALCUTTA 7 C. W. N. 853

———— "option"—

See post, "shipment at seller's option."

———— "o putra pautradi"—

GOOROO DAS MUSTAFI *v.* SARAT CHUNDER MUSTAFI
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———— "or the like," in Act X of 1859, s. 23 (4)—

ROOKE *v.* BENGAL COAL COMPANY, LTD.
I. L. R. 28 Calc. 485
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———— "order"—

See post, "party against whom an order is passed."

in Act X of 1897, s. 24—

PADAN SAHA *v.* EMPEROR
7 C. W. N. 658

———— "order granting a certificate," in Act VII of 1889, s. 19—

VENKATESWARLU *v.* BRAHMARAVUTU RAJA KRISTNAJI I. L. R. 25 Mad. 634

———— "order him to be committed for trial," in Act V of 1898, s. 436—

QUEEN-EMPRESS *v.* SURENDRA NATH SARKAR I. L. R. 28 Calc. 397
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———— "order made on appeal"—

SUNDER KOER *v.* CHANDISHWAR PROSAD SINGH I. L. R. 30 Calc. 679

———— "ordinarily"—

See ante, "Court to which appeals ordinarily lie."

———— "ostensible means of subsistence," in Act V of 1898, s. 109 (*b*)—

QUEEN-EMPRESS *v.* POORAN AGARWALLA
5 C. W. N. 28

———— "other"—

See ante, "crops or other produce of land."

See ante, "fraud, surprise or mistake, or such other special ground."

———— "other reasonable cause"—

See ante, "any other reasonable cause."

in Act XVIII of 1879, s. 13 (*f*)—

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———— "otherwise," in Act XIV of 1882, s. 600—

BANARASI PERSHAD *v.* KASHI KRISHEN NARAIN I. L. R. 23 All. 227
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5 C. W. N. 193

———— "owner"—

See post, "the purchaser shall not acquire . . . owners."

in Ben. Act III of 1899, s. 3 (32)—

FINK *v.* CORPORATION OF CALCUTTA
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s.c. 7 C. W. N. 706

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———— "owner of mines"—

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———— "owner of package."

See RAILWAYS ACT, s. 75.
I. L. R. 33 BoM. 703

———— "paid"—

See post, "sum he has rightly paid under the guarantee."

See post, "the area for which rent has been previously paid."

in Act XV of 1877, Sch. II, Arts. 61, 99—

RAJAH OF VIZIANAGRAM *v.* SETRUCHERLA SOMASEKHARAZ I. L. R. 26 Mad. 686

———— "parjyapta haibek"—

HARRISS *v.* BROWN
I. L. R. 28 Calc. 621
s.c. 5 C. W. N. 729
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———— "parties concerned in such dispute," in Act V of 1898, s. 145 (*1*)—

KRISHNA KAMINI *v.* ABDUL JUBBAR
I. L. R. 30 Calc. 155;
s.c. 6 C. W. N. 737

———— "parties to the suit," in Act XIV of 1882, s. 244 (*c*)—

KAHIMUDDIN SARKAR *v.* LALL MEA
I. L. R. 29 Calc. 696
s.c. 6 C. W. N. 727

———— "party"—

See ante, "all proceedings under this Act between party and party."

See ante, "all the parties to a suit."

See CONTRACT ACT, s. 64.
I. L. R. 26 Calc. 381

———— "party against whom an order is passed," in Act XIV of 1882, s. 283—

MOIDIN KUTTI *v.* KUNHI KUTTI ALI
I. L. R. 25 Mad. 721

———— "passed jointly"—

See LIMITATION ACT, 1877, SCH. II, ART. 179, EXPL. 1 I. L. R. 31 Bom. 50

———— "pay"—

See ante, "bound by law to pay."

———— "payment"—

See ante, "date of payment."

See ante, "for payment to the decree-holder."

———— "peace"—

See ante, offences involving a breach of the peace."

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———— "pension"—

See post, "political pensions."

———— "person"—

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I. L. R. 26 Calc. 381

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See STAMP ACT, 1879, s. 61.
I. L. R. 27 Calc. 324

———— "person aggrieved," in Act V of 1898, s. 198—

BEAUCHAMP *v.* MOORE
I. L. R. 26 Mad. 43

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I. L. R. 25 All. 132

———— "person entitled to institute a suit or make an application," in Act XV of 1877, s. 7—

PERIASAMI *v.* KRISHNA AYYAN
I. L. R. 25 Mad. 431

———— "person interested," in Act I of 1894, s. 23—

NARAIN CHANDRA BORAL *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 28 Calc. 152
s.c. 5 C. W. N. 349

———— "person whose immovable property has been sold," in Act XIV of 1882, s. 310A—

MALLIKARJUNADU SETTI *v.* LINGA MURTI PANTULU . I. L. R. 26 Mad.

PARESH NATH SINGHA *v.* NOBOGOPAL CHATTOPADHYA I. L. R. 29 Calc. 1
s.c. 5 C. W. N. 821

———— "personally interested"—

See CRIMINAL PROCEDURE CODE, s. 556.
I. L. R. 27 All. 25; 33

———— "physical comfort"—

See EASEMENTS ACT, s. 28 (*c*)
I. L. R. 30 Bom. 319

———— "physical possession," in Act XV of 1877, Sch. II, Art. 10—

BATUL BEGAM *v.* MANSUR ALI KHAN
I. L. R. 24 All. 17
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5 C. W. N. 888

———— "place to which the public have access"—

CAWASJI MERWANJI SHROFF *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY
I. L. R. 26 Bom. 609

———— "plaintiff"—

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WORDS AND PHRASES—*contd.*

———— "police force"—

See post, "rendering such force efficient in the discharge of all its duties."

———— "police station"—

See ante, "officer in charge of a police station."

———— "policy of sea-insurance," in Act II of 1899, Sch. I, Art. 47, cl. A—

In the matter of a REFERENCE UNDER THE INDIAN STAMP ACT, 1899 (1903) I. L. R. 30 Calc. 565

———— "political pensions," in Act IV of 1882, s. 266 (*g*)—

MUTHUSAMI NAIDU *v* ALAGIA MANAVALA SIMMALA RAJA I. L. R. 26 Mad. 423

———— "possession"—

See ante, "actual possession."

See ante, "physical possession."

in Act XV of 1877, s. 28—

LALLA KANHOO LAL *v.* MANKI BIBI 6 C. W. N. 601

in Act XIV of 1882, s. 331—

MANCHARAM *v.* FAKIRCHAND I. L. R. 25 Bom. 478

———— "power"—

See ante, "no power to alienate."

———— "prejudice"—

See post, "to the prejudice of the purchaser."

———— "prevailing rate"—

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———— "prevented by any sufficient cause," in Act XIV of 1882, ss. 103, 108, 558—

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———— "prior to the realisation," in Act XIV of 1882, s. 295—

RAMMANATHAN CHETTIAR *v.* SUBBRAMANIA SASTRIAL I. L. R. 26 Mad. 179

———— "probable cause"—

See post, "reasonable and probable cause."

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———— "proceeding"—

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in Act XV of 1877, s. 14—

JAFAR *v.* KAMALINI DEBI I. L. R. 28 Calc. 438 5 C. W. N. 150

———— "proceedings"—

See ante, "all proceedings under this Act between party and party."

in Madras Act VIII of 1865, s. 80—

DHARMAKATRA OF TINNANORE TEMPLE *v.* LUCHMI DOSS I. L. R. 26 Mad. 589

———— "proceedings"—

See "PRESIDENCY SMALL CAUSE COURTS ACT," s. 38 I. L. R. 31 Bom. 259

———— "produce"—

See ante, "crops for other produce of land."

———— "profits"—

See ante, "mesne profits."

———— "projah"—

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———— "promise"—

See ante, "breach of promise of marriage."

———— "proper Court"—

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———— "property"—

See ante, "immovable property."

See ante, "movable and immovable property."

See ante, "movable property."

See post, "saleable property."

in Act VII of 1870, Sch. I, Art. 11—

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See PENAL CODE, s. 420. I. L. R. 32 Calc. 22

———— "proprietor"—

See COURT OF WARDS I. L. R. 36 Calc. 28

———— "proprietor," in Act V of 1888, s. 51—

BAHAL RAI *v.* SUMER CHAND I. L. R. 25. All 493

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WORDS AND PHRASES—*contd.*

———— "prosecuting with due diligence," in Act XV of 1877, s. 14—

DASRATH RAI *v.* BHIRGU RAI CHANDAN
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———— "prosecutions," in Ben. Act IV of 1866, s. 49 (*1*)—

BIJOYENDRA LAL MITTER *v.* EMPEROR
7 C. W. N. 883

———— "protected interest," in Act VIII of 1885, s. 160—

AKHOY KUMAR SOOR *v.* BEJOY CHAND MOHATAP I. L. R. 29 Calc. 813

———— "public"—

See ante, "place to which the public have access."

———— "public place"—

See GAMBLING I. L. R. 30 Bom. 348

———— "public purpose," in Act I of 1894—

EZRA *v.* SECRETARY OF STATE
I. L. R. 30 Calc. 36
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———— "public servant," in Act XLV of 1860, s. 21—

NAZAMUDDIN *v.* QUEEN-EMPRESS
I. L. R. 28 Calc. 344

———— "public street"—

ANKLESVAR MUNICIPALITY *v.* RIKHAV CHAND KAPURCHAND
I. L. R. 25 Bom. 315

———— "publication"—

BAHAL RAI *v.* SUMER CHAND
I. L. R. 25 All. 493

———— "publisher"—

See PRINTING PRESSES AND NEWSPAPERS ACT, 1867, s. 3. I. L. R. 23 Calc. 414

———— "publishing or conducting" sales—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 311. I. L. R. 32 Bom. 572

———— "punishment"—

See post, "shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment."

———— "purchased," in Act XV of 1877, Sch. II, Art. 134—

MANAVIKRAMAN ETTAN THAMBURAN *v.* AMMU . I. L. R. 24 Mad. 471

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———— "purchaser"—

See post, "the purchaser shall not acquire, etc."

See post, "to the prejudice of the purchaser."

———— "purpose"—

See ante, "for the purpose of cross-examination."

See ante, "public purpose."

See post, "solely for agricultural purposes."

———— "question of law"—

See ante, "involve some substantial question of law."

———— "realization"—

See ante, "prior to the realisation."

———— "reasonable cause"—

See ante, "any other reasonable cause."

See ante, "other reasonable cause."

———— "reasonable and probable cause"—

BHIM SEN *v.* SITA RAM
I. L. R. 24 All. 363

———— "reclaim"—

SHAMRAO PANDURANG *v.* SECRETARY OF STATE FOR INDIA
I. L. R. 25 Bom. 32

———— "registered"—

See ante, "contract in writing registered."

———— "relative," in Act X of 1865, s. 105—

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———— "remedy"—

See ante, "mere forbearance ... to enforce any other remedy," etc.

———— "removal"—

See ante, "in the event of the death, resignation, removal," etc.

———— "rendering such force (*i.e.*, the police force) efficient in the discharge of all its duties," in Ben. Act IV of 1866, s. 9—

BIJOYENDRA LAL MITTER *v.* EMPEROR
7 C. W. N. 883

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WORDS AND PHRASES—*contd.*

———— "rent"—

See ante, "abatement of rent."

See ante, "in which the rent payable by the tenant has been a matter in issue."

See post, "the area for which rent has been previously paid."

in Bom. Act V of 1879—

SADASHIV *v.* RAMKRISHNA
I. L. R. 25 Bom. 556

———— "rent"—

See BENGAL TENANCY ACT, s. 67.
11 C. W. N. 110

See CESS, ASSESSMENT OF.
I. L. R. 35 Calc. 82 ; 11 C. W. N. 105

———— "report," in Act V of 1898, s. 4 (*h*)—

KING-EMPEROR *v.* SADA
I. L. R. 26 Bom. 150

———— "required"—

See ante, "anything which the landlord is, under this Act, required or authorised to do."

———— "required or authorised to do."

See BENGAL TENANCY ACT (VIII OF 1885), s. 188 . I. L. R. 35 Calc. 331

———— "reservations"—

See ante, "all stipulations and reservations."

———— "reside"—

See INSOLVENCY ACT, s. 5.
11 B. L. R. 254

———— "residence"—

See DIVORCE ACT, 1869, s. 2.
3 C. W. N. 250

———— "resign"—

See KHOTI SETTLEMENT ACT, 1880, s. 10
I. L. R. 31 Bom. 267

———— "resignation"—

See ante, "in the event of the death, resignation," etc.

———— "reverse the finding and sentence," in Act V of 1898, s. 423 (*1*) (*b*)—

SAMI AYYA *v.* EMPEROR
I. L. R. 26 Mad. 478

———— "revivor," in Act XV of 1877, Sch. II, Art. 180—

MONOHAR DAS *v.* FUTTEH CHAND
I. L. R. 30 Calc. 679
s.c. 7 C. W. N. 795

WORDS AND PHRASES—*contd.*

———— "right"—

See ante, "any dispute shall arise respecting the right of succession."

See post, "the purchaser shall not acquire any rights, etc.

———— "right, title and interest of the debtors"—

AKHOY KUMAR SOOR *v.* BEJOY CHAND MOHATAP I. L. R. 29 Calc. 813

———— "rightly paid"—

See post, "sum he has rightly paid under the guarantee."

———— "run to waste."

See MUNICIPALITY
I. L. R. 32 Bom. 460

———— "sale"—

See ante, "date of sale."

See post, "sells or offers for sale."

in Act VII of 1870, s. 34—

KEDAR NATH SHAHA *v.* EMPEROR
I. L. R. 30 Calc. 921
s.c. 7 C. W. N. 704

———— "saleable property," in Act XIV of 1882, s. 266—

SHOILOJANUND OJHA *v.* PEARY CHARAN DEY I. L. R. 29 Calc. 470
s.c. 6 C. W. N. 728

———— "same class"—

See ENHANCEMENT OF RENT.
9 W. R. 83

———— "same judgment-debtor," in Act XIV of 1882, s. 295—

RAMANATHAN CHETTIER *v.* SUBRAMANIA SASTRIAL I. L. R. 26 Mad. 179

———— "same transaction," in Act V of 1898, s. 235—

CHEKUTTY *v.* EMPEROR
I. L. R. 26 Mad. 454

———— "samskara"—

See HINDU LAW I. L. R. 32 Bom. 81

———— "satisfaction"—

See ante, "execution or satisfaction of the decree."

———— "sea-insurance"—

See ante, "policy of sea insurance."

———— "seller's option"—

See post, "shipment at seller's option."

———— "sells or offers for sale," in Act VII of 1870, s. 34, and Act II of 1899, s. 69—

QUEEN-EMPRESS *v.* VIRASAMI
I. L. R. 24 Mad. 319

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WORDS AND PHRASES—*contd.*

———— "sentence"—

See ante, "enhance the sentence."

See ante, "reverse the finding and sentence."

———— "servant"—

See ante, "public servant."

———— "settlement of the assessment," in Bom. Act II of 1876, s. 9—

VINAYAK ATMARAM *v.* COLLECTOR OF BOMBAY I. L. R. 26 Bom. 339

———— "several distinct matters"—

See ante, "instrument comprising or relating to several distinct matters."

in Act II of 1899, s. 5—

REFERENCE UNDER STAMP ACT, s. 57. I. L. R. 25 Mad. 3

———— "shall add to any existing embankment," in Ben. Act II of 1882, s. 76 (*a*)—

AJODHYA NATH KOILA *v.* RAJ KRISHTO BHAR I. L. R. 30 Calc. 481 s.c. 7 C. W. N. 284

———— "shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment," in Mad. Reg. XI of 1816, s. 10 (*1*)—

RATTIGADU *v.* KONDA REDDI I. L. R. 24 Mad. 271

———— "shikmi"—

See ante, "hissadaran shikmi."

———— "ship"—

See ante, "by a ship."

———— "shipment at seller's option during August-September"—

MACKERTICH *v.* NOBO COOMAR RAY I. L. R. 30 Calc. 477; s.c. 7 C. W. N. 431

———— "shopkeeper," in Mad. Act IV of 1884, Sch. A—

MUNICIPAL COUNCIL OF MANGALORE *v.* SECRETARY OF STATE FOR INDIA I. L. R. 25 Mad. 747

———— "signing otherwise than as witness"—

See STAMP ACT, 1879, s. 61. I. L. R. 27 Calc. 324

WORDS AND PHRASES—*contd.*

———— "situate"—

See JURISDICTION OF CRIMINAL COURTS I. L. R. 30 Mad. 136

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 44 I. L. R. 30 Mad. 393

———— "sold"—

See ante, "any person whose immovable property has been sold."

See ante, "person whose immovable property has been sold."

———— "solely for agricultural purposes," in Mad. Act IV of 1884, s. 63 (*3*)—

KING-EMPEROR *v.* ALLAN I. L. R. 25 Mad. 627

———— "some interest in," in Act XIV of 1882, s. 279—

SABHAPATHI CHETTI *v.* NARAYANASAMI CHETTI I. L. R. 25 Mad. 555

———— "some other cause of like nature."

See LIMITATION ACT (XV OF 1877), S. 14 I. L. R. 35 Calc. 728 12 C. W. N. 473

———— "son"—

See ante, "eldest son to be born."

———— "sonatan"—

See DEED—CONSTRUCTION 7 W. R. 320

———— "special ground"—

ROYAL INSURANCE COMPANY *v.* AUKHOY COOMAR DUTT I. L. R. 28 Calc. 272 s.c. 5 C. W. N.

See, also, ante, "fraud, surprise of mistake, or such other special ground."

———— "specific moveable property"—

See ZURIPESHGI LEASE 11 C. W. N. 862

———— "specifically mortgaged," in Act XVII of 1879, s. 22—

BALSHET *v.* DHONDO RAMKRISHNA I. L. R. 26 Bom. 33

———— "spirituous liquor"—

See CANTONMENTS ACT, 1880, S. 14 I. L. R. 15 Calc. 452

———— "square"—

See ante, "open square or the like."

———— "stamped at the time of execution," in Act I of 1879, s. 17—

SURIJ MULL *v.* HUDSON I. L. R. 24 Mad. 259

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WORDS AND PHRASES—*contd.*

———"stamp of improper description," in Act II of 1899, s. 37, and Rule 16 of the Rules thereunder dated 17th February 1899—

REFERENCE UNDER s. 57 OF ACT II OF 1899 . I. L. R. 23 All. 213

——— "stipulations"—

See ante, "all stipulations and reservations."

———"street"

See U. P. MUNICIPALITIES ACT, s. 3 (4) I. L. R. 30 All. 70

——— "street"—

See ante, "public street."

See BOMBAY MUNICIPAL ACT (III OF 1888). I. L. R. 30 Bom. 558

——— "structure"—

See ante, "materially alter the structure of any house"

——— "subjects in dispute"—

See post, "the subjects in dispute."

——— "subject of dispute," in Act V of 1898, ss. 145 and 146—

SADAR ALI *v.* ABDUL KARIM 5 C. W. N. 710

——— "sub-lease"—

See post, "the sub-lease shall not be valid."

——— "Subordinate Judge"—

See ante, "in the event of the death of a Subordinate Judge," etc.

——— "subsistence"—

See ante, "ostensible means of subsistence."

——— "substantial question of law"—

See ante, "involve some substantial question of law."

——— "succession"—

See ante, "any dispute shall arise respecting the right of succession."

——— "successively"—

GOPAL CHUNDER BOSE *v.* KARTICK CHUNDER DEY . I. L. R. 29 Calc. 716

——— "such"—

See ante, "any such offence."

See ante, "fraud, surprise or mistake or such other special ground."

WORDS AND PHRASES—*contd.*

——— "such thing to be done" in Act V of 1898, s. 147—

PASUPATI NATH BOSE *v.* NANDO LAL BOSE 5 C. W. N. 67

——— "sufficient cause"—

See ante, "prevented by any sufficient cause."

in Act XV of 1877, s. 5—

KICHILAPPA NAICKAR *v.* RAMANUJAM PILLAI I. L. R. 25 Mad. 166

RAM NARAIN JOSHI *v.* PARMESWAR NARAIN MAHTA I. L. R. 30 Calc 309 s.c. L. R. 30 I. A. 20

——— "sufficient grounds for committing," in Act V of 1898, s. 209—

EMPEROR *v.* VARJIVANDAS I. L. R. 27 Bom. 84

——— "suit"—

See ante, "all the parties to a suit."

See ante, "if a suit be adjusted."

See ante, "parties to the suit."

See ante, "person entitled to institute a suit or make an application."

See post, "the value of the original suit."

——— "suit"—

See PRESIDENCY SMALL CAUSE COURTS ACT, s. 38 I. L. R. 31 Bom. 259

——— "suit for money"—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 380 I. L. R. 32 Bom. 602

——— "suit relating to a trust," in Act IX of 1887, Sch. II, Art. 18—

SUNDARALINGAM CHETTI *v.* MARIYAPPA CHETTI I. L. R. 26 Mad. 200

———"suits for land or other immovable property," in Letters Patent, High Courts, 1865—

HARA LALL BANERJEE *v.* NITAMBINI DEBI I. L. R. 29 Calc. 315

——— "sum he has rightly paid under the guarantee," in Act IX of 1872, s. 145—

PUTTI NARAYANAMURTHI AYYAR *v.* MARIMUTHU PILLAI I. L. R. 26 Mad. 322

——— "surprise"—

See ante, "fraud, surprise or mistake"

——— "swaraj"—

See SEDITION I. L. R. 34 Calc. 991

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WORDS AND PHRASES—*contd.*

———— "talukh"—

See GRANT . . 18 W. R. 469

———— "talukhdar," in Bom. Act VI of 1888, s. 2 (*a*)—

NARANDAS PARBHUDAS *v.* PARSHOTTAM VALU . I. L. R. 26 Bom. 757

———— "tari"—

See CANTONMENTS ACT (III OF 1880), S. 14 I. L. R. 15 Calc. 452

———— "the area for which rent has been previously paid," in Act VIII of 1885, s. 52 (*1*) (*a*)—

RAJENDRA LAL GOSWAMI *v.* CHUNDER BHUSAN GOSWAMI 6 C. W. N. 318

———— "the date of issuing a notice," in Act XV of 1877, Sch. II, Art. 179—

KADARESSUR SEN BABOR *v.* MOHIM CHANDRA CHAKRAVARTI 6 C. W. N. 656

———— "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners," in Act XI of 1859, s. 54—

ANNODA PROSAD GHOSE *v.* RAJENDRA KUMAR GHOSE I. L. R. 29 Calc. 223 s.c. 6 C. W. N. 375

———— "the subjects in dispute," in Act XIV of 1882, s. 42—

RAMASWAMI AYYAR *v.* VYTHINATHA AYYAR I. L. R. 26 Mad. 760

———— "the sub-lease shall not be valid," in Act VIII of 1885, s. 85 (*3*)—

MADAN CHANDRA KAPALI *v.* JAKI KARIKAR 6 C. W. N. 377

———— "the value of the original suit," in Act XII of 1887, s. 21 (*a*)—

SHEO SINGH *v.* BALDEO SINGH I. L. R. 25 All. 277

———— "therein"—

See ante, "found therein."

———— "thing"—

See ante, "intangible thing."

See ante, "such thing to be done."

———— "three miles"—

See BOM. ACT III OF 1866 4 Bom. Cr. 9

———— "ticca mohto"—

See ENHANCEMENT OF RENT. 3 W. R., Act X, 144

———— "time of execution"—

See ante, "stamped at the time of execution"

WORDS AND PHRASES—*contd.*

———— "title"—

See ante, ". having only an imperfect title."

See ante, "right, title and interest of the debtors."

———— "to be born"—

See ante, "eldest son to be born."

———— "to the prejudice of the purchaser," in Ben. Act III of 1899, s. 495—

MOTI LAL PAL *v.* CORPORATION OF CALCUTTA . I. L. R. 30 Calc. 643 s.c. 7 C. W. N. 637

———— "trade mark," in Act XLV of 1860, s. 478—

RADHA KRISHNA JOSHI *v.* KISSONLAL SHRIDHAR I. L. R. 26 Bom. 289

———— "trader," in Mad. Act IV of 1884, Sch. A—

MUNICIPAL COUNCIL OF MANGALORE *v.* SECRETARY OF STATE FOR INDIA I. L. R. 25 Mad. 747

———— "transaction"—

See ante, "same transaction."

———— "transfer, succession or otherwise"—

See BENGAL TENANCY ACT, S. 26 13 C. W. N. 12

———— "trial"—

See ante, "order him to be committed for trial."

See post, "where the trial was by jury."

———— "trust"—

See ante, "suit relating to a trust."

See post, "whenever the direction of the Court is deemed necessary for the administration of such trust.'"

———— "trust for a specific purpose"—

See LIMITATION ACT (XV OF 1877), S. 10 I. L. R. 32 Bom. 394

———— "unable to entertain," "unable to decide," "prosecuted with due deligence"—

See LIMITATION ACT (XV OF 1877), S. 14 I. L. R. 35 Calc. 728

———— "under-renter"—

See BENGAL REGULATION, 1799—VII 13 W. R. 302

———— "undivided family"—

See PARTITION ACT (IV OF 1893), S. 4 I. L. R. 29 All. 308

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WORDS AND PHRASES—*contd.*

———— "unfair advantage"—

See CONTRACT ACT (IX OF 1872), S. 16
I. L. R. 32 Bom. 37

———— "unless the Court otherwise directs"—

See CIVIL PROCEDURE CODE, 1882, S. 80
13 C. W. N. 490

———— "useless"—

See ante, "become useless and inoperative."

———— "valid"—

See ante, "the sub-lease shall not be valid."

———— "value"—

See ante, "the value of the original suit."

———— "vexatious," in Act V of 1898, s. 250—

BENI MADHUB KURMI *v.* KUMUD KUMAR BISWAS I. L. R. 30 Calc. 123
s.c. 6 C. W. N. 799

———— "village cattle"—

See BOMBAY SURVEY AND SETTLEMENT ACT, 1865, S. 32.
I. L. R. 2 Bom. 110

———— "village community"—

See ante, "member of the village community."

in Act XII of 1878—

RAHIMUDDIN *v.* REWAL
I. L. R. 30 Calc. 635
s.c. 7 C. W. N. 498
L. R. 30 I. A. 89

———— "wager"—

See ante, "by way of wager."

———— "wantonly"—

See PENAL CODE, S. 153
I. L. R. 29 All. 569

———— "wash"—

QUEEN-EMPRESS *v.* GANGAYYA
I. L. R. 24 Mad. 417

———— "whenever the direction of the Court is deemed necessary for the administration of such trust," in Act XIV of 1882, s. 539—

NETI RAMA JOGIAH *v.* VENKATA CHARULU
I. L. R. 26 Mad. 450

———— "where the trial was by jury," in Act V of 1898, s. 418—

KING-EMPEROR *v.* PARBHUSHANKAR
I. L. R. 25 Bom. 680

WORDS AND PHRASES—*concld.*

———— "with the distrainer"—

VIRARAGHAVA AYYANGAR *v.* KANAGAVALLI AMMAL I. L. R. 25 Mad. 503

———— "without interruption," in Act IV of 1882, s. 108 (*c*)—

TAYAWA *v.* GURSHIDAPPA
I. L. R. 25 Bom. 269

———— "writing"—

See ante, "contract in writing, registered."

———— "wrong"—

See ante, "continuing wrong."

———— "year"—

See SALE FOR ARREARS OF REVENUE.
I. L. R. 34 Calc. 381

———— "year"—

See ante, "current year."

WORKING FOR GAIN.

See JURISDICTION—CAUSES OF JURISDICTION—DWELLING, CARRYING ON BUSINESS, OR WORKING FOR GAIN.

WORKMAN.

See WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859).
2 B. L. R. A. Cr. 32
I. L. R. 7 Mad. 100
I. L. R. 7 Bom. 379
I. L. R. 10 Bom. 96

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859).

———— *Inquiry under the Act—Summary trial not permissible.* An offence under the Workmen's Breach of Contract Act, 1859, cannot be tried summarily. *Emperor v. Dhondu Krishna I. L. R.* 33 Bom. 22, followed. EMPEROR *v.* BALU (1908) . I. L. R. 33 Bom. 25

———— Preamble and s. 1.—"*Artificer, Workman or Labourer*"—*Person entitled to work by contract and to percentage of profits—Fraudulent breach of contract—Neglect or refusal to perform work—Refusal to work for alleged breach of contract by employer.* A person entitled under his agreement to have the stipulated work performed on the contract system in lieu of pay, and to receive a percentage on the profits as commission with an annual statement of the accounts of the business, a percentage of the reserve fund as commission in the event of the firm being wound up, and a similar percentage on sums drawn from such fund at any time, is not an "artificer, workman or labourer" under the Act. The neglect or refusal, wilfully and without lawful or reasonable excuse, to perform work or get it performed as mentioned in s. 1 of the Act, must amount to a fraudulent

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WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*concld.*

breach of the contract, as stated in the preamble to it. Where, therefore, a person left his employment owing to his employer's failure to furnish him with a statement of the business accounts and to pay a percentage of the profits, in accordance with the terms to the contract:—*Held*, that there was no such neglect or refusal as to bring him within the scope of s. 1 of the Act. PURNA CHANDRA NANDAN *v.* TARACK NATH CHANDRA (1909) . I. L. R. 36 Calc. 917

——— **ss. 1, 2.**—*Summary inquiry into an offence punishable under the Workmen's Breach of Contract Act—Court Fees Act (VII of 1870), sec. 31—Court-fee on petition of Complaint—Liability of the workman to pay.* An offence under the Workmen's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code. In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court-fee paid on the petition of complaint. EMPEROR *v.* DHONDU (1904) I. L. R. 33 Bom. 22

WORSHIP.

See HINDU LAW—WORSHIP.

WRITTEN STATEMENT.

See ADMISSION—ADMISSIONS IN STATEMENTS AND PLEADINGS.
B. L. R. Sup. Vol. 904
1 B. L. R. A. C. 133
9 W. R. 83, 130, 290
16 W. R. 257
22 W. R. 220
I. L. R. 14 Bom. 516

See PRACTICE I. L. R. 34 Calc. 443

See SET-OFF—CIVIL PROCEDURE CODE, 1882, s. 11
8 C. W. N. 174

See SET- OFF—GENERAL CASES.
14 W. R. 473
I. L. R. 15 Mad. 22

——— **absence of evidence in support of—**

See EASEMENT. I. L. R. 30 Calc. 918

See POSSESSION, ORDER OF CRIMINAL COURT AS TO—DECISION OF MAGISTRATE AS TO POSSESSION.
5 C. W. N. 71

——— **denial of title in—**

See CO-SHARER SUITS BY CO-SHARERS WITH RESPECT TO THE JOINT PROPERTY
I. L. R. 28 Calc. 223

WRITTEN STATEMENT—*contd.*

——— **denial of title in**—*concld.*

See FALSE EVIDENCE—GENERAL CASES.
I. L. R. 6 All. 626

See LANDLORD AND TENANT—FORFEITURE—DENIAL OF TITLE.
I. L. R. 28 Calc. 135
I. L. R. 13 Calc. 96
I. L. R. 15 Mad. 123

——— **presumption from non-denial in, of allegation made against defendant—**

See INJUNCTION SPECIAL CASES—OBSTRUCTION OR INJURY TO RIGHTS OF PROPERTY . I. L. R. 26 Bom. 735

——— **treated as an acknowledgment—**

See LIMITATION ACT, 1877, s. 19—ACKNOWLEDGMENT OF DEBTS.
I. L. R. 24 Mad. 361

1. ——— **Form and contents of written statement**—*Civil Procedure Code, 1859, s. 123—Defendant's written statement—Variance between pleading and proof.* S. 123 of the Civil Procedure Code, contemplated that a defendant should, in his written statement, set forth the case he intends to make at the trial. The rule followed in *Eshenchunder Singh* v. *Shamachurn Bhutto, 11 Moo. I. A. 7; Mohummud Zahoor Ali Khan* v. *Rutta Koer, 11 Moo. I. A. 468;* and *Narainee Dossee* v. *Nurrohurry Mohuto, Marsh. 70*, that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, applies also to the case made on the pleadings by a defendant. Therefore, where the defendant in a suit in ejectment averred in his written statement that the land in dispute was in fact his, but had previously to 1865 been encroached on by the plaintiff, who, in 1865, was about to erect a building thereon, and that the defendant then, in order to avoid litigation, compromised the dispute by payment to the plaintiff of a sum of money, and purchased the land, and had since then remained in possession of it:—*Held*, that the only defence open to the defendant was that of purchase, and that he could not be allowed at the trial to prove a case of continuous user and possession adverse to the plaintiff commencing before 1865. CHOVA KARA *v.* ISA BIN KHALIFA . . . I. L. R. 1 Bom. 209

2. ——— *Argumentative statement.* A written statement should not be argumentative. BISHEN SAHAYE SINGH *v.* BEER KISHORE SINGH . . 8 W. R. 296

3. ——— *Offer without prejudice—Irrelevant matter—Act VIII of 1859, s. 124.*—An officer without prejudice should be omitted from the pleadings. In a suit where the written statement of the plaintiff contained letters relative to an offer made by the defendants without prejudice, the Court ordered, on the application of

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WRITTEN STATEMENT—*contd.*

the defendant, that the paragraphs of the written statement relating to the offer should be struck out. HALFORD *v.* EAST INDIAN RAILWAY COMPANY
12 B. L. R. Ap. 19

4. ——— *Irrelevant matter—Application to take written statement off the file.* Where there was in a written statement matter irrelevant and improper, the Court, on application, ordered it to be taken off the file, with leave to file a fresh one in a week. Written statements should set out the *bonâ fide* nature of the defence, and nothing else. KASUBLAL DEY *v.* TREMEARNE
3 B. L. R. Ap. 12

5. ——— *Taking off the file for irrelevancy—Relevant matter—Tender of written statement.* The Court has jurisdiction to take a written statement off the file, for irrelevancy until it is "tendered," which is when it is produced at the hearing of the suit. "Relevancy" is to be judged by what the defendant believed to be material to his case, and not whether it did in fact disclose a good defence to the action. KESHAVJI NAIK *v.* NASARVANJI ARDESIR WADIA
10 Bom. 425

6. ——— *Inconsistent pleas—Plea allowed on appeal inconsistent with written statement.* A Hindu wrote his will devising certain ancestral property to his wife, and on the following day he registered it and took the plaintiff in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will, and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in. *Held*, that the defendants were not precluded from succeeding on the latter of these pleas notwithstanding it was inconsistent with their written statement. *Mahomed Buksh Khan* v. *Hoseini Bibi, I. L, R. 15 Calc. 684 : L. R, 15 I. A. 81,* distinguished. NARAYANASAMI *v.* RAMASAMI
I. L. R. 14 Mad. 172

7. ——— **Court-fee on written statement**—*Code of Civil Procedure (Act VIII of 1859), s. 120—Act X of 1877, s. 110—Court Fees Act (VII of 1870), s. 19.* A written statement of his case, tendered by a party to a suit at any time before or at first hearing of the suit, is not liable to any Court-fee, and may be written on a plain paper (s. 110 of Act X of 1877). A written statement called for by the Court after the first hearing is also exempt from stamp duty (s. 19 of Act VII of 1870). NAGU *v.* YEKNATH . **I. L. R. 5 Bom. 400**

CHERAG ALI *v.* KADIR MAHOMED
12 C. L. R. 367

8. ——— **Verification of written statement**—*Admission on record without verification.* A written statement filed by the defendant should be verified, but if admitted in the record without verification, its allegation should be noticed and issues framed accordingly. RADHACHURN ROY *v.* MORAN & Co. . . . **13 W. R. 342**

9. ——— *Verification on behalf of Corporation—Principal officer of Corporation or Company—Civil Procedure Code, 1882, ss. 115 and 235—Practice—Waiver of objection to verification—Plaint, verification of.* The Civil Procedure Code by ss. 115 and 435 enables a principal officer of a corporation to verify a plaint or written statement, and it is therefore not necessary that permission for that purpose should be obtained, but it should be shown in cases to which s. 435 applies that the person purporting to verify a plaint or a written statement on behalf of a Corporation or Company is a principal officer of the Corporation, and is able to depose to the facts of the case. If the plaint or written statement contains a statement to that effect, verification in the usual form would probably be sufficient. Where suits had been filed against the East Indian Railway Company, the plaints in which described the defendant Company as a Corporation, and an application was made for the admission on behalf of the defendant Company of written statements signed. "The East Indian Railway Company by their constituted attorney and agent Richard Gardiner," who was described in the verification as the "Agent of the defendant Company," and the written statements contained no statement to the effect that he was a principal officer of the defendant Company and able to depose to the facts of the case :—*Held*, that such evidence should be supplied by affidavit before the written statements could be admitted. The provisions in the Code relating to the verification of written statement, however, being intended for the protection of plaintiffs, the ir observance might be waived by the plaintiffs, and if they were prepared to waive objections to the sufficiency of the verification, further evidence of the nature indicated might be dispensed with. SREENATH BANERJEE *v.* EAST INDIAN RAILWAY CO. **I. L. R. 22 Calc. 268**

10. ——— *Application to verify—Notice—Practice* where an application is made that a written statement be verified by a person other than the plaintiff or defendant, it is always desirable that notice be given to the other side, although not absolutely necessary. FINLAY, CAMPBELL & Co. *v.* STEELE
1 Ind. Jur. N. S. 39

11. ——— *Application to verify by agent—Notice.* The Court will allow a written statement to be verified by the constituted attorney of the party without notice to the other side. OVEREND, GURNEY & Co. *v.* STEELE
1 Ind. Jur. N. S. 40

12. ——— **Filing written statement**—*Time for filing.*—Under the Code of Civil Procedure a plaintiff cannot file a written statement after having seen that of the defendants, and by way

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WRITTEN STATEMENT—*contd.*

of rejoinder thereto. JADUB RAM DEB *alias* JADUB CHUNDER DEB *v.* RAM LOCHUN MUDUCK **5 W. R. 56**

13. ——— *Filing and verifying written statement on behalf of plaintiff—Civil Procedure Code, 1859, ss. 28, 123.* The plaintiff in a suit went on a pilgrimage after he had been orderd to file a written statement, but without having filed it. Not having returned when the case was on the board, his son applied, under ss. 28 and 123 of Act VIII of 1859, for leave to verify and file a statement, alleging himself to be interested as a reversioner. The application was refused. *Held*, that a third party will not be allowed to verify and file a written statement for a plaintiff who has culpably neglected to file one himself. DENOMOYE DOSSEE *v.* TARRACHURN COONDOO CHOWDHRY **Bourke O. C. 153**

14. ——— **Admission of written statements**—*Civil Procedure Code, 1859, ss. 120, 122.* The admission of written statements of the parties on various dates, unless expressly called for by the Court, was *held* to be contrary to the provisions of ss. 120 and 122 of the Civil Procedure Code, 1859. ALI NUKEE *alias* EMDAD ALI *v.* TORAB ALI *alias* MIRZA NAWAB . . . **W. R. 1864, 44**

15. ——— **Written statement by third party**—*Power of Court.* A Court has no authority to receive a written statement in a suit from one who is not a party, or to permit such a person to appear at the hearing. SURNOMOYEE *v.* BYKUNT CHUNDER MUSTOFEE . . **25 W. R. 17**

16. ——— **Defendant neglecting to put in statement**—*Adjournment of case—Costs.* In the event of a defendant neglecting to furnish a written statement, the Court will examine him as to the grounds of his defence and should it appear desirable that a written statement should be put in, the case will be adjourned for that purpose at the expense of the defaulting party. RAMRUTTON *v.* ORIENTAL INLAND STEAM NAVIGATION COMPANY **2 Hyde, 89**

17. ——— **Additional written statement**—*Practice—Act VIII of 1859, s. 122.* An application by the defendant for leave to file an additional written statement allowed on condition of the defendant paying the whole costs and furnishing a copy of the additional statement to the plaintiff free of charge. Distinction made between such an application by a plaintiff and one made by a defendant. DASMANI DASI *v.* SRINATH GHOSE **3 B. L. R. Ap. 11**

18. ——— *Supplemental statements, filing of.* Supplemental written statements cannot be filed after the parties have entered upon their case at the hearing. MUNCHERSHAW BEZONJI *v.* NEW DHURUMSEY SPINNING & WEAVING COMPANY . **I. L. R. 4 Bom. 576**

19. ——— *Civil Procedure Code, 1859, s. 122.* A Court was *held* not to have done wrong in admitting a supplemental written statement which it had called for under s. 122, Civil Procedure Code, 1859, which did not add to or vary the plaintiff's claim. JAHANGEER BUKSH *v.* BHICKAREE LALL . . **11 W. R. 71**

20. ——— *Statement explaining plaint.* A written statement which was in explanation of the plaint and not starting a new case was allowed to be put in by the plaintiff after evidence was taken, and the defendant not being prejudiced by its admission. LALL MAHOMED *v.* DHOOLEE RAM DOSS . . **22 W. R. 377**

21. ——— **Amendment of written statement**—*Permission to extend counter claim—Practice.* The defendants, owing to their ignorance of the true facts, did not include in their counter claim certain sums paid by them to the plaintiff in part payment of the alleged losses incurred in respect of the purchase and re-sale of the aforesaid cotton. *Held*, that the lower Court (RUSSELL, *J.*) had rightly permitted the defendants to put in a supplemental written statement extending their counter claims so as to include these items. LAKHMICHAND *v.* CHOTOORAM **I. L. R. 24 Bom. 403**

22. ——— **Objections to written statement**—*Sunday—"Four clear days"—Civil Procedure Code, 1859, s. 124.* A written statement has been "four clear days" upon the file in compliance with the rule 28, although the last of such days is a Sunday. Objections to the written statement on the ground stated in s. 124 of Act VIII of 1859 cannot be taken when the suit is ripe for hearing. SMALLWOOD *v.* PARRY . **Cor. 39**

23. ——— *Civil Procedure Code (Act XIV of 1882), ss. 115, 146 written statement, received and not objected to, though not signed or verified according to law—Objection taken on appeal after case fought out on merits.* It is not obligatory upon a defendant to put in a written statement. He may do so if he likes. S. 146 of the Civil Procedure Code contemplates that issues may be settled whether there was a written statement or not, though it is not obligatory on the Court to frame issues if the defendant makes no defence. Where a written statement filed on behalf of the defendant was actually received by the Court and no application was made by the plaintiff to have it taken off the file on the ground of its not being signed and verified by the defendant as required by s. 115 of the Civil Procedure Code, and the question was raised for the first time in appeal after the case had been fought on in the first Court on the footing of a proper written statement. *Held*, that in such circumstances the appellate Court was not justified in decreeing the suit on the footing that there was no defence, by reason of the written statement not being signed or verified by the defendant, and the case should have been tried on the merits. RUSTUN GAZI *v.* TARA PROSANNA CHOWDHURY (1907) . . . . **11 C. W. N. 871**

24. ——— **Raising question not raised in written statement**—*Omission to raise equitable defence in written statement.* A defendant is

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WRITTEN STATEMENT—*concld.*

not precluded from availing himself of any equity which might arise out of the facts proved at the trial, merely because he has not raised that equity on the face of his written statement. GOUR CHUNDER BISWAS *v.* GREESH CHUNDER BISWAS
7 W. R. 120

25. ——— *Raising question of jurisdiction—Fresh issue—Practice.* Where a question of jurisdiction had not been raised in a written statement, the defence therein being limited to a statement, of the merits of the case, an application to raise an issue as to jurisdiction was granted on payment of the costs of the adjournment to enable the plaintiff to meet the case set up. ROHEEMOLLA *v.* PALMER . . . **Cor. 8**

WRITTEN SUBMISSION.

See ADMINISTRATION SUIT.
I. L. R. 33 Bom. 69

WRONG-DOERS.

See CONTRIBUTION, SUIT FOR—JOINT WRONG-DOERS.

See LIMITATION ACT, 1877, SCH. II, ART. 109 . . **I. L. R. 24 Calc. 413**

See PARTITION . **I. L. R. 35 Calc. 961**
12 C. W. N. 127

See RES JUDICATA—PARTIES—SAME PARTIES OR THEIR REPRESENTATIVES.
I. L. R. 14 Bom. 408

WRONGFUL ATTACHMENT.

See ATTACHMENT—LIABILITY FOR WRONGFUL ATTACHMENT.
I. L. R. 17 Calc. 436
L. R. 17 I. A. 17

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.
3 B. L. R. A. C. 413

I. L. R. 3 Bom. 74
7 Mad. 235

See DAMAGES—SUITS FOR DAMAGES—TORTS.

See EXECUTION OF DECREE—LIABILITY FOR WRONGFUL EXECUTION.

WRONGFUL CONFINEMENT.

See COMPOUNDING OFFENCE.
I. L. R. 21 Calc. 103

See PENAL CODE, SS. 340 to 348.

See UNLAWFUL COMPULSION.
I. L. R. 19 Calc. 572

See WRONGFUL RESTRAINT.
I. L. R. 12 Bom. 377

1. ——— **What amounts to imprisonment**—*Suit for damages.* The detaining of a person in a particular place, or the compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of the person exercising that exterior will. PARAN KUSAM NARASAYA PANTULU *v.* STUART.
2 Mad. 396

WRONGFUL CONFINEMENT—*contd.*

2. ——— **Nature of confinement**—*Penal Code (Act XLV of 1860), s. 346.* In order to render a person liable under s. 346 of the Penal Code it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. *In the matter of the petition of* SREENATH BANERJEE. EMPRESS *v.* SREENATH BANERJEE.
I. L. R. 9 Calc. 221

3. ——— **Unlawful commitment by person in authority**—*Illegal arrest—Penal Code, s. 220—Presumption of malice.* Proof of an unlawful commitment to confinement will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved in order to satisfy the requirements of s. 220 of the Penal Code. REG. *v.* NARAYAN BABAJI
9 Bom. 346

4. ——— **Obtaining arrest of wrong person**—*Liability of person setting Court in motion.* Where a wrong person is arrested and imprisoned under a decree to which he is no party, the person setting the Court in motion is not liable for such arrest and imprisonment if he did not obtain the process fraudulently or improperly. BHEEMA CHARLU *v.* DONTI MURTI . . **8 Mad. 38**

5. ——— **Illegal arrest**—*Malice.* Four persons, two of them police constables and two village officers, were convicted of wrongful confinement and abetment thereof. The defendants, the village officers, maliciously directed the arrest of certain persons for resisting the detention of certain pigs found trespassing. *Held*, a good conviction. ANONYMOUS . **5 Mad. Ap. 24**

6. ——— **Wrongful restraint**—*Penal Code, ss. 339, 340, 342—Malice.* Malice is not an essential ingredient in the offence of "wrongful confinement" as defined by s. 340 of the Indian Penal Code (Act XLV of 1860). The offence is complete when a person is wrongfully restrained in such a manner as to be prevented from proceeding beyond certain circumscribing limits. And a person is wrongfully restrained when he is voluntarily obstructed so as to be prevented from proceeding in any direction in which he has a right to proceed. The accused as abkari inspector visited a toddy shop where the complainant and one *D* were employed as agents for the sale of toddy. Having reason to suspect that an offence under the Abkari Act (Bombay Act V of 1878) had been committed, the accused made an inquiry, in the course of which the complainant made certain statements implicating his fellow-servant. The accused thereupon resolved to prosecute *D* and make the complainant a witness in the case. In order to prevent him being tutored, the accused ordered his sepoy to bring the complainant to his camp, and there detained him during the night, and on the following

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WRONGFUL CONFINEMENT—*contd.*

morning sent him in charge of a sepoy to a Magistrate's Court, where the complainant repeated the statements made by him before the accused. He was then allowed to go away. The accused prosecuted *D*, and in the course of his trial admitted in his deposition that he had ordered his sepoy to bring the complainant to his camp, and had detained him there during the night. After the termination of *D's* trial, the complainant charged the accused with wrongful confinement under s. 342 of the Indian Penal Code. The accused pleaded that the complainant had voluntarily come to his tent to have his statements reduced to writing, and that he had of his own accord stopped in his camp during the night. The trying Magistrate held this plea proved, and discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882). The Sessions Judge held that, though the accused had detained the complainant in his camp during the night, still he was not guilty of any offence under the Penal Code, as he had acted without malice and to the best of his judgment. *Held*, by the High Court on revision, that the mere circumstance that the accused had acted without malice and to the best of his judgment did not protect him, if his act otherwise satisfied the definition of s. 340 of the Indian Penal Code. DHANIA *v.* CLIFFORD . **I. L. R. 13 Bom. 376**

7. ——— **Wrongful arrest**—*Penal Code (Act XLV of 1860), s. 342—Criminal Procedure Code, 1882, s. 54—Offence committed by a British subject in foreign territory—Powers of the police to arrest for such offence without a warrant.* S. 54 of the Criminal Procedure Code (Act X of 1882) does not empower a police officer to arrest, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India. *M* was a native Indian subject of the Queen-Empress, residing at Belgaum. A complaint was filed against him in the Sangli State, charging him with committing breach of trust within the territories of that State. Thereupon he obtained an order from the District Magistrate of Belgaum, dated the 15th November 1891, which exempted him from arrest for the offence of criminal breach of trust without a warrant issued by himself or by the Political Agent of the Southern Maratha country. This order was communicated to *M* through the accused, who was the chief constable at Belgaum. On the 27th November 1891 a police officer from Sangli State came to Belgaum with a warrant issued by the Sangli Court for the arrest of *M* on a charge of criminal breach of trust. The chief constable thereupon directed *M's* arrest. *M* brought to the notice of the chief constable the District Magistrate's order of the 15th November 1891, but he was detained in custody till the matter was reported to the first class Magistrate, who ordered his discharge. In the meantime the complaint filed against *M* in the Sangli State was dismissed without requiring his extradition. *M* thereupon prosecuted the chief constable on a charge of wrongful arrest and wrongful confinement. *Held*, that the chief constable had no power to arrest the complainant without a warrant and that he was guilty of the offence of wrongful confinement under s. 342 of the Penal Code. *In re* MUKUND BABU VETHE **I. L. R. 19 Bom. 72**

WRONGFUL CONFINEMENT—*concld.*

8. ——— *Prisoner in jail—Confinement, illegal, in cell—Penal Code (Act XLV of 1860), ss. 79, 114 and 342.* If a prisoner is confined in a particular part of a prison without legal authority, that confinement is a wrongful one, notwithstanding that his confinement in the prison at large may be legal. BAISHTAB CHARAN SHAHA *v.* EMPEROR (1902) **I. L. R. 30 Calc. 95 s. c. 6 C. W. N. 511**

9. ——— *Penal Code (Act XLV of 1860) s. 342—Officer arresting and confining judgment-debtor in house of judgment-creditor not guilty of wrongful confinement.* An officer arresting a judgment-debtor under a warrant which directs him to produce the judgment-debtor when arrested before the Court with all convenient speed, is not guilty of wrongful confinement if, having effected the arrest when the Court is not sitting, he confines him in the house of the judgment-creditor. His duty is to produce the judgment-debtor at the next sitting of the Court and until he so produces him, he is responsible for his safe custody. EMPEROR *v.* SAMUEL (1906). **I. L. R. 30 Mad. 179**

WRONGFUL CONVERSION.

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS.
I. L. R. 4 Calc. 116
5 Bom. O. C. 140
I. L. R. 10 All. 133

See ONUS OF PROOF—WRONGFUL CONVERSION . . . **7 W. R. 286**

See PLEDGOR AND PLEDGEE.
I. L. R. 19 Calc. 322
L. R. 19 I. A. 60

WRONGFUL DETENTION.

——— **Detention of accused by Police Inspector**—*Criminal Procedure Code, 1872, s. 124*—*Per* GLOVER, *J.*—Where a Sub-Inspector of Police is charged with having detained prisoners for more than twenty-four hours, it is not necessary for the Crown to prove that he detained them with a guilty knowledge, as s. 124, Act X of 1872, imperatively lays down that accused persons are on no account to be detained beyond that time except under special order of the Magistrate, which was not obtained in this case. QUEEN *v.* BASOORAM DASS . **19 W. R. Cr. 36**

WRONGFUL DISMISSAL.

See DAMAGES, SUIT FOR .
I. L. R. 34 Calc. 863

See MASTER AND SERVANT.

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WRONGFUL DISMISSAL *concld.*

——— **suit for, against Government.**

See GOVERNMENT . **7 B. L. R. 688**

WRONGFUL DISTRAINT.

See BENGAL RENT ACT (VIII OF 1869), S. 27 . **6 W. R. Act X, 7, 33**
7 W. R. 41
9 W. R. 162
Marsh. 264
15 W. R. 451
3 B. L. R. Ap. 74
3 B. L. R. A. C. 261

See BENGAL RENT ACT (VIII OF 1869), S. 100.
Marsh. 470
3 W. R. Act X, 139

See BENGAL TENANCY ACT, SS. 121, 122, 140.
I. L. R. 28 Calc. 364

See JURISDICTION OF CIVIL COURT—RENT AND REVENUE SUITS, N.-W. P.
I. L. R. 12 All. 409

See LIMITATION ACT, 1877, SCH. II, ART. 28.
7 C. W. N. 728

See MADRAS RENT RECOVERY ACT, S. 20
I. L. R. 26 Mad. 183

See MADRAS RENT RECOVERY ACT, S. 78.
I. L. R. 20 Mad. 449

See PRIVATE DEFENCE, RIGHT OF.
23 W. R. Cr. 40

See RIOTING . . **8 Mad. Ap. 11**
I. L. R. 13 Mad. 148

See SMALL CAUSE COURT, MUFUSSIL—JURISDICTION—WRONGFUL DISTRAINT.

See TRESPASS—GENERAL CASES.
23 W. R. Cr. 40

1. ——— Cutting and carrying away crops—*Persons put in possession in execution of decree.* Certain patnidars who, in execution of a decree for khas possession, had been put in nominal possession of their lands, instead of ousting the raiyats allowed them to cultivate, and when they had cultivated cut and carried away their crops. *Held*, that the act of the patnidars was an abuse of the law of distraint, and rendered them liable for damages. ADOR MOHUN CHUCKERBUTTY *v.* THAKOOR MONEE DABEE . . **10 W. R. 70**

2. ——— Crops, seizure of—*Act X of 1859, ss. 142 and 143—Trespass.* Certain sub-lessees sued in the Collector's Court the zamindar and others employed by him for the value of crops seized and carried away, under a certificate, as was alleged by the defendants, granted to them by the Collector, but which they failed to produce. *Held*, that ss. 142 and 143 of Act X of 1859 applied to the case. S. 143, Act X of 1859, contemplated not only the case of a person who professes to follow the provisions of the law, though he has no power to distrain, but also the case of a person who, under colour of the Act, does distrain, but does not do so according to the provisions of the Act. Such persons were considered by that section as trespassers, and were liable to the penalty of trespass, in addition to damages which may be awarded against them by the Revenue Court. RADHA MOHAN NASKAR *v.* JADUNATH DASS
3 B. L. R. A. C. 261 : 12 W. R. 68

3. ——— Person acting without authority—*Act X of 1859, s. 143—Trespasser.* S. 143, Act X of 1859, did not apply when a distrainer acted without the authority of the superior holder. In such a case he was a mere trespasser. ROWSHUN *v.* BHOLANATH DOSS . . **5 W. R., Act X., 67**

4. ——— Suit for damages for illegal distraint—*Tort—Non-joinder of parties—Parties in actions of tort.* A suit for compensation for illegal distraint of crops was brought by one of two persons jointly entitled to the crops distrained. Objection being taken at a late stage of the case on the ground of non-joinder of a party, that party was in his own application added as a plaintiff. *Held*, that the rule that persons having the same cause of action must sue jointly does not apply to actions on tort in every case in which persons have been damnified by the same tortious act. If the objection of non-joinder of party in an action of tort be not taken at the time and in the way provided by law, the defendant is liable to such portion of the damages only as have been incurred by the plaintiff who originally brought the suit. JAGDEO SINGH *v.* PADARATH AHIR.
I. L. R. 25 Calc. 285

5. ——— Persons removing property under rent law—*Procedure—Penal Code, s. 379.* Persons removing property under the provisions of the rent law relating to distraint ought not to be proceeded against under the criminal law, but the parties aggrieved by a wrongful distraint should have recourse to the remedy provided by Bengal Act VIII of 1869. *In the matter of* AGHANI AGHANI *v.* BHAGI HALWAI . **8 C. L. R. 204**

6. ——— Right to sue to set aside wrongful distraint—*Right of landlord against trespasser.* A landlord whose tenant's crops have been wrongfully distrained by a stranger, has a right to sue to set aside such wrongful distraint. HORRO NARAIN *v.* SHOODHA KRISHTO BERAH.
I. L. R. 4 Calc. 890 : 4 C. L. R 32

7. ——— Right to damages for wrongful distraint—*Beng. Act VIII of 1869, ss. 69, 78—Liability to suit for damages.* When, on the one hand, a raiyat institutes a suit to contest the demand of a distrainer, the Court has no option, but must adjudicate upon the demand. If, on the other hand, the distrainer has distrained "otherwise than according to the provisions of the Rent Act," he has done so at his peril, and rendered himself liable to an action for damages by the owner of the distrained property. TARINEE KANT LAHIREE CHOWDHRY *v.* RAJKISHORE TONTRY . **24 W. R. 334**

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WRONGFUL DISTRAINT—*concld.*

8. _____ **Right to damages**— *Act X of 1859, s. 142—Suit to contest distraint—Onus of proof damages.* In a suit to contest the demand of a distrainer, the landlord is only required to prove the fact of tenancy and the amount of jumma if thereupon the tenant pleads payment and payment is denied, the onus is on the tenant to prove his allegation. Before a tenant can obtain any decree for damages on the ground of illegal distraint he must prove what loss he has actually sustained. OOJAN DEWAN *v.* PRANNATH MUNDUL
8 W. R. 220

9. _____ **Onus of proof**—*Suit for damages for wrongful distraint—Act X of 1859, s. 143.* In order to maintain a suit under s. 143, Act X of 1859, it was necessary for the plaintiff to prove that the defendant in making the distress was acting not only without right, but without anything to justify him in supposing that he had a right to distrain—a mere trespasser without any reasonable foundation for the claim set up. RAYE KUMUL DOSSEE *v.* JHOROO MOLLAH . . **15 W. R. 543**

See JOYLOLL SHEIKH *v.* BROJONATH PAUL CHOWDHRY . . . **9 W. R. 162**

10. _____ **Suit on account of property damaged by wrongful distrainer**—*Act X of 1859, s. 142—Damages for vexatious distraint, power of Court to award.* When a suit had been brought under s. 142, Act X of 1859, on account of property damaged or destroyed by neglect of a distrainer, the Court was not competent to award damages for vexatious distraint. Such damages were properly awarded by the Collector under s. 138, in a suit to contest the distrainer's demand. NONKOO RAM *v.* WOOJOGUR ROY . . .
5 W. R., Act X, 68

11. _____ **Procedure**—*Beng. Act VIII of 1869, s. 101—Proceedings against persons wrongfully distraining.* When proceedings are taken before a Munsif under Bengal Act VIII of 1869, s. 101, he is bound, first, to inquire whether an offence has been committed, and if he is satisfied that it has, the only order he can make against the offenders (not being tenants) is that they shall pay the value of the crops distrained. PREM CHAND LAHA *v.* ADDOITO DOSS . **20 W. R. 445**

WRONGFUL GAIN OR LOSS.

See CRIMINAL BREACH OF TRUST.
6 C. W. N. 203

See CHEATING . **I. L. R. 33 Calc. 50**

See THEFT . **I. L. R. 15 Bom. 344**
I. L. R. 18 All. 88
I. L. R. 22 Calc. 669 ; 1017
I. L. R. 25 Calc. 416

WRONGFUL LOSS.

See CHEATING . **I. L. R. 33 Calc. 50**
See FORGERY . **5 C. W. N. 897**

WRONGFUL LOSS—*concld.*

See MISCHIEF . **3 B. L. R. A. Cr. 17**
I. L. R. 3 Calc. 473
I. L. R. 12 Calc. 55 ; 660
I. L. R. 7 Bom. 126

See WRONGFUL GAIN OR LOSS.

WRONGFUL POSSESSION.

_____ **Trespasser**—*Sums paid during wrongful possession, right to recover.* Where a person was wrongfully taken possession of an estate and held it adversely to the true owner, and has, during his possession, paid certain sums for Government revenue on the supposition that he was the lawful owner (being, however, in reality, nothing more than a trespasser and wrong-doer), he is not entitled to recover, as against the true owner, any sums so paid, even though such payments may have enured to the benefit of the true owner, but must be content to bear the burden of his own wrong. TILUCK CHAND *v.* SOUDAMINI DASI
I. L. R. 4 Calc. 566 : 3 C. L. R. 456

WRONGFUL RESTRAINT.

See COMPOUNDING OFFENCE.
I. L. R. 21 Calc. 103

See MISCHIEF . **I. L. R. 12 Calc. 55**

See PENAL CODE, SS. 339 to 341.

See WRONGFUL CONFINEMENT.
I. L. R. 13 Bom. 376

1. _____ **Penal Code, ss. 339, 340, 342**—*Police officer, conduct of.* In a case of a police officer charged under Penal Code, s. 342, where there was no malice, no intention of doing an act of the nature spoken of in s. 339 or 340, and no voluntary obstruction or restraint, though there was probably excessive and mistaken exercise of powers not civilly excusable in a police officer, the facts were *held* not to amount to the criminal offence of wrongful restraint. *In the matter of the petition of* BUDROOL HOSSEIN
24 W. R. Cr. 51

2. _____ **s. 339**—*Refusal to let person go until he gave bail.* Where a police officer refused to let a person go home until he had given bail, he was *held* to have been guilty of wrongful restraint under s. 339 of the Penal Code. SHEO SHURN SAHAI *v.* MAMHOMED FAZIL KHAN
10 W. R. Cr. 20

3. _____ *Police keeping witness in custody under surveillance.* Where the police kept a witness under surveillance for four days, the High Court *held*, under the circumstances, that there was nothing in law to warrant them in keeping him so in restraint. BAJRANGI LALL *v.* EMPRESS . . . . **4 C. W. N, 49**

4. _____ *Restraint and taking money on false plea.* Where the accused

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WRONGFUL RESTRAINT—*contd.*

prevented the complainants from proceeding in a certain direction with their carts and exacted from them a sum of money on a false plea :—*Held*, that the accused were guilty of wrongful restraint, and not theft. JOWAHIR SHAH *v.* GRIDHAREE CHOWDHRY
10 W. R. Cr. 35

5. ——— Penal Code, ss. 79 and 341— *Mistake of fact —Act done in good faith under belief it is justified by law.* A Court peon accompanied by two of the decree-holder's men (petitioners) went to execute a warrant of arrest against the judgment-debtor *M*. A palki with closed doors was noticed to be coming out of the male appartment of *M's* house. The petitioners, believing that *M* was effecting his escape in that palki, stopped it and examined it, although the persons accompanying the palki protested and said there was a lady in it. Admittedly, there was in the palki a pardanashin lady of rank. *Held*, that, having regard to the terms of s. 79 of the Penal Code, a conviction of the petitioners under s. 341 was not right. KANAI LAL GOWALA QUEEN-EMPRESS . **I. L. R. 24 Calc. 885**

KANHAI GOALA *v.* QUEEN-EMPRESS
1 C. W. N. 665

6. ——— Penal Code, ss. 52, 79, 99, and 342—*Act done by a person by mistake of fact is good faith believing himself justified by law—Right of private defence against acts of a public servant acting bonâ fide under colour of his office—Act XII of 1856, s. 35—Reasonable suspicion—Obstruction to a police officer while acting in execution of duty—Arrest—Criminal Procedure Code (Act X of 1882), s. 54.* On the 29th December 1887, the accused, a police constable, was on duty at a temporary post near the Arther Crawford Market. His turn of duty lasted from 4 to 7 A. M. Between 6-30 and 7 A.M. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujarathi marks and not knowing that such marks are placed on English-made goods, concluded that this statement was false, and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant, and took him to a European Inspector, to whom he stated the facts, alleging that he had arrested the complainant because he had assaulted him. The Inspector, seeing that the complainant was an old man, and on the accused saying he was not hurt, let the complainant go. The complainant then lodged a complaint before the acting Chief Presidency Magistrate charging the accused with wrongful restraint and wrongful confinement, offences punishable under

WRONGFUL RESTRAINT—*contd.*

ss. 341 and 342, respectively, of the Indian Penal Code (XLV of 1860). The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police. The Magistrate found that there was no justification for the suspicion which the accused professed to entertain ; that there were no reasonable grounds for questioning the complainant about the cloth in his possession, and that the scuffle was caused solely by the action of the accused in treating the complainant without any valid reason as a suspected thief. The Magistrate convicted the accused of wrongful confinement under s. 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment. *Held*, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant, the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, satisfactory, he acted under a *bonâ fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in s. 52 of the Indian Penal Code (Act XLV of 1860). He was therefore protected by s. 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under s. 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was therefore legally arrested, under s. 54, cl. 5, of the Criminal Procedure Code (Act X of 1882), for obstructing a police-officer while acting in the execution of his duty. BHAWOO JIVAJI *v.* MULJI DAYAL
I. L. R. 12 Bom. 377

7. ——— *Indian Penal Code (Act XLV of 1860), ss. 143, 341—Erecting a fence over a way—Obstruction to public pathway—Decree of Civil Court—Maps and plans depicting way—Unlawful assembly—Magistrate, duty of, to maintain decrees of Civil Court—Rule, enlargement of, at the hearing.* In deciding whether a person, accused of wrongful restraint by erecting a fence over a way had, as he alleged, obtained a decree of the Civil Court with regard to that particular

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way, a Magistrate should, instead of obtaining evidence to modify or question a decree passed by the Civil Court declaring rights of parties, confine his attention to observing or enforcing the terms of the decree of the Civil Court. RASH MOHAN PAL *v.* MOHIM CHANDRA CHAKRAVARTY (1900) 5 C. W. N. 215

8. ——— *Criminal Procedure Code (Act V of 1898) s. 423—Right of way, interference with—Order of preserving status quo ante on conviction, if proper—Appellate Court, power of, to set aside for such order —Penal Code (Act XLV of 1860), s. 341.* Where a person blocked up a private way, along which the complainant had a right to go, by raising a wall, and was convicted of the offence of wrongful restraint under s. 341 of the Penal Code, and an order was passed by the trying Magistrate directing the accused to remove the obstruction and not to interfere with the complainant's right of way, and, on appeal, the Appellate Court set aside the order directing the removal of the obstruction and preventing the accused from interfering with the complainant's right :—*Held*, that the order of removal of the obstruction was a necessary corollary to the previous conviction of the accused, and was a proper order. *Held*, also, that, although an Appellate Court has, under s. 423 of the Code of Criminal Procedure, the power of making any amendment or any consequential or incidental order that may be just and proper, such Court cannot make an order which would make the entire proceeding infructuous and absurd. *Held*, also, that the order of the Appellate Court, setting aside the order for removal of the obstruction, was neither proper nor just. DEBENDRA CHANDRA CHOWDHURY *v.* MOHINI MOHAN CHOWDHURY (1901) . . 5 C. W. N. 432

9. ——— *Right of way, interference with—Order to remove obstruction, legality of—Penal Code (Act XLV of 1860), ss. 114, 241, Criminal Procedure Code (Act V of 1898), s, 522. Held*, by the Full Bench (AMEER ALI, *J.*, and BRETT, *J.* dissenting), that a Magistrate, while convicting an accused under ss. $\frac{341}{114}$ of the Penal Code for wrongfully restraining a person by the erection of a hut or by similar act of obstruction, has no jurisdiction to order that the hut or other means of obstruction should be removed. *Debendra Chandra Chowdhury* v. *Mohini Mohon Chowdhry, 5 C. W. N. 432*, overruled. *Held*, further, by the Full Bench, that, whereas in this case criminal force had been used by the accused to the complainant when the latter objected to the obstruction, which interfered with his right of way over a path, and this constituted the offence of wrongful restraint, of which offence the accused had been convicted, an order for the removal of the obstruction should be passed under s. 522 of the Criminal Procedure Code. MOHINI MOHAN CHOWDHRY *v.* HARENDRA CHANDRA CHOWDHRY (1904) . I. L. R. 31 Calc. 691

WRONGFUL SEIZURE IN EXECUTION.

See CIVIL PROCEDURE CODE, 1882, S. 244 (ACT XXIII OF 1861, S. 11)—QUESTIONS IN EXECUTION OF DECREE.
3 N. W. 187
2 Agra 105
5 Mad. 185
12 B. L. R. 201; 203 note; 207 note; 208 note.
12 W. R. 85
3 B. L. R. A. C. 413
I. L. R. 22 Calc. 483

See DAMAGES—MEASURE AND ASSESSMENT OF DAMAGES—TORTS .
Marsh. 495
3 Agra 202
3 B. L. R. A. C. 413
I. L. R. 3 Bom. 74
7 Mad. 235

See EXECUTION OF DECREE—LIABILITY FOR WRONGFUL EXECUTION.

See MALICIOUS PROSECUTION.
I. L. R. 19 Bom. 485

See SALE IN EXECUTION OF DECREE—WRONGFUL SALES.

Y

YEAR.

——— **agricultural—**

See N.-W. P. RENT ACT (XVIII OF 1873), S. 94 . . I. L. R. 1 All. 512

YOUTHFUL OFFENDER.

See REFORMATORY SCHOOLS ACT (VIII OF 1897).

Z

ZAMINDAR.

See CHAUKIDARI CHAKRAN ACT, S. 48.
10 C. W. N. 637

See GRANT—CONSTRUCTION OF GRANTS.
I. L. R. 9 Mad. 307
L. R. 13 I. A. 32

See GRANT — POWER TO GRANT.
B. L. R. Sup. Vol. 75, 774

See ZAMINDAR, DUTY OF.

See ZAMINDAR, POWER OF.

See ZAMINDAR, RIGHTS OF.

See ZAMINDAR AND RAIYAT.

——— **kabuliat between Government and—**

See SPECIFIC PERFORMANCE — SPECIAL CASES . I. L. R. 3 Calc. 464

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ZAMINDAR—*concld.*

——— liability of, for repairs of tank.

See CONTRACT ACT, S. 70.
I. L. R. 18 Mad. 88

——— proof of title of—

See OWNERSHIP, PRESUMPTION OF.
I. L. R. 15 Mad. 101
L. R. 18 I. A. 149

——— purchase by, of patni interest, effect of—

See MERGER . . 3 C. L. R. 159
I. L. R. 19 Calc. 760

ZAMINDAR, DUTY OF.

——— Ancient tanks—*Negligence — Statutory powers — Liability for damage occasioned by overflow of tanks.* The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved upon zamindars. Such zamindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such zamindars with regard to these tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. A zamindar, if the banks of any such tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby. MADRAS RAILWAY COMPANY *v.* ZAMINDAR OF CARVETINAGARAM .
14 B. L. R. 209 : 22 W. R. 279
L. R. 1 I. A. 364

S.C. in lower Courts. MADRAS RAILWAY COMPANY *v.* ZAMINDAR OF KAVETINUGGUR
5 Mad. 139
and after remand . . . 6 Mad. 180

ZAMINDAR, POWER OF.

1. ——— Power to grant lease—*Lease granted for longer term than zamindar's engagement with Government — Operation of Act XVI of 1842.* A lease granted by a zamindar for a longer period than the term of his own engagement with the Government was not absolutely void for the excess, but only voidable, and might be confirmed. *Semble:* That Act XVI of 1842 applied to agricultural leases, not to *bonâ fide* leases for other purposes. NITA RAM *v.* NANUCK DASS
1 N. W. Part III, 47 : Ed. 1873, 103

2. ——— *Hindu law—Authority to grant lease as manager and owner.* Under the Hindu law, the granting of a lease, though for a term, is an act within the scope of a zamindar's authority as manager and owner of the zamindari, and is, as such, binding on his successor, unless, in the circumstances in which it was made, it was otherwise than *bonâ fide.* RAMANANDAN *v.* SRINIVASA MURTHI . .I. L. R. 2 Mad. 80

ZAMINDAR, POWER OF—*concld.*

3. ——— Power to alter boundaries—*Effect of arrangement altering boundary without sanction of Government.* Zamindars have no authority, without the sanction of Government, to alter the boundaries of their permanently settled estates, and to transfer villages from one zamindari to another. Such an arrangement is of no binding effect, except between the parties who have made it. RAMCHUNDER BANERJEE *v.* MUDDUN MOHUN TEWAREE . . . W. R. 1864, 34

4. ——— Power to charge estate with personal debts—A decree for possession of certain land with wasilat obtained by a zamindar of an estate, as such, cannot be pledged by him as security for a personal debt, nor for such a debt can the estate be made liable, nor his successor be held responsible. NIMAYE CHURN SEIN *v.* RAMMONEE BEEBEE 10 W. R. 152

ZAMINDAR, RIGHTS OF.

See MADRAS REGULATION XXV OF 1802. 14 B. L. R. 115
L. R. 1 A. 268 ; 282

See PATNI TENURE.
I. L. R. 28 Calc. 744

See WASTE LANDS.
I. L. R. 19 All. 172

1. ——— Nature of zamindari estate—*Power to deal with estate.* A zamindar's estate is analogous to an estate-tail as it originally stood upon the statute *de donis.* The zamindar is the owner of the zamindari, but can neither encumber nor alienate beyond the period of his own life. CHINTALAPATI CHINNA SIMHADRIRAJ *v.* ZAMINDAR OF VIZIANAGRAM . . . 2 Mad. 128

2. ——— Collections of rent—*Claim to intermediate tenure—Onus of proof.* A zamindar has as such a *primâ facie* right to the gross collections from all the mouzahs within his zamindari. It is for parties setting up an intermediate tenure to prove their grant. PRAHLAD SEN *v.* DURGA PRASAD TEWARI . . .
2 B. L. R. P. C. 111 : 12 W. R. P. C. 6
12 Moo. I. A. 286

3. ——— Right to rent—*Payment of revenue by zamindar.* The right of a zamindar to exact from a tenant payment of rent for a certain piece of land in no way depends on whether he does or does not pay revenue for that land. JOTENDRO MOHUN TAGORE *v.* AYMUN BEEBEE
1 C. L. R. 366

4. ——— Liability for rent—*Co-sharer in talukh. Held,* that a zamindar, by becoming a co-sharer in the talukh, does not lose his right to the joint responsibility of all the other co-sharers for the due payment of the rent ; he only becomes

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ZAMINDAR, RIGHTS OF—*contd.*

bound to make an allowance for that portion which he as a co-sharer ought to pay. GOBINDO COOMAR CHOWDHRY *v.* MANSON
15 B. L. R. 56 : 23 W. R. 152

5. ——— Compensation—*Compensation to patnidar for loss sustained by erection of works by railway company.* A zamindar who receives his rents in full is not entitled to participate in compensation received by his patnidar for loss suffered by the latter in consequence of works being erected on land included in the patni. MAHARAJAH OF BURDWAN *v.* WOOMA SOONDUREE DOSSEE . . . . . 10 W. R. 12

6. ——— Sale in execution of decree—*Custom—Charge on sale-proceeds.* Where a sale took place in execution of a decree, and it was proved by custom that the zamindar's right extended to one-fourth of the sale-proceeds in cases of involuntary sale :—*Held*, that the zamindar had a right to recover the fourth share of the proceeds of sale from the judgment-creditor, who in truth reserved the sale price. The zamindar's right attached to the sale-proceeds, and was a prior charge upon the proceeds. BYJ NATH PERSHAD *v.* MAHOMED FUZL HOSSEIN
2 Agra, Part II, 204

7. ——— *Custom — Right to share of sale-proceeds—Calculation of amount—Zamindari huq.* Where by custom the zamindari is entitled to a quarter share of the sale-proceeds as his huq zamindari, he is entitled to recover it on the occasion of sales, either absolute or originally conditional, but subsequently becoming absolute by foreclosure, from the vendor and the purchaser, and the latter cannot be discharged from his liability by proving that he has paid all, including zamindar's dues, to the former, it being incumbent on him to see that the zamindar is satisfied in respect of his dues. *Held*, further, that, under the circumstances, the plaintiffs, the zamindars, were entitled to one-fourth from R450, the principal amount repayable, and not from the amount ascertained at the time of foreclosure to be due to the mortgagee, including interest, inasmuch as the deed made no provision for payment of any sum as interest. HEERA RAM *v.* DEO NARAIN SINGH
Agra F. B. 63 : Ed. 1874, 48

8. ——— *Sale in execution of house in Mohalla—Wajib-ul-urz—Liability of auction-purchase—Right of zamindar to huq-i-chaharam.* The zamindars of a certain mohalla claimed from the purchaser of a house situated in such Mohalla, which had been sold in execution of a decree, one-fourth of the sale-preceeds of such house, such purchaser being the holder of such decree. Such suit was based upon the terms of the wajib-ul-urz. That document stated, *inter alia*, that, when a house in such Mohalla was sold, a cess called chaharam was received by such zamindars "according to the understanding arrived at between the seller and the zamindars."

ZAMINDAR, RIGHTS OF—*concld.*

Held, that such zamindars were not entitled under the terms of the wajib-ul-urz to one-fourth of the sale-proceeds; that the decree-holder, because he happened to have become the auction-purchaser, could not be regarded as the "seller" and it was only the "seller" who was liable; that the terms of the wajib-ul-urz were applicable only to private and voluntary sales, and not to execution-sales; and that, under these circumstances, the suit must be dismissed. BENI MADHO *v.* ZAHURUL HAQ I. L. R. 3 All. 797

9. ——— Sale of zamindar's right—*Right as tenant in another house.* Where a zamindar's right is sold by auction, it does not follow that, by the sale of the zamindari right, he forfeits his tenant-right which he had in another patti in respect of a house. RAM BUKSH SINGH *v.* PURDUMUN KISHORE . 2 Agra, Part II, 202

10. ——— *Landholder and tenant—Sale of house by tenant—Haq-i-chaharum by whom payable.* In the case of a customary right to receive *haq-i-chaharum*, where it does not appear that the *zamindar's* right to a share of the purchase money is limited to a right to claim it from the vendor, the right can be enforced against the vendee also. *Heera Ram* v. *Raja Deo Narain Singh*, *N.-W. P., H. C.* (*1867*), *F. B.*, *63*, referred to. DHANDAI BIBI *v.* ABDUR RAHMAN (1901)
I. L. R. 23 All. 209

ZAMINDAR AND RAIYAT.

See BENGAL RENT ACT, 1869.
See LANDLORD AND TENANT.
See MADRAS RENT RECOVERY ACT, 1865.
See RIGHT OF OCCUPANCY.

ZAMINDARI DAKS.

1. ——— Beng. Act VIII of 1862—*Effect of Act on liability of patnidars.* Bengal Act VIII of 1862 did not relieve patnidars from their liability under the old laws of paying the zamindari dâk charges. BISSONATH SIRCAR *v.* SHURNOMOYEE . . . . . 4 W. R. 6

2. ——— *Liability of patnidar.* Where the terms of a patni lease did not make the patnidar liable for the maintenance of the zamindari dâks, it was *held* that the patnidar was not liable for a tax which was imposed on the zamindar by Bengal Act VIII of 1862. RAKHAL DOSS MOOKERJEE *v.* SHURNO MOYEE
6 W. R. 100

3. ——— *Liability of patnidar.* The provision in a pottah that if any item is laid upon the zamindar over and above the sudder jumma, the patnidar shall bear a rateable proportion of it, *held* not to include the charges connected with the zamindari dâk. ROHINEE KANT ROY *v.* TRIPOORA SOONDUREE DASSIA . 8 W. R. 45

SARODA SOONDURY DEBIA *v.* WOOMA CHURN SIRCAR 3 W. R. S. C. C. Ref. 17

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ZAMINDARI DAKS—*concld.*

4. ——— *Cess — Dâk cess —Zamindari dâk, maintenance of—Ben. Reg. XX of 1817, s. 10—Ben. Act VIII of 1862—Contract between zamindar and patnidar as to payment of dâk charges—Liability of patnidar to pay dâk charges —Construction of patni lease.* In a *patni-kabuliyat* executed in 1855, the *patnidar* stipulated to pay the salary and expense of *amlas of dâk chauki* houses, and to appoint them and superintendent their work, under the system of *zamindari dâk* then in vogue. *Held*, that this stipulation imposed upon the patnidar the liability of paying *dâk* charges recoverable from the *zamindar;* and, although the system has since been changed, the liability of paying such charges must be taken to exist. *Saroda Soondury Debea* v. *Wooma Churn Sircar, 3 W. R. S. C. C. Ref. 17,* followed. JILLAR RAHMAN *v.* BIJOY CHAND MAHTAP (1900) I. L. R. 28 Calc. 293

ZAMINDARI DUES AND CESSES.

——— suit for—

See SMALL CAUSE COURT, MOFUSSIL—JURISDICTION—CESS.
I. L. R. 1 All. 444

ZAMORIN OF CALICUT.

See HINDU LAW — WILL — POWER OF DISPOSITION — GENERALLY.
I. L. R. 21 Mad. 105

See PENSIONS ACT, s. 12.
I. L. R. 21 Mad. 105

ZANZIBAR.

See CONSULAR COURT (AT ZANZIBAR).
I. L. R. 3 Bom. 58

——— application of Bom. Reg. II of 1827, s. 21, cl. 1, to—

See JURISDICTION OF CIVIL COURT—CASTE . . I. L. R. 26 Bom. 174

——— Consular Court at—

See HIGH COURT, JURISDICTION OF—BOMBAY — CIVIL.
I. L. R. 20 Bom. 480

See HIGH COURT, JURISDICTION OF — BOMBAY — CRIMINAL.
I. L. R. 3 Bom. 334

See JURISDICTION OF CRIMINAL COURT — GENERAL JURISDICTION.
I. L. R. 19 Bom. 741

——— jurisdiction of British Consul at Zanzibar to hear suits—

See CONSULAR COURT (ZANZIBAR).
I. L. R. 3 Bom. 58

——— *Law of Zanzibar—Lands taken for public purposes — Zanzibar Order in Council, 1884—Indian Land Acquisition Act,* 1894, *s. 6—Compensation—Incidents of land governed by the local law—Mahomedan law of compensation —Buildings erected by Government on the plaintiffs' land without authority.* The lands of the plaintiffs in the island of Mombasa, part of the dominions of the Sultan of Zanzibar, were taken for a railway by the British Government, under s. 6 of the Indian Land Acquisition Act, 1894, which had been brought into force in Zanzibar by Order in Council. In a suit for compensation for the value of the lands so taken, and also of the buildings previously erected thereon by the said Government without authority: *Held*, that (i) as regards the lands, the plaintiffs are entitled under the said Act to the market value thereof at the date of service of notice under s. 6, including such actual speculative advance therein as had already taken place in consequence of the railway scheme, but excluding any future speculative advance from the like cause; (ii) that, as regards the buildings, English law applied, under the Order in Council of 1884 and the subsequent treaty of 1886. By that law, notwithstanding treaty rights of exterritoriality, the *lex loci rei sitæ* governs the incidents of land, that is, in this case, Mahomedan law, of which law a Zanzibar Judge has judicial cognizance; and (iii) that, by Mahomedan law, the houses did not become the plaintiffs' property: the plaintiffs are entitled to have them removed, and the value to them of the right to have them removed from lands which have ceased to be their property is the measure of the compensation due. SECRETARY OF STATE FOR FOREIGN AFFAIRS *v.* CHARLESWORTH, PILLING AND COMPANY (1901) . I. L. R. 26 Bom. 1
s.c. L. R. 28 I. A. 121

ZERAIT LAND.

See BENGAL TENANCY ACT, s. 116.
13 C. W. N. 661; 664

See BENGAL TENANCY ACT, s. 120.
13 C. W. N. 135

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 211. 12 C. W. N. 650

See MESNE PROFITS.
12 C. W. N. 650

ZOROASTRIAN FAITH.

——— tenets of—

See MUKTAD CEREMONIES.
I. L. R. 33 Bom. 122

ZUR-I-PESHGI LEASE.

See ATTACHMENT—ALIENATION DURING ATTACHMENT . I. L. R. 18 All. 123

See BENGAL REGULATION VIII OF 1819.
See BENGAL TENANCY ACT, s. 21.
10 C. W. N. 351

See DECREE — FORM OF DECREE — POSSESSION . I. L. R. 18 All. 440

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ZUR-I-PESHGI LEASE—*contd.*

See LEASE — ZURI-PESHGI LEASE.

See MORTGAGE — POSSESSION UNDER MORTGAGE.

See RIGHT OF OCCUPANCY — ACQUISITION OF RIGHT — MODE OF ACQUISITION. **I. L. R. 24 Calc. 272**
L. R. 23 I. A. 158
1 C. W. N. 23

See TRANSFER OF PROPERTY ACT, S. 59. **13 C. W. N. 40**

Limitation Act (XV of 1877), Sch. II, Arts. 48, 109—Suit to recover rents realised by zur-peshgidar after expiry of lease—Limitation — "Specific moveable property," meaning of—Suit of Small Cause Court nature of less than ₹500 in value order of remand, appeal from—Civil Procedure Code (Act XIV of 1882), ss. 586, 588 cl. (28). A suit brought by an owner of land for the recovery from *zur-peshgidars* of rents realised by the latter from the tenants after the expiry of the *zur-peshgi* lease, is governed by Art. 109 of Sch. II of the Limitation Act and not by Art. 48. By "specific moveable property" in Art. 48 is meant property which can be specified by the delivery of the identical subject and does not cover money. *Rameshar Chaubay* v. *Matabhikh, I. L. R. 5 All. 343*, dissented from. *Essoo Bhayaji* v. *The Steamship "Savitri," I. L. R. 11 Bom. 133; Jagjivan v. Gulam Jilani, I. L. R. 8 Bom. 19*, followed. AGANDH MAHTO *v.* KHAJAH ALIULLAH (1907) . . . . **11 C. W. N. 862**

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